



New Competition Tool:

Legal comparative study

of existing competition tools aimed at
addressing structural competition problems
with a particular focus on the UK's market investigation tool

Expert study

Prepared by

Prof. Richard Whish

EUROPEAN COMMISSION

Directorate-General for Competition

E-mail: comp-publications@ec.europa.eu

European Commission

B-1049 Brussels

**New Competition Tool:
Legal comparative study
of existing competition tools aimed at
addressing structural competition problems
with a particular focus on the UK's market investigation tool**

Expert study

***Europe Direct is a service to help you find answers
to your questions about the European Union.***

Freephone number (*):

00 800 6 7 8 9 10 11

(*)The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

LEGAL NOTICE

The information and views set out in this report are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.

More information on the European Union is available on the Internet (<http://www.europa.eu>).

Luxembourg: Publications Office of the European Union, 2020

Catalogue number: KD-04-20-573-EN-N

ISBN: 978-92-76-22774-8

DOI: 10.2763/528171

© European Union, 2020

Reproduction is authorised provided the source is acknowledged.

The reproduction of the artistic material contained therein is prohibited.

Author:

King's College London

- Prof. Richard Whish

Table of Contents

<i>Table of Contents</i>	1
<i>Executive Summary</i>	2
<i>Chapter 1: Introduction</i>	5
<i>Chapter 2: Overview of UK competition legislation</i>	6
<i>Chapter 3: Market investigations in the UK: substance</i>	8
<i>Chapter 4: Market investigations in the UK: institutional arrangements</i>	18
<i>Chapter 5: Market investigations in the UK: procedure</i>	24
<i>Chapter 6: The market investigation provisions in practice</i>	32
<i>Chapter 7: Analogous market investigation provisions in other jurisdictions</i>	37
<i>Chapter 8: Conclusions</i>	48
<i>Annexes</i>	49

Executive Summary

The European Commission is considering the possibility of proposing a 'New Competition Tool' that could be used to address structural competition problems arising in markets that are not covered, or not covered effectively, by Articles 101 and 102 TFEU. This initiative is part of a broader piece of work that may lead, apart from the adoption of the proposed Digital Services Act, to the establishment of a system of ex-ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role.

In essence the idea of the New Competition Tool is that, after having conducted a rigorous market investigation, the new Tool would allow the Commission to impose behavioural and/or structural remedies to overcome any structural harms to competition in the market investigated. This could be done without the establishment of a finding of an infringement of Article 101 and/or 102 by the undertakings under investigation.

This Report is one of the research papers commissioned as part of the Commission's New Competition Tool initiative. It contains a comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK's system of market investigations.

Chapter 2 of the Report begins by providing an overview of UK competition legislation. The Competition Act 1998 contains two prohibitions, the 'Chapter I prohibition', modelled upon Article 101(1) TFEU, and the 'Chapter II prohibition', modelled upon Article 102 TFEU. These 'antitrust' provisions are enforced by the Competition and Markets Authority (the 'CMA') and, within their jurisdictional perimeters, by the sectoral regulators such as the Office of Communications ('Ofcom') and the Office of Gas and Electricity Markets ('Ofgem'). Apart from the Competition Act, Part 4 of the Enterprise Act 2002 establishes a system whereby the CMA and the sectoral regulators may make a market investigation reference in order to discover whether any features of a market prevent, restrict or distort competition. If the CMA finds that 'features of a market have an adverse effect on competition', it must consider how those adverse effects and any detriment to customers could be remedied and it must implement appropriate remedies, that is to say remedies that are effective and proportionate. The CMA has wide-ranging remedial powers, including the power to order the divestiture of assets. A finding in a market investigation that features of a market have an adverse effect on competition does not mean that the investigated undertakings are guilty of wrongdoing; a market investigation may lead to the CMA requiring changes in an undertaking's or undertakings' future behaviour, but there are no sanctions for past conduct; nor is provision made for the payment of compensation to anyone harmed by the behaviour under investigation.

Chapter 3 of the Report explains the substantive provisions of the system of market investigations. The CMA and the sectoral regulators may make an 'ordinary reference' when there are 'reasonable grounds for suspecting' that one or more 'features' of a market prevent, restrict or distort competition in the supply or acquisition of goods or services in the UK or in a part thereof. Power also exists to make a 'cross-market reference' where the features of concern exist in more than one market; in practice the provisions on cross-market references have not yet been used. Features of a market include:

- the structure of the market concerned or any aspect thereof;
- the conduct of persons supplying or acquiring goods or services who operate on that market, whether that conduct occurs in the same market or not; and
- conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.

The CMA and the sectoral regulators with concurrent powers have a discretion whether to make a market investigation reference when the reference test is met. Paragraph 2.1 of the CMA's Guidance on making references says that the CMA will make a market investigation reference only when the following criteria, in addition to the statutory ones, are met:

- it would not be more appropriate to deal with any competition issues under the Competition Act 1998 or by other means, for example by using the powers of the sectoral regulators;
- it would not be more appropriate to accept undertakings in lieu of a reference;
- the scale of the suspected problem, in terms of the adverse effect on competition, is such that a reference would be appropriate;
- there is a reasonable chance that appropriate remedies will be available.

Once a reference has been made, the Enterprise Act requires that the CMA to decide whether any feature, or combination of features, of each market referred prevents, restricts or distorts competition in the referred market(s). If the CMA considers that there is an 'adverse effect on competition', the Act provides that the CMA must decide three additional questions:

- first, whether it should take action to remedy, mitigate or prevent the adverse effect on competition or any detrimental effect on customers it has identified;
- secondly, whether it should recommend that anyone else should take remedial action; and
- thirdly, if remedial action should be taken, what that action should be.

The Enterprise Act requires that, when considering remedial action, the CMA must have regard to the need to achieve 'as comprehensive a solution as is reasonable and practical to the adverse effect on competition and any detrimental effects on customers'. Section 134(7) of the Act says that the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits as defined in section 134(8). If the CMA finds that there is no anti-competitive outcome, the question of remedial action does not arise.

The CMA may implement remedies either by accepting undertakings from the firms under investigation (section 159 Enterprise Act) or by imposing orders upon them (section 161 Enterprise Act); the CMA has a choice of whether to seek undertakings or to make an order. Another possibility is for the CMA to make recommendations that someone else should take remedial action, perhaps a sectoral regulator or the Government. In some cases the CMA may have recourse to a package of measures consisting of undertakings, orders and/or recommendations. In paragraph 92 of the Market investigation guidelines the CMA says that it will proceed on the basis of practicality, such as the number of parties concerned and their willingness to negotiate and agree undertakings in the light of the CMA's report. Where a large number of firms are under investigation it may be more practical to adopt an order than to try to accept numerous undertakings from different entities.

An order may contain anything that is permitted by Schedule 8 to the Act. The powers contained in Schedule 8 include orders:

- to restrict a particular kind of conduct on the part of firms: for example to prohibit certain agreements, refusals to supply, tying transactions or discrimination. Provision is specifically made for the regulation of prices to be charged for goods or services;
- to supply goods or services;
- not to acquire a business;
- to divest a business.

Chapter 4 of the Report explains the institutional framework of market investigations and the system of appeals. The power to make a market investigation reference is vested in the CMA and also, within their jurisdictional perimeters, the sectoral regulators. In the case of references by the CMA, the Board of that institution makes the decision to refer a market for investigation. The actual investigation is then conducted by an 'inquiry group'. To avoid the danger of confirmation bias, the inquiry group will consist of individuals who had no part in the Board's decision to make the reference in the first place. Decisions of the CMA are subject to judicial review by the Competition Appeal Tribunal: the decision can be challenged on the grounds of illegality, irrationality or procedural impropriety. There is no appeal to the Tribunal on the merits of a decision in a market investigation case. In principle a challenge of 'irrationality' in a judicial review under UK law would appear to be much the same as a challenge of 'manifest error of assessment' under EU law. The Report analyses the outcome of the judicial reviews that have been brought in market investigation cases.

Chapter 5 of the Report explains the procedures of the CMA when conducting market investigations. The major stages of an investigation are set out in paragraphs 3.36 to 3.64 of the CMA's Supplemental guidance. They are:

- handover between a market study and a market investigation;
- information gathering;
- issues statement;
- hearings;
- assessment;
- 'put-back';
- provisional decision report;
- response hearings;
- final report.

The Report contains commentary on these various phases of market investigations. The procedure for market investigations is a transparent one, in line with its general policy as set out in Transparency and disclosure: statement of the CMA's policy and approach, which applies to all CMA cases under both the Competition Act and the Enterprise Act.

Section 169 of the Enterprise Act imposes a duty on the CMA, when making any decision in a market investigation case that may have a substantial impact on the interests of a person, to consult with that person before making that decision. Section 169(4) of the Act provides that, when deciding what is practicable when consulting, the CMA must have regard to timetabling constraints that the Act imposes on it and any need to protect confidentiality.

Chapter 6 of the Report examines how the market investigation provisions have been applied in practice. It considers a series of topics – market definition, counterfactuals, theories of harm, the relevance of performance and prices, and the findings in the CMA's various reports of adverse effects on competition. It also explains the various remedies that have been deployed in market investigation cases, including the divestitures required in BAA Airports and Aggregates.

Chapter 7 describes provisions analogous to the UK market investigation system that are included in the competition laws of Greece, Iceland, Mexico and South Africa.

The report ends with some concluding thoughts in Chapter 8

Chapter 1: Introduction

1.1 On 2 June 2020 the European Commission announced that it was considering the possibility of proposing a ‘New Competition Tool’ that could be used to address structural competition problems arising in markets that are not covered, or not covered effectively, by Articles 101 and 102 TFEU. This initiative is part of a broader piece of work: the Commission’s Press Release¹ stated that the Commission had been reflecting on the role of competition policy, and how it fits in a world that is changing fast and is increasingly digital and globalised. The Commission’s conclusion was that it should:

- continue to enforce rigorously the existing competition rules, including making use of interim measures and restorative remedies where appropriate;
- consider the establishment of a system of ex-ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role; and
- consider the establishment of a New Competition Tool.

1.2 In essence the idea of the New Competition Tool is that, after having conducted a rigorous market investigation, the new Tool would allow the Commission to impose behavioural and/or structural remedies to overcome any structural harms to competition in the market investigated. This could be done without the establishment of a finding of an infringement of Article 101 and/or 102 by the undertakings under investigation, and no fines would be imposed on the market participants; nor would there be provision for the award of compensation to anyone harmed by the competition harms identified.

1.3 The Commission’s Inception Impact Assessment of 2 June 2020 explained in greater detail the context of its examination of the possible creation of a New Competition Tool; the Commission’s objectives and policy options; its preliminary assessment of expected impacts; and the evidence base and data collection that would be involved in the process together with the Commission’s proposals to consult with citizens and stakeholders. Specifically, the Commission announced that it intended to procure targeted research papers on policy options and key features of a New Competition Tool.

1.4 This Report is one of the research papers commissioned as part of the New Competition Tool initiative. I was asked to produce a comparative study of existing competition tools aimed at addressing structural competition problems, with a particular focus on the UK’s market investigation tool.

1.5 In Chapter 2 I begin by providing an overview of UK competition legislation. I then describe the system of market investigations in the UK: first, the substantive provisions (Chapter 3); then the institutional framework and the system of appeals (Chapter 4); and thereafter the procedure when a market investigation is carried out (Chapter 5). Chapter 6 examines how the market investigation provisions have been applied in practice. Chapter 7 describes analogous provisions in Greece, Iceland, Mexico and South Africa. The report ends with some concluding thoughts in Chapter 8.

¹ IP/20/977 of 2 June 2020.

Chapter 2: Overview of UK competition legislation

2.1 The two principal competition law statutes in the UK are the Competition Act 1998 and the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013 (the 'ERRA 2013').

Antitrust

2.2 The Competition Act contains two prohibitions. The 'Chapter I prohibition', modelled upon Article 101(1) TFEU, prohibits agreements that may affect trade within the UK and that have as their object or effect the prevention, restriction or distortion of competition. The 'Chapter II prohibition', modelled upon Article 102 TFEU, prohibits the abuse of a dominant position if it may affect trade within the UK. These 'antitrust' provisions are enforced by the Competition and Markets Authority (the 'CMA') and, within their jurisdictional perimeters, by the sectoral regulators such as the Office of Communications ('Ofcom') and the Office of Gas and Electricity Markets ('Ofgem'). This is known as the 'concurrency regime', whereby each of the sectoral regulators has concurrent jurisdiction with the CMA to apply competition law within the sectors for which they are responsible. There are nine sectoral regulators in the UK with concurrent powers to apply the competition rules. Rules on the concurrency regime are contained in the Competition Act (Concurrency) Regulations 2014². There is also *Guidance on concurrent application of competition law to regulated industries*³. The CMA and the sectoral regulators meet within the UK Competition Network and work closely across a range of matters, jurisdictional, procedural and substantive. An Annual Concurrency Report is published⁴. Paragraph 3.16 of the Market investigation guidelines⁵ provides that where either the CMA or a sectoral regulator is considering making a market investigation reference they must consult one another.

2.3 The powers of the CMA and the sectoral regulators with concurrent powers to enforce the antitrust provisions are similar to those of the European Commission: for example they can conduct on-the-spot investigations, request information, impose interim measures, adopt final decisions, impose penalties for infringements and issue directions to bring infringements to an end. These powers are explained in the CMA's *Guidance on the CMA's investigation procedures in Competition Act 1998 cases*⁶; this *Guidance* will soon be revised following a recent period of consultation.

Merger control

2.4 Part 3 of the Enterprise Act makes provision for the control of mergers. Mergers that do not meet the jurisdictional thresholds set out in the EU Merger Regulation and that satisfy the thresholds of the Enterprise Act fall exclusively within the jurisdiction of the CMA.

² SI 2014/536.

³ CMA10, March 2014, available at www.gov.uk.

⁴ Available at www.gov.uk.

⁵ CC3, January 2014, revised July 2017; these guidelines will be found as Annex III to this Report.

⁶ CMA8, January 2019.

Market investigations

2.5 Part 4 of the Enterprise Act establishes a system whereby the CMA and the sectoral regulators may make a **market investigation reference** in order to discover whether any features of a market prevent, restrict or distort competition⁷. Power also exists for the Secretary of State to make a market investigation reference in limited circumstances, although this power has never been exercised in practice. The market investigation is carried out by a 'group' of the CMA⁸. If the CMA group conducting the market investigation finds that features of a market have an adverse effect on competition, it must consider how those adverse effects and any detriment to customers could be remedied and it must implement appropriate remedies, that is to say remedies that are effective and proportionate. The CMA has wide-ranging powers available to remedy any features of the market causing adverse effects on competition or any detriment arising from those features, including the power to order the divestiture of assets.

2.6 Whereas a finding that the Chapter I and II prohibitions in the Competition Act have been infringed may lead to the imposition of penalties in the form of administrative fines on the undertakings responsible and to the award of damages to anyone harmed by the infringement, a finding in a market investigation that features of a market have an adverse effect on competition does not mean that the investigated undertakings are guilty of wrongdoing. A market investigation may lead to the CMA requiring changes in an undertaking's or undertakings' **future** behaviour, but there are no sanctions for **past** conduct; nor is provision made for the payment of compensation to anyone harmed by the behaviour under investigation. As the CMA says in paragraph 21 of the *Market investigation guidelines*, the market investigation system is investigative and inquisitorial: it is not accusatorial.

Market investigations: substance

2.7 The substantive provisions on market investigations in Part 4 of the Enterprise Act, including their relationship with the Chapter I and II prohibitions in the Competition Act and with the powers of the UK's sectoral regulators, are described in Chapter 3.

Market investigations: institutions and judicial review

2.8 The power to make a market investigation reference is vested in the CMA and, within their jurisdictional spheres of competence, in the sectoral regulators such as OFCOM and OFGEM. The Secretary of State also has power in limited circumstances to make a reference. It sometimes happens that a market investigation reference originates in a super-complaint by certain consumer bodies designated by the Secretary of State. Market investigation references typically follow on from a market study conducted by the CMA or (less regularly) a sector regulator. These institutional arrangements are described in Chapter 4 of this Report.

⁷ Part 4 of the Enterprise Act will be found as Annex I to this Report.

⁸ See paragraphs 2.9, 4.15 and 4.16 below on CMA groups.

2.9 Chapter 4 also explains that, when a market investigation reference is made, the actual investigation is conducted by a group of members of the CMA Panel, usually consisting of three, four or five people. This group will have had no involvement in the decision to make a reference in the first place; furthermore the CMA group, when conducting the investigation and reaching a decision, is operationally independent of the Board of the CMA.

2.10 The CMA group's decision is final, except that there is an appeal by way of judicial review against the decision of the CMA group to the Competition Appeal Tribunal (the 'CAT'). Appeals will be discussed towards the end of Chapter 4.

Market investigations: procedure

2.11 The Enterprise Act, as supplemented by the ERRA 2013, explains the procedure to be followed in the conduct of market investigations. These provisions are described in Chapter 5.

Market investigations: guidelines

2.12 The CMA (and its predecessor, the Office of Fair Trading (the 'OFT') and the Competition Commission) have issued a number of guidelines and other publications that explain the operation of the markets regime, which consists of both market studies and market investigations. These guidelines do not have binding statutory force: the CMA is able to adapt its procedures to the needs of individual cases, subject to certain procedural obligations established in the primary legislation, such as the duty to consult on certain matters and to meet statutory deadlines for the completion of particular tasks. Of particular importance are:

- *Guidance on making references*⁹
- *Market investigation guidelines*¹⁰: paragraphs 50 to 87 of these guidelines have been revised and incorporated into the CMA's Supplemental guidance (below)
- *Supplemental guidance on the CMA's approach*¹¹, which explains changes to the markets regime introduced by the ERRA 2013.

These three documents will be cited regularly in this Report and will be found as Annexes II, III and IV to this Report.

Chapter 3: Market investigations in the UK: substance

⁹ *Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act, OFT 511, March 2006: this Guidance was adopted by the CMA when it took over the functions of the OFT on 1 April 2014.*

¹⁰ *Guidelines for market investigations: Their role, procedure, assessment and remedies, CC3, January 2014, revised July 2017.*

¹¹ *CMA3, January 2014, revised July 2017.*

3.1 This chapter will explain the substantive provisions in the Enterprise Act on market investigations. It will begin by considering the legal basis on which a market investigation reference may be made. The CMA, and the sectoral regulators within their jurisdictional perimeters, have a discretion whether or not to make a reference: paragraphs 3.10 to 3.24 below explain how this discretion is exercised. In particular these paragraphs explain the relationship between the Chapter I and II prohibitions and the market investigation system (paragraphs 3.11 to 3.17) and the way in which the sectoral regulators choose whether to use their sector-specific regulatory powers or the market investigation provisions to address competition concerns (paragraphs 3.18 to 3.21). The possibility of the CMA accepting ‘undertakings in lieu of a reference’ is then described. The questions to be determined by the CMA during the investigation are then explained, followed by a review of the remedies that can be imposed to remedy, mitigate or prevent any adverse effect on competition identified by the investigation.

The power to make a reference

3.2 Section 131(1) of the Enterprise Act provides that the CMA and the sectoral regulators¹² may make an ‘ordinary reference’ when there are ‘reasonable grounds for suspecting’¹³ that one or more ‘features’ of a market prevent, restrict or distort competition in the supply or acquisition of goods or services in the UK or in a part thereof. Power also exists to make a ‘cross-market reference’ where the features of concern exist in more than one market; in practice the provisions on cross-market references have not yet been used. Features of a market include:

- the structure of the market concerned or any aspect thereof;
- the conduct¹⁴ of persons supplying or acquiring goods or services who operate on that market, whether that conduct occurs in the same market or not; and
- conduct relating to the market concerned of customers of any person who supplies or acquires goods or services¹⁵.

It is important to stress that the features of a market that may be investigated in a market reference include both structural and behavioural ones; and furthermore that demand-side considerations (‘conduct ... of customers who ... acquires goods or services’) can be investigated as well as the conduct of suppliers of goods and services on the supply-side of the market.

3.3 In paragraph 1.9 of its *Guidance on making references* the CMA says that it may not always be clear whether a feature of a market that affects competition is best described as structural or an aspect of conduct: it regards this as a semantic issue. The CMA points out that section 131 of the Enterprise Act does not require it to state, when making a reference, whether the feature to be investigated is structural or an

¹² *The powers of the sectoral regulators in relation to market investigation references are set out in the Enterprise Act 2002, Sch 9, Part 2.*

¹³ *The ‘reasonable grounds for suspecting’ standard for the making of a reference is not a very high one: see Case 1054/6/1/05 Association of Convenience Stores [2005] CAT 36, paragraph 7, available at www.catribunal.org.uk; it is not higher than the standard to be satisfied when initiating an antitrust investigation under s 25 Competition Act 1998.*

¹⁴ *‘Conduct’ for these purposes includes a failure to act and need not be intentional: Enterprise Act 2002, s 131(3).*

¹⁵ *Enterprise Act 2002, s 131(2).*

aspect of conduct. The market investigation system in the UK focuses on **features** of the market, including both the structure of the market and conduct on it.

3.4 Part II of the *Guidance on making references* discusses the CMA's interpretation of the reference test set out in section 131 of the Enterprise Act. This *Guidance* will be found as Annex II to this Report.

3.5 Chapter 4 of the *Guidance* discusses the meaning of 'prevention, restriction or distortion of competition'. Paragraph 4.4 repeats the point made earlier that there may not be a clear divide between structural features of a market and those relating to conduct: it gives as an example exclusionary conduct by firms in the market that affects structure to the extent that it raises barriers to entry. The CMA says that in most cases it is likely that an assessment that a reference is appropriate will be based on a combination of features and will include evidence about both structure and conduct. Chapter 4 of the *Guidance* also says that market definition can be a useful step in assessing harm to competition and that the CMA will approach market definition in market investigation cases as it would in other competition cases.

3.6 Chapter 5 of the *Guidance on making references* discusses what is meant by 'structural features of a market'. It considers in turn:

- concentration;
- vertical integration;
- conditions of entry, exit and expansion;
- regulations and government policies;
- informational asymmetries;
- switching costs; and
- countervailing power.

3.7 Chapter 6 of the *Guidance on making references* discusses firms' conduct. It considers in turn:

- the conduct of oligopolies;
- facilitating practices;
- custom and practice; and
- networks of vertical agreements.

3.8 As noted above, Chapter 7 of the *Guidance* considers the conduct of customers, which section 131(2)(c) of the Act considers to be a feature of a market, and specifically addresses the issue of search costs, that is to say the cost that customers may have to incur in order to make an informed choice.

3.9 Section 135 of the Enterprise Act provides that the CMA may vary a reference.

The CMA's and the sectoral regulators' discretion whether to make a market investigation reference

3.10 The CMA and the sectoral regulators with concurrent powers have a discretion whether to make a market investigation reference when the reference test is met. Paragraph 2.1 of the *Guidance on making references* says that the CMA will make a market investigation reference only when the following criteria, in addition to the statutory ones, are met:

- it would not be more appropriate to deal with any competition issues under the Competition Act 1998¹⁶ or by other means, for example by using the powers of the sectoral regulators¹⁷;
- it would not be more appropriate to accept undertakings in lieu of a reference¹⁸;
- the scale of the suspected problem, in terms of the adverse effect on competition, is such that a reference would be appropriate;
- there is a reasonable chance that appropriate remedies will be available.

The relationship between the market investigation provisions and the Competition Act

3.11 The greatest utility of the market investigation provisions is that they can be used to investigate features of a market that have an adverse effect on competition, irrespective of whether there is a violation of the antitrust provisions in the Competition Act 1998. The powers in Part 4 of the Enterprise Act are much more comprehensive in scope than the Chapter I and II prohibitions in the Competition Act. As will be seen in Chapter 6 of this Report, which considers the market investigation provisions in practice, investigations in which an adverse effect on competition has been identified involved markets where the detriment to competition was attributable to factors such as, for example, the oligopolistic structure of the market, switching inertia by consumers or governmental policy and economic regulation: these are not issues that could be addressed under the antitrust provisions in the Competition Act. The Competition Act seeks to suppress behaviour that violates the Chapter I and II prohibitions; Part 4 of the Enterprise Act takes a holistic view of markets and is intended to identify forward-looking remedies that will deliver better outcomes for consumers. However it could be the case that features of a market having an adverse effect on competition might violate the Chapter I and/or II prohibitions. There is no formal provision in the Enterprise Act that says that conduct that infringes or might infringe the Chapter I or II prohibitions in the Competition Act cannot be the subject of a market investigation reference. It is therefore a matter for the CMA in its discretion to decide whether to deal with a particular situation under the Competition Act or the Enterprise Act. The CMA discusses the relationship between the market investigation provisions and the Competition Act 1998 in paragraphs 2.2 to 2.8 of the *Guidance on making references*.

3.12 Paragraph 2.3 of the *Guidance on making references* states that the CMA's policy is to consider first whether a suspected problem may be addressed under the

¹⁶ *The relationship between the market investigation provisions and the Competition Act 1998 is discussed in paragraphs 3.11 to 3.17 below.*

¹⁷ *The relationship between the market investigation provisions and the powers of sectoral regulators is discussed in paragraphs 3.18 to 3.21 below.*

¹⁸ *Undertakings in lieu of a reference are discussed in paragraphs 3.25 to 3.30 below.*

Competition Act 1998. The CMA says that generally it would consider a market investigation reference where it has reasonable grounds to believe that market features restrict competition, but do not establish a breach of the Chapter I and/or Chapter II prohibitions; or when action under the Competition Act has been or is likely to be ineffective for dealing with any adverse effect on competition identified.

3.13 Paragraphs 2.4 and 2.5 of the *Guidance on making references* state that a market investigation reference might be appropriate for dealing with parallel behaviour in oligopolistic markets which falls outside the Chapter I and II prohibitions, not least given the uncertainty that surrounds the concept of collective abuse of a collective dominant position.

3.14 Paragraph 2.6 of the *Guidance* says that the market investigation provisions may be suitable for dealing with the problems that can arise from parallel networks of similar vertical agreements that may have the effect of preventing the entry of new competitors into a market without there being any evidence of collusion between the firms that caused this situation to arise.

3.15 Paragraph 2.7 of the *Guidance* makes the point that competition problems arising in oligopolistic markets and where there are parallel networks of vertical agreements involve industry-wide market features or multi-firm conduct. The *Guidance* says that the 'great majority' of references are likely to be of this type. It says that 'generally speaking' single-firm conduct will 'where necessary and possible' be dealt with under the Competition Act 1998 or sectoral legislation or rules. The CMA says that:

'It is not the present intention of the [CMA] to make market references based on the conduct of a single firm, whether dominant or not, where there are no other features of a market that adversely affect competition'.

3.16 However paragraph 2.8 of the *Guidance* says that the general principle of not reviewing single-firm conduct under the market investigation provisions is subject to certain comments and qualifications, as follows:

'In many cases anti-competitive conduct by a single firm may be associated with structural features of the market, for example barriers to entry or regulation and government policies, or conduct by customers which have adverse effects on competition. These other market features are discussed in sections 5 and 7 of this guidance. Where they are present a market investigation reference may be more appropriate than action under [the Competition Act 1998] even though only a single firm appears to be conducting itself anti-competitively.

The principle will be reviewed should the development of case law relating to [the Competition Act 1998] Chapter II prohibition give good grounds for believing that the prohibition is inadequate to deal with conduct by a single firm which has an adverse effect on competition.

The [CMA] might decide to make a market investigation reference when there has been an abuse of a dominant position and it is clear that nothing short of a structural remedy going beyond what is appropriate under [the Competition Act 1998] would be effective in dealing with the consequential adverse effect on competition ...'

3.17 On the date of submission of this Report to the Commission, 19 market investigation references had been completed by the CMA (or its predecessor, the Competition Commission). There has never been a case in which a firm or firms under investigation have argued that the market investigation provisions should not have been used because the powers in the Competition Act 1998 should have been used instead.

The relationship between the market investigation reference provisions and the powers of the sectoral regulators

3.18 The CMA may launch a market investigation reference into any sector of the economy: there are no sectors that are legally excluded from Part 4 of the Enterprise Act. The fact that a particular sector might be subject to sector-specific regulation does not preclude the CMA from making a reference.

3.19 As noted in paragraph 2.2 above, the sectoral regulators have powers, concurrently with the CMA, to apply competition law in the sectors for which they are responsible. The sectoral regulators can also make market investigation references to the CMA¹⁹. In the Guidance on making references the CMA says, at the end of paragraph 2.3, that, when exercising their discretion whether to make a reference, the sectoral regulators may wish to consider whether it would be more appropriate for them to deal with any adverse effects on competition under any relevant sector-specific legislation or rules.

3.20 Four of the 19 market investigation references to have been made were referred by sectoral regulators:

- The Office of Rail and Road made a reference of Rolling Stock Leasing on 26 April 2007; the Competition Commission reported on 7 April 2009;
- OFCOM made a reference of Movies on Pay TV on 4 August 2010; the Competition Commission reported on 3 August 2012;
- OFGEM referred Energy on 26 June 2014; the CMA reported on 24 June 2016;
- The Financial Conduct Authority referred Investment Consultants on 14 September 2017; the CMA reported on 12 December 2018.

3.21 In one other case OFCOM accepted undertakings from BT, the main UK fixed-line telecommunications provider, in lieu of a market investigation reference: see paragraph 3.29 below.

Scale of the problem

¹⁹ On these institutional arrangements Chapter 4 below.

3.22 Paragraph 2.27 of the Guidance on making references says that the CMA will make a reference only where it has reasonable grounds to suspect that the adverse effects on competition of features of a market are likely to have a significant detrimental effect on customers through higher prices, lower quality, less choice or less innovation; where the effects are insignificant the CMA considers that the burden on business and the cost of a reference would be disproportionate.

3.23 Paragraph 2.28 of the Guidance on making references says that, generally speaking, the CMA would not refer a very small market; a market where only a small proportion is affected by the features having an adverse effect on competition; or a market where the adverse effects are expected to be short-lived.

Availability of remedies

3.24 Paragraphs 2.30 to 2.32 of the Guidance on making a reference say that the CMA would not refer a market if it appeared that there were unlikely to be any available remedies to deal with an adverse effect on competition, for example where a market is global and a remedy under UK law would be unlikely to have any discernible effect.

Undertakings in lieu of a reference

3.25 Section 154(2) of the Enterprise Act gives power to the CMA to accept an undertaking or undertakings in lieu of a making a market investigation reference. It can do this only where it considers that it has the power to make a reference and otherwise intends to make such a reference. In proceeding under section 154(2) the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers, taking into account any relevant customer benefits. The CMA says in paragraphs 2.21 and 2.25 of its *Guidance on making references* that it considers that undertakings in lieu are unlikely to be common; following a preliminary investigation the CMA may not be in possession of sufficient information to know whether undertakings in lieu would be adequate to remedy any perceived detriments to competition.

3.26 Section 155 of the Act provides that, before accepting undertakings in lieu of a reference, the CMA is obliged to publish details of the proposed undertakings, to allow a period of consultation (of not less than 15 days) and to consider any representations received; a further period of consultation is required should the CMA intend to modify the undertakings. As noted in paragraph 3.28 below, undertakings in lieu have been accepted in three cases over a period of 17 years. Section 155 lays down some basic rules for such cases: subject to this the actual procedure will vary depending on the facts of the particular investigation.

3.27 Section 156 of the Act provides that, if an undertaking in lieu has been accepted, it is not possible to make a market investigation reference within the following 12 months, unless there is a breach of the undertaking or unless it was accepted on the basis of false or misleading information.

3.28 Undertakings in lieu of a reference have been accepted in three cases, *Postal franking machines*²⁰, *BT*²¹, a case involving OFCOM, and *Extended warranties on domestic electrical goods*²².

3.29 The undertakings in lieu of a reference in the *BT* case were of major significance. OFCOM accepted more than 230 separate undertakings from BT in order to achieve operational separation between 'Openreach', which owned and operated the monopoly part of BT's business, and those parts of its business where it is subject to competition. OFCOM remained concerned, however, that BT still had the ability and incentive to favour its own retail business when making strategic decisions about Openreach²³. BT sought to address this concern by establishing Openreach as a distinct company with its own staff, management and strategy. In July 2017 OFCOM accepted BT's proposal and agreed to release BT from its undertakings in lieu²⁴. The intention is that Openreach will serve all of its customers equally and BT will no longer be able to favour its own vertically-integrated business units.

3.30 In February 2019 the Chairman of the CMA, Lord Tyrie, submitted proposals to the Secretary of State for Business, Enterprise and Industrial Strategy for possible reforms of the market investigation provisions²⁵. One proposal was that the CMA should be given power to accept **partial** undertakings in lieu and, more generally, to accept undertakings at other points in its investigation where feasible and appropriate. Under current legislation such undertakings must satisfy all the concerns of the CMA at the end of the market study: it would however be attractive to have the power to identify and remedy certain competition problems by agreeing undertakings during an investigation; others would then be dealt with at the end of the market investigation, as currently happens. The UK Government has not yet responded to this (or any other) of the CMA's proposals.

Questions to be decided on market investigation references

3.31 Once a reference has been made, section 134(1) of the Enterprise Act requires that the CMA must decide whether any feature, or combination of features, of each market referred prevents, restricts or distorts competition in the referred market(s). If the CMA considers that there is an 'adverse effect on competition'²⁶, section 134(4) of the Act provides that the CMA must decide three additional questions:

- first, whether it should take action to remedy, mitigate or prevent the adverse effect on competition or any detrimental effect on customers it has identified: detrimental effects are defined in section 134(5) of the Act as higher prices, lower quality, less choice of goods or services and less innovation;
- secondly, whether it should recommend that anyone else should take remedial action; and

²⁰ OFT decision of 17 June 2005.

²¹ OFCOM decision of 22 September 2005.

²² OFT decision of 27 June 2012.

²³ Details of OFCOM's review can be found at www.ofcom.org.uk.

²⁴ OFCOM Statement of 13 July 2017.

²⁵ Available at www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy.

²⁶ One of the Tyrie proposals for reform of the market investigation provisions was that the 'adverse effect on competition test' might be replaced by an 'adverse effect on consumers' text; no response has yet come from the Government to these proposals.

- thirdly, if remedial action should be taken, what that action should be.

3.32 Section 134(2) of the Enterprise Act says that an adverse effect on competition ('AEC') exists where features of a market are found to prevent, restrict or distort competition. Part 3 of the *Market investigation guidelines* provides detailed guidance on the AEC test based on experience in conducting numerous investigations since the Enterprise Act entered into force in 2003. Part 3 of the *Guidance* is divided into four sections dealing respectively with market characteristics and outcomes; market definition; the competitive assessment; and concluding the AEC test. There are extensive references to decided cases under the market investigation regime.

3.33 Section 134(6) of the Enterprise Act requires that, when considering remedial action, the CMA must have regard to the need to achieve 'as comprehensive a solution as is reasonable and practical to the adverse effect on competition and any detrimental effects on customers'. Section 134(7) of the Act says that the CMA may, in particular, have regard to the effect of any action on any relevant customer benefits as defined in section 134(8). If the CMA finds that there is no anti-competitive outcome, the question of remedial action does not arise.

3.34 Section 136(1) of the Act requires the CMA to prepare and publish a report within the period permitted by section 137. Time limits are discussed in paragraphs 5.5 to 5.8 below.

3.35 The CMA's report must contain its decisions on the questions to be decided under section 134, its reasons for those decisions and such information as the CMA considers appropriate for facilitating a proper understanding of those questions and the reasons for its decisions. As noted in paragraph 3.31 above, the questions to be decided include, if remedial action should be taken, what that action should be.

Remedies in market investigation cases

3.36 When the CMA has prepared and published a report under section 136 and concluded that there is an AEC, section 138(2) requires it to take such action as it considers to be reasonable and practicable to remedy, mitigate or prevent the AEC and any detrimental effects on customers that have resulted from, or may result from, the AEC. When deciding what action to take the CMA must be consistent with the decisions in its report on the questions it is required to answer, unless there has been a material change of circumstances since the preparation of the report or the CMA has a special reason for deciding differently.

3.37 In making its decision under section 138(2) the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any AEC, having regard to any relevant customer benefits of the market features concerned. The market investigation provisions differ from antitrust cases. In the latter any directions imposed by the CMA in an infringement decision under the Competition Act will be designed to suppress the offending conduct that took place in the past. Under the Enterprise Act the CMA will seek to achieve a 'comprehensive solution' designed to bring about a well-functioning market in the future. Extensive consultation takes place in market investigation cases involving third parties as well as the firms under investigation. The evolution of remedies in a particular case can be actively followed on the relevant website of the CMA.

3.38 The CMA may implement remedies either by accepting undertakings from the firms under investigation (section 159 Enterprise Act) or by imposing orders upon them (section 161 Enterprise Act); the CMA has a choice of whether to seek undertakings or to make an order. Another possibility is for the CMA to make recommendations that someone else should take remedial action, perhaps a sectoral regulator or the Government. In some cases the CMA may have recourse to a package of measures consisting of undertakings, orders and/or recommendations. In paragraph 92 of the *Market investigation guidelines* the CMA says that it will proceed on the basis of practicality, such as the number of parties concerned and their willingness to negotiate and agree undertakings in the light of the CMA's report. Where a large number of firms are under investigation it may be more practical to adopt an order than to try to accept numerous undertakings from different entities.

3.39 An order may contain anything that is permitted by Schedule 8 to the Act. The powers contained in Schedule 8 include orders:

- to restrict a particular kind of conduct on the part of firms: for example to prohibit certain agreements, refusals to supply, tying transactions or discrimination. Provision is specifically made for the regulation of prices to be charged for goods or services;
- to supply goods or services;
- not to acquire a business;
- to divest a business.

3.40 Section 164(1) provides that the provisions that may be contained in an undertaking are not limited to those permitted by Schedule 8 in the case of orders. In paragraph 92 of the *Market investigation guidelines* the CMA says that, in deciding whether to accept undertakings or to impose an order, it will consider whether a particular remedy falls within the order-making powers available to it under Schedule 8 of the Act.

3.41 Section 168 of the Enterprise Act provides that, where the CMA or the Secretary of State considers remedies in relation to regulated markets such as telecommunications, gas and electricity, they should take into account the various sector-specific regulatory objectives that the sectoral regulators have. These may go beyond preventing adverse effects on competition: for example there is a legal obligation to ensure the maintenance of a universal postal service.

3.42 In paragraph 93 of the *Market investigation guidelines* the CMA points out that it has power, in regulated sectors, to make an order to modify the licence conditions of regulated firms.

3.43 Part 4 of the *Market investigation guidelines* provides detailed guidance on remedies in cases where a market investigation leads to a finding of an AEC. Part 4 begins, in paragraphs 325 to 354, by explaining the framework for the consideration of remedies. It then discusses, in paragraphs 355 to 369, the concept of 'relevant customer benefits' as defined in section 134(8) of the Act. Paragraphs 371 to 384 provide an overview of the various types of remedy that can be imposed: these

paragraphs should be read in conjunction with Annex B of the *Guidelines* which summarises some of the key considerations relevant to the evaluation, design and implementation of different classes of remedies. Annex B first discusses divestiture and intellectual property remedies; then behavioural remedies; and finally recommendations. The final section of Part 4 of the *Market investigation guidelines* considers the selection of remedies in particular cases by considering different problems that may have been identified in the market investigation and possible remedial approaches that may be taken to deal with those problems.

3.44 Further guidance on remedies is to be found in paragraphs 4.14 to 4.25 of the CMA's *Supplemental guidance*, in particular on the duration of remedies and whether a 'sunset clause' should be included, specifying the maximum duration of a remedy.

3.45 One of the proposals submitted to the Secretary of State by Lord Tyrie in February 2019 was that power should be made available to the CMA to impose interim measures during the course of a market investigation, for example to stop potential harm more quickly and/or in some cases to safeguard remedial options: no such power exists under the current legislation.

Chapter 4: Market investigations in the UK: institutional arrangements

4.1 This chapter will discuss the institutional arrangements for the conduct of market investigation references in the UK. It will begin by considering which institutions have the power to make a reference, and the work that they will have done before making a reference. Chapter 4 will then explain that the actual market investigation is conducted by a 'group' of members selected from the CMA Panel. The chapter will conclude by describing the system of appeals from decisions of the CMA to the CAT.

Which institutions may make a market investigation reference?

4.2 As noted earlier in this Report, the power to make a market investigation reference is vested in the CMA and also, within their jurisdictional perimeters, the sectoral regulators. In limited circumstances it is also possible for the Secretary of State to make a reference. Paragraph 3.20 above pointed out that four of the 19 market investigations to have been completed at the time of this Report were made by sectoral regulators.

4.3 Paragraph 23 of the *Market investigation guidelines* explains that, prior to making a reference, the referring body will already have looked into the market in question: a reference can be made only where the referring body has reasonable grounds for suspecting that features of a market prevent, restrict or distort competition. It may be that the CMA or sectoral regulator will have conducted a market study on its own initiative (paragraphs 4.4 to 4.9 below); or it may have been prompted to do so by a complaint or complaints: in certain circumstances this may have been a 'super-complaint' (paragraphs 4.10 and 4.11 below).

Market studies

4.4 The CMA and the sectoral regulators may conduct market studies when they consider that markets are not working well. There is no statutory definition of a market study, but these institutions' function of keeping markets under review enables them to conduct market studies. The CMA has published *Market studies: guidance on the [CMA's] approach ('Market studies guidance')*²⁷. **Market studies** are distinct from **market investigations**, although it is possible that a market study might lead to a market investigation reference. The most obvious distinction between a market study and a market investigation is that there are no legally binding order-making powers at the end of a market study.

4.5 Section 130A of the Enterprise Act requires the CMA to publish a market study notice on commencement of a market study under section 5 of that Act; this provision would also apply where a sectoral regulator initiates a market study to which the Enterprise Act applies. A market study notice must specify the timetable within which the CMA must complete the study, the scope of the market study and the period during which representations may be made to the CMA in relation to the market.

4.6 Chapter 4 of the *Market studies guidance* explains how the CMA goes about market studies. The major stages of a study include selection of a market; pre-launch work; the decision to launch a market study; gathering and analysis of evidence; and consultation on the CMA's findings.

4.7 Where the CMA has published a market study notice, section 131B of the Enterprise Act requires the CMA to publish a 'market study report' setting out its findings and actions (if any) that will be taken as a result of the study; this must be done within 12 months of publication of the market study notice. If the CMA proposes to make a market investigation reference in relation to the subject-matter of a market study it must publish a notice of its proposed decision and begin the process of consulting relevant persons within six months of the market study notice. Strict time limits are imposed on the conduct of market studies in order to disturb the operation of the market as little as possible. They are discussed in paragraphs 2.9 and 2.10 of the CMA's *Supplemental guidance on the CMA's approach*.

4.8 Various outcomes may follow a market study by the CMA, including:

- a clean bill of health for the market in question;
- consumer-focused action, for example to raise consumers' awareness in such a way that they make better purchasing decisions;
- making recommendations to business to change its behaviour, for example on matters such as information about after-sales services, standard terms and conditions and improving consumer redress;
- making recommendations to Government to amend legislation or take some other action to remove 'public' restrictions of competition;
- investigation or enforcement action against firms that might be in breach of competition or consumer law;
- a market investigation reference or undertakings in lieu of such a reference.

4.9 If the CMA proposes to make a market investigation reference, section 131B of the Enterprise Act provides that the market study report must contain the decision of the CMA whether to make a reference (or accept undertakings in lieu of a reference), its reasons for that decision and such information as the CMA considers appropriate for

²⁷ *OFT 510, 2010, subsequently adopted by the CMA and available at www.gov.uk.*

facilitating a proper understanding of its reasons for that decision. If the CMA decides to make a reference, it will be made at the same time as the market study final report is published.

-

Super-complaints

4.10 Market investigation references sometimes originate in complaints, including so-called 'super-complaints'. Section 11 of the Enterprise Act provides for super-complaints to be made to the CMA and to the sectoral regulators. The purpose of a super-complaint is that a designated consumer body can make a complaint to the CMA or regulator about features of a market for goods or services in the UK that appear to be significantly harming the interests of consumers. This is a way of making the consumer's voice more powerful: individual consumers often lack the knowledge, motivation or experience to complain effectively, but a designated consumer body should have the resources and ability to do so. Consumer bodies are designated by the Secretary of State; seven have been designated:

- The Campaign for Real Ale Ltd;
- The Consumer Council for Water;
- The Consumers' Association ('Which?');
- The General Consumer Council for Northern Ireland;
- The National Association of Citizens Advice Bureaux ('Citizens Advice');
- The National Consumer Council;
- The Scottish Association of Citizens Advice Bureaux.

4.11 The CMA must respond to a super-complaint by publishing a 'fast-track' report within 90 days. A super-complaint can lead to a number of responses including, though not limited to, competition or consumer law enforcement, referral to a sectoral regulator, the launch of a market study, a market investigation reference or recommendations that certain action be taken (for example Government action).

Consultation prior to a market investigation reference

4.12 Section 169 of the Enterprise Act requires the CMA or sectoral regulator to consult before making a market investigation reference and section 172 requires it to give reasons for its decision to propose a reference. The Act leaves open the form and extent of the consultation process: the consultation may be a public one, though not necessarily so. The duty to consult is discussed in paragraphs 3.4 to 3.9 of the *Guidance on making references*. An example of the consultation provisions operating in practice is afforded by the most recent market investigation reference of *Funerals*. The CMA began a market study on 1 June 2018, and consulted on a possible reference on 29 November 2018. A reference was launched on 28 March 2019 and is due for completion by 27 March 2021.

Decision-making in market investigation cases

4.13 As has been seen, market studies can be conducted by both the CMA and the sectoral regulators. However market investigations are carried out solely by the CMA. Given that the CMA can conduct both market studies and market investigations, its governance and decision-making structure has been designed to ensure that key decisions in relation to each of these are made by separate parts of the CMA. These arrangements are described in paragraphs 1.22 to 1.28 of the *Supplemental guidance on the CMA's approach*.

4.14 When the CMA makes a market investigation reference, this decision is taken by the Board of the CMA. The Board consists of a Chair, a Chief Executive and a number of executive and non-executive directors. There is also a 'CMA Panel', appointed by the Secretary of State. The Panel has a Chair and three Inquiry Chairs. There are a number of Panel members (currently 30).

4.15 Once a market investigation reference has been made (whether by the CMA or by a sectoral regulator), the Chair of the CMA Panel will appoint a 'group' to conduct the actual investigation. The inquiry group will consist of at least three members of the CMA Panel. The Chair of the CMA Panel must ensure that no member of the inquiry group participated in the Board's decision to refer the market in the first place²⁸. The inquiry group is required to decide whether there is an AEC in the market(s) referred and, if so, what remedial action should be taken. The group is responsible for the implementation of remedies up to the point at which the reference is determined.

4.16 These arrangements are intended to imitate the division of functions between the OFT and the Competition Commission that existed prior to the ERRA, which abolished the OFT and Competition Commission and created a new, unitary authority, the CMA. Under the prior system the OFT referred markets to the Competition Commission, and the Commission then conducted the market investigation 'with a fresh pair of eyes', a significant safeguard against the possibility of 'confirmation bias'. When the CMA was created there was anxiety that this safeguard would be lost; for this reason the decision-makers in the market investigation are separate from those who make the reference²⁹.

•
4.17 The Board of the CMA has no say in the final outcome of a market investigation. However paragraph 3.39 of the CMA's *Supplemental guidance on the CMA's approach* provides that the CMA Board may append an 'advisory steer' to a market investigation reference setting out its expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation. The inquiry group is expected to take the advisory steer into account, but is required by law to make its statutory decisions independently of the CMA Board. An advisory steer was given to the inquiry group by the CMA Board in the reference made in 2019 of *Funerals*³⁰.

▪ **Review of market investigation decisions under Part 4 of the Enterprise Act**

4.18 Section 179 of the Enterprise Act makes provision for review of decisions under Part 4 of the Act.

4.19 Section 179(1) of the Act provides that any person 'aggrieved by a decision' of the CMA may apply to the CAT for a review of that decision: the aggrieved person could be a third party with sufficient interest. The application must be made within two months of the date on which the applicant was notified of the disputed decision or of its date of publication, whichever is earlier. When dealing with applications under section 179(1) the CAT must apply the same principles as would be applied by a court

²⁸ At its Board meeting of 4 June 2020 the Board of the CMA confirmed its practice that Panel members who are Board members may not take part in decisions to make a market investigation reference for any investigation on which it is anticipated that they might sit on the inquiry group.

²⁹ For reasons of operational efficiency some of the CMA staff that carried out work that led to the reference will also work on the actual reference: the CMA's *Supplemental guidance on the CMA's approach*, paragraph 1.22.

³⁰ The advisory steer is available at www.gov.uk.

on an application for judicial review³¹: that is to say, a decision can be challenged on the grounds of illegality, irrationality or procedural impropriety. As in the case of appeals from decisions of the European Commission to the General Court under EU law, there is no appeal **on the merits** of a decision in a market investigation case to the CAT. In principle a challenge of 'irrationality' in a judicial review under UK law would appear to be much the same as a challenge of 'manifest error of assessment' under EU law.

4.20 The principles to be applied in a judicial review of decisions in market investigation cases were helpfully set out in the CAT's judgment in *BAA Ltd v Competition Commission*³² at paragraph 20. In particular at paragraph 20(6) of its judgment the CAT said that:

'It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC ...'.

4.21 Section 179(5) of the Act provides that the CAT may dismiss the application or quash the whole or part of the decision to which it relates; and, in the latter situation, it may refer the matter back to the original decision-maker for further consideration³³. Section 179(6) provides that an appeal may be brought before the Court of Appeal, with permission, against the CAT's decision on a point of law³⁴.

- 4.22 It is possible to make some generalised comments about the applications for review that have been made under the market investigation provisions.
-
- 4.23 First, three applications to the CAT challenged a decision *not* to make a market investigation reference: one case was successful³⁵, one was unsuccessful³⁶ and one did not proceed to judgment³⁷.
- 4.24 Secondly, as one would expect, the CAT requires that the CMA must act fairly³⁸; where there is a defect in this respect the CAT will be prepared to quash the decision in question. In *BMI Healthcare v Competition Commission*³⁹ one of the parties investigated successfully persuaded the CAT that the Competition Commission's decision to use a 'disclosure room' during the *Private healthcare* investigation should be annulled due to procedural irregularities on the Commission's part.

³¹ *Enterprise Act 2002, s 179(4)*.

³² *Case 1185/6/8/11 [2012] CAT 3*.

³³ *Ibid, s 179(5)(b)*, on which see the ruling on relief in *Case 1104/6/8/08 Tesco plc v Competition Commission [2009] CAT 9*.

³⁴ *Enterprise Act 2002, s 179(6) and (7)*.

³⁵ *Case 1052/6/1/05 Association of Convenience Stores v OFT [2005] CAT 36*.

³⁶ *Case 1191/6/1/12 Association of Convenience Stores v OFT [2012] CAT 27*.

³⁷ *Case 1148/6/1/09 CAMRA v OFT, order of 7 February 2011*.

³⁸ See paragraphs 5.28 to 5.30 below on the obligation of the CMA to inform firms under investigation of the 'gist' of the case.

³⁹ *Case 1218/6/8/13 [2013] CAT 24*.

- 4.25 In a subsequent appeal in relation to the same investigation, *HCA International v CMA*⁴⁰, the CMA accepted that it had erred in its final report in *Private healthcare* and that fairness required that the parties be given an opportunity to comment on its revised 'insured prices analysis'⁴¹. The CAT quashed the CMA's decisions that there was an AEC in relation to insured patients and that HCA should divest itself of two hospitals in central London and referred the matter back to the CMA⁴². The CMA subsequently reaffirmed its AEC decision on insured patients, but considered that divestment was no longer proportionate⁴³.
- 4.26 Thirdly, in two appeals there have been challenges to the CMA's decision **not** to find an AEC: both were unsuccessful. In *AXA PPA Healthcare Ltd v CMA*⁴⁴ the CAT held that the CMA had rationally concluded that the formation of anaesthetist groups did not give rise to an AEC in *Private healthcare*; there was insufficient evidence to support the theory of harm that anaesthetist groups have market power arising from the joint setting of prices. In *Federation of Independent Practitioner Organisations v CMA*⁴⁵ the Court of Appeal unanimously upheld the CMA's decision that there was no AEC resulting from insurers' buyer power in relation to consultants and the restrictions placed on consultants' fees.
- 4.27 Fourthly, several applications challenged the decisions to impose certain remedies; this happened in five investigations: *Groceries*, *Payment protection insurance*, *BAA airports*, *Private healthcare* and *Aggregates*. Aspects of the remedies imposed in two investigations - *Groceries* and *Payment protection insurance* - were successfully challenged before the CAT. In *Tesco v Competition Commission*⁴⁶ and *Barclays v Competition Commission*⁴⁷ the CAT was critical of the approach of the Competition Commission (the predecessor of the CMA) to evaluating the likely costs and benefits of its remedies. On reconsideration of the matters referred back to the Commission, it adopted conducted further analysis and adopted partially modified remedies. As noted, in *Private healthcare* the appeal by HCA International led to the CMA's decision in relation to insurance patients and the related divestment remedy being quashed and remitted to the CMA⁴⁸.

4.28 Lastly, in the *BAA Airports*⁴⁹ investigation the Competition Commission required significant divestments by BAA of airports in the region of London and in Scotland. BAA applied for judicial review: the CAT concluded that the Commission's decision was a proportionate one, but set aside its finding because there was an appearance of bias in the proceedings⁵⁰: on appeal the Court of Appeal reversed the decision on apparent bias and upheld the findings of the Commission⁵¹. An appeal against a subsequent

⁴⁰ Case 1229/6/12/14 *HCA International Ltd v CMA* [2014] CAT 23.

⁴¹ *Ibid*, paragraph 13; at paragraph 55 the CAT said that the CMA's concession and decision to look at the matter afresh was 'the responsible thing for it to do in the circumstances'.

⁴² www.competitionandmarkets.blog.gov.uk.

⁴³ Final Remittal Report of 5 September 2016.

⁴⁴ Case 1228/6/12/14 [2015] CAT 5.

⁴⁵ [2016] EWCA Civ 777, dismissing an appeal against a majority CAT decision, Case 1230/6/12/14 [2015] CAT 8.

⁴⁶ Case 1104/6/8/09 [2009] CAT 6.

⁴⁷ Case 1109/6/8/09 [2009] CAT 27.

⁴⁸ Case 1229/6/12/14 *HCA International Ltd v CMA* [2014] CAT 23.

⁴⁹ Final Report of 19 March 2009.

⁵⁰ Case 1110/6/8/09 *BAA Ltd v Competition Commission* [2009] CAT 35.

⁵¹ *Competition Commission v BAA Ltd* [2010] EWCA Civ 1097.

decision of the Competition Commission not to alter its decision in the light of changed circumstances also failed⁵².

Chapter 5: Market investigations in the UK: procedure

5.1 This chapter will explain the procedures of the CMA when conducting market investigations. The CMA has published a number of documents of relevance to its procedures. Of particular importance are the following:

- *Transparency and disclosure: statement of the CMA's policy and approach*⁵³
- *CMA Rules of Procedure for Merger, Market and Special Reference Groups 2014*⁵⁴
- *Market investigation guidelines*⁵⁵
- *Supplemental guidance on the CMA's approach*⁵⁶.

5.2 The major stages of an investigation are set out in paragraphs 3.36 to 3.64 of the CMA's *Supplemental guidance*. They are:

- handover between a market study and a market investigation;
- information gathering;
- issues statement;
- hearings;
- assessment;
- 'put-back';
- provisional decision report;
- response hearings;
- final report.

5.3 Where the CMA finds an AEC it is required to consider whether remedies are appropriate; if so there will be a 'remedies implementation stage'. The implementation of remedies is discussed in paragraphs 4.1 to 4.25 of the *Supplemental guidance*.

- 5.4 Each market investigation has its own home page on the CMA's website, and it is a simple matter to follow the progress of an investigation by referring to it. This accords with the CMA's commitment to be open and transparent in its working, as set out in its *Statement on transparency and disclosure*. The home page sets out the core documents of an inquiry; contains the CMA's announcements, for example on its provisional findings and final report; and makes available the written submissions and the evidence provided to the CMA, as well as summaries of hearings held. The home page may also contain surveys and working papers of relevance to the investigation and an account of roundtable discussions. For example in *Groceries*⁵⁷ economic roundtables were held on local competition and on buyer power; in *Local buses*⁵⁸ researchers were appointed for a study on distinguishing exclusionary conduct, tacit

⁵² Case 1185/6/8/11 BAA Ltd v Competition Commission [2012] CAT 3.

⁵³ CMA 6, January 2014.

⁵⁴ CMA17, March 2014; subject to these rules, each market investigation group can determine its own procedure: ERRA, Sch 4, paragraph 51(5).

⁵⁵ CC3, January 2014, revised July 2017; see Annex III to this Report.

⁵⁶ CMA3, January 2014, revised July 2017; see Annex IV to this Report.

⁵⁷ Final Report of 30 April 2008.

⁵⁸ Final Report of 20 December 2011.

coordination and competition; and in *Payday lending* a market research agency was instructed to carry out a customer survey⁵⁹.

- 5.5 A criticism of market investigations in the period after the Enterprise Act came into force in 2003 was their length. The investigation itself could take up to two years; and the remedies phase fell outside the statutory period within which the investigation must be completed, sometimes leading to protracted delay in bringing a case to a conclusion. The ERRA 2013 shortened the period of market investigations by amending the Enterprise Act and introducing time limits for the implementation of remedies.

- 5.6 Section 137(1) of the amended Enterprise Act now requires the CMA to complete its investigation within 18 months of the date of the reference. Section 137(2A) provides that the 18-month period may be extended by no more than six months where there are 'special reasons' for doing so⁶⁰; only one such extension is possible. The CMA has stated that it may extend the inquiry period in complex cases, where for example there are multiple parties, issues or markets⁶¹. The time limits in section 137 may be reduced by the Secretary of State⁶².

5.7 Paragraphs 3.28 and 3.29 of the *Supplemental guidance on the CMA's approach* discuss the timescales of investigations. Each inquiry group will decide the timescales for its investigation on a case-by-case basis, but paragraph 3.29 of the *Supplemental guidance* sets out a typical timetable for a case:

⁵⁹ Final Report of 24 February 2015.

⁶⁰ Enterprise Act 2002, s 137(2A).

⁶¹ See the CMA's *Supplemental guidance*, paragraph 3.7.

⁶² Enterprise Act 2002, s 137(3).

Stage of process	Timing within 18-month investigation
Reference	Pre-reference sharing of appropriate information with the CMA by the CMA market study team/the referring body
'First day letter'/initial information requests Publication of initial Issues Statement (setting out theories of harm and inviting views on possible remedies) Initial submissions from main and third parties	Months 1–2
Site visits and hearings	Month 3
Further interaction with parties and consultation on analysis: eg roundtables, confidentiality rings, disclosure rooms, working papers	Months 2–11
Final deadline for all parties' submissions before the Provisional Decision Report	Month 11
Publication of Provisional Decision Report on the AEC and remedies (if needed)	Month 12
Consideration of responses to Provisional Decision Report Response hearings with parties	Months 12–16
Final deadline for all parties' submissions before Final Report	Month 16
Publication of Final Report	Month 18

Stage of process	Timing within 18-month investigation
Reference	Pre-reference sharing of appropriate information with the CMA by the CMA market study team/the referring body
'First day letter'/initial information requests	Months 1–2
Publication of initial Issues Statement (setting out theories of harm and inviting views on possible remedies)	
Initial submissions from main and third parties	
Site visits and hearings	Month 3
Further interaction with parties and consultation on analysis: eg roundtables, confidentiality rings, disclosure rooms, working papers	Months 2–11
Final deadline for all parties' submissions before the Provisional Decision Report	Month 11
Publication of Provisional Decision Report on the AEC and remedies (if needed)	Month 12
Consideration of responses to Provisional Decision Report	Months 12–16
Response hearings with parties	
Final deadline for all parties' submissions before Final Report	Month 16
Publication of Final Report	Month 18

5.8 The ERRA introduced time limits for the implementation of remedies. Section 138A of the amended Enterprise Act provides that the CMA must discharge its duty under section 138(2), that is to say it must accept undertakings or make an order, within six months of the date of the publication of its final report under section 136.

The six-month period may be extended by no more than four months where there are 'special reasons' for doing so. The CMA has said that it may extend the remedies timetable where, for example, it does 'consumer testing' of the implementation of its remedies or it has to grapple with complex practical issues⁶³.

5.9 After any undertakings have been taken or an order has been made, there may be a further period during which the parties actually implement the remedies: for example a period may be allowed for the disclosure of information required to be disclosed or for the divestiture of assets required to be divested. The period permitted for implementation must be proportionate, taking into account the impact of the remedies on the firms required to give them and the detriment to customers caused by an adverse effect on competition.

5.10 In the most recent completed market investigation, *Investment consultants*, the CMA commenced the investigation on 14 September 2017 and issued its Final Report on 12 December 2018; this was therefore the start date of the period within which remedies had to be determined. The CMA then initiated a consultation on its draft Consultancy and Fiduciary Management Market Investigation Order 2019 order on 11 February, requiring comments by 13 March 2019. The CMA received 21 responses. The actual order was made on 10 June 2019.

5.11 The CMA may use its investigatory powers for the purpose of implementing its remedies⁶⁴; furthermore it may 'stop the clock' if a person fails to comply with a requirement of a notice under section 174 and that failure prevents the CMA from properly discharging its duty under section 138(2)⁶⁵. This power has never been used in the context of the setting of remedies.

5.12 Paragraph 88 of the *Market investigation guidelines* explains that, once undertakings have been accepted or an order has been made, the inquiry group will normally be disbanded. Responsibility for any further work on remedies will generally then be transferred to the staff of the CMA; it is also possible to appoint a specific group of members of the CMA Panel where appropriate.

5.13 The following paragraphs discuss the various stages of a market investigation, based on the CMA's *Market investigation guidelines* and its *Supplemental guidance*.

Handover between a market study and a market investigation

5.14 Paragraphs 3.37 to 3.40 of the *Supplemental guidance* explain the process where the CMA initiates a market investigation reference. In order to ensure an efficient handover to the inquiry group, the team that worked on the initial study will begin preparatory work on a reference on a contingency basis prior to the final decision to make a reference. This will include consideration of the further information-gathering and analysis that is likely to be required in the investigation. A preparatory investigation team of staff and the panel members will be established and they will be briefed on the case to date and the concerns underpinning any reference; for reasons of operational efficiency, some staff who worked on the initial study may be transferred to the market investigation itself. As noted in paragraph 4.17 above, the Board of the CMA may issue an 'advisory steer' to the inquiry group; however the group's investigation will be fully independent of the Board. Where one of the sectoral regulators makes the reference the CMA will seek to engage with the referring body to enable it to prepare for the investigation; similar engagement would take place with

⁶³ See the CMA's *Supplemental guidance*, paragraph 4.7.

⁶⁴ *Ibid*, paragraph 4.8; see *Enterprise Act 2002*, s 174(1)(b).

⁶⁵ *Supplemental guidance*, paragraph 4.8; see *Enterprise Act 2002*, s 138A(3).

the relevant Government department in the event of a reference by the Secretary of State.

Information gathering

5.15 Paragraphs 3.41 to 3.45 of the *Supplemental guidance* explain how the CMA gathers information. At an early stage in the investigation there will be informal meetings between the case team and the main parties to discuss the information that may be needed; ‘data meetings’ may be held. In due course a detailed market and financial questionnaire will be sent; the CMA may also decide to conduct one or more surveys: the relevant parties will be consulted on the design and content of such surveys. The CMA may decide to hold site meetings. Further guidance on the type of information that the CMA will look for is provided in paragraphs 35 to 3.41 of its *Market investigation guidelines*.

5.16 Section 174 of the Enterprise Act gives the CMA powers to require information for the purpose of market investigations: these powers may be exercised during the investigation and for the purpose of implementing any remedies. The CMA can impose a penalty on a person who, without reasonable excuse, fails to comply with a notice given under section 174 or who intentionally obstructs or delays a person who is trying to copy documents required to be produced. It is a criminal offence for a person intentionally to alter, suppress or destroy any document that he or she has been required to produce under section 174: a person guilty of this offence could be fined or imprisoned for a maximum of two years. There is a right of appeal to the CAT against decisions of the CMA to impose monetary penalties: the CAT may quash the penalty or substitute a different amount or different dates of payment⁶⁶. One of Lord Tyrie’s proposals to the Secretary of State in February 2019 was that the enforcement powers under Part 4 of the Enterprise Act should be strengthened.

Issues statement

5.17 At an early stage in the investigation the CMA will publish an issues statement which will identify the theories of harm that it will be looking at. The parties will be invited to respond to this statement, including on any possible remedies that it may contain.

Hearings

5.18 Paragraphs 3.47 to 3.49 of the *Supplemental guidance* discuss the hearings that the CMA holds at an early stage of an investigation (at a later stage it holds ‘response hearings’ after the publication of its provisional decision: see paragraph 5.22 below).

Assessment

5.19 Paragraphs 3.50 to 3.54 of the *Supplemental guidance* explain that the staff team and the inquiry group, working together, will at this stage work on the competition assessment, leading in due course to the provisional decision report; they will consider possible remedies at the same time as forming the group’s competition assessment.

‘Put-back’

⁶⁶ Enterprise Act 2002, s 174D(10) and s 114.

5.20 Paragraphs 3.55 to 3.56 of the *Supplemental guidance* describe the ‘put-back’ process, whereby the CMA may send text to the parties to enable them to verify the factual correctness of certain content and to identify confidential material. Put-back is an example of the CMA’s commitment to transparency and disclosure: see further paragraphs 5.24 to 5.30 below.

Provisional decision report

5.21 Paragraphs 3.57 to 3.59 of the *Supplemental guidance* discuss the inquiry group’s provisional decision report in which it identifies any features of the market(s) that may give rise to an AEC. Where an AEC has been identified, the provisional decision report will also contain the group’s provisional decision on remedies. There will then be a public consultation of not less than 21 days.

Response hearings

5.22 Paragraphs 3.60 to 3.62 of the *Supplemental guidance* explain that ‘response hearings’ will then be held; this may be followed by further consultation.

Final report

5.23 The inquiry group will then publish its final report. As noted in paragraphs 4.18 to 4.28 above, this may then be followed by an appeal to the CAT.

Transparency and disclosure

5.24 The procedure for market investigations does not involve access to the file of the kind that occurs in antitrust cases conducted by DG COMP under Articles 101 and 102 TFEU and by the CMA under the Competition Act. In antitrust cases undertakings are accused of infringing the law: the European Commission or the CMA sets out its case in a statement of objections, and undertakings then have access to the file, as part of their rights of defence, in order to be able to understand the case and the evidence against them. Penalties may be imposed at the conclusion of cases under the Competition Act and, for the purposes of the Human Rights Act 1998, the proceedings are characterised as criminal and therefore Article 6 of the European Convention on Human Rights is engaged.

5.25 Market investigations take place under a separate regime from antitrust cases. Investigations under the Enterprise Act examine features of the market that may have adverse effects on competition, a quite different exercise from identifying wrongdoing on the part of undertakings. Antitrust cases are adversarial in nature; the market investigation process is an inquisitorial one.

5.26 The CMA has a general policy of being transparent in its dealings with stakeholders. Its position is set out in *Transparency and disclosure: statement of the CMA’s policy and approach*, which applies to all CMA cases under both the Competition Act and the Enterprise Act. After an introduction, section 2 of the *Statement on transparency and disclosure* provides an explanation of the CMA’s aims in respect of transparency, information requests and the handling of information. Section 3 discusses transparency in the course of a case and section 4 looks at the obtaining and use of information. Section 5 deals with complaints and accountability. Later sections deal with disclosure to UK public authorities, cooperation with overseas authorities and freedom of information and data protection. The market investigation system is characterised by considerable transparency, in particular as a result of the extensive consultation that takes place throughout investigations. As noted in

paragraph 5.4 above, extensive materials can be found on the CMA's website in any particular case.

5.27 Section 169 of the Enterprise Act imposes a duty on the CMA, when making any decision in a market investigation case that may have a substantial impact on the interests of a person, to consult with that person before making that decision. Section 169(4) of the Act provides that, when deciding what is practicable when consulting, the CMA must have regard to timetabling constraints that the Act imposes on it and any need to protect confidentiality.

5.28 The fairness of the CMA's procedures has been considered in various judicial reviews of both market investigation and merger cases under the Enterprise Act. As noted in paragraph 4.24 above, the CAT found that there had been one procedural irregularity in the CMA's investigation into *Private healthcare*. In its judgment in that case, *BMI Healthcare v Competition Commission*, the CAT cited *R v Home Secretary, ex parte Doody*⁶⁷, in which the House of Lords (at the time the top appellate court in the UK) had said that natural justice required that, in administrative proceedings: 'Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests **fairness will very often require that he is informed of the gist of the case which he has to answer**'. (emphasis added)

5.29 In the *BMI* case, the CAT recognised that what constitutes the 'gist' of the case may vary from one context to another:

'Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the "gist" of the case which he has to answer, what constitutes the "gist" of a case is acutely context-sensitive. Indeed, "gist" is a peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the "gist" of the Commission's reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission's practice, described in paragraph 7.1 of the CC7 Guidance, of disclosing its provisional findings as part of its consultation process'.⁶⁸

5.30 In subsequent cases dealing with the fairness of merger reviews as opposed to market investigations the CAT has applied the 'gist' test to the fairness of the CMA's proceedings, and has acknowledged that it is a vague term and that it is acutely context sensitive. For example at paragraph 225 of its judgment in *Groupe Eurotunnel SA v Competition Commission*⁶⁹ it cited with approval paragraph 8 of its earlier ruling on confidentiality in *Ryanair Holdings plc v Competition Commission*⁷⁰:

'We agree that you do have to look at the facts of each case. At one end of the spectrum there may be a case where numbers are involved and you need to see the relevant numbers or data in order to understand the gist of what is being put. In other cases, more like the present, you need to know what the general position is...'

Remedies implementation stage

5.31 The ERRA 2013 introduced statutory time limits for the implementation of remedies in market investigation cases. Paragraphs 4.1 to 4.25 of the *Supplemental*

⁶⁷ [1994] 1 AC 531, at 560.

⁶⁸ Case 1218/6/8/13 *BMI Healthcare v Competition Commission* [2013] CAT 24, at paragraph 39(7).

⁶⁹ Cases 1216/4/8/13 and 1217/4/8/13 [2013] CAT 30.

⁷⁰ Case 1219/4/8/13 [2013] CAT 25.

guidance explain the changes made to this phase of market investigations by the ERRA.

5.32 Section 138A of the Enterprise Act requires the CMA to make a final order, or to accept undertakings, within six months of the date of publication of its final report: this includes a period of formal public consultation. One extension, of up to four months, is permitted where there are special reasons for doing so. The CMA has formal investigatory powers during this period, and may ‘stop the clock’ if any person has failed to comply with any requirement of a notice that it has issued.

5.33 The inquiry group will decide on a case-by-case basis whether to make a final order or to accept undertakings. The CMA has power, following the publication of its final report but before the investigation is finally determined, to take interim measures to prevent pre-emptive measures that might impede the final action to be taken in the case.

Review of enforcement undertakings and orders

5.34 Section 162 of the Act requires the CMA to keep enforcement undertakings and enforcement orders under review and to ensure that they are complied with; it is also required to consider whether, by reason of a change of circumstances, there is a case for release, variation, supersession or revocation. Section 167 provides that there is a duty to comply with orders and undertakings; this duty is owed to anyone who may be affected by a breach of that duty. Any breach of the duty is actionable if such a person sustains loss or damage, unless the subject of the undertaking or order took all reasonable steps and exercised all due diligence to avoid a breach of the order or undertaking. Compliance with an order or undertaking is also enforceable by civil proceedings brought by the CMA for an injunction.

Chapter 6: The market investigation provisions in practice

6.1 By 28 September 2020 a total of 20 market investigation references had been made, 19 of which had been completed; one was pending, into funerals, launched on 28 March 2019⁷¹.

6.2 A number of points can be made about the market investigations that have so far been completed.

Meaning of ‘adverse effect on competition’

6.3 Section 134(2) of the Enterprise Act 2002 says that an AEC exists where features of a market are found to prevent, restrict or distort competition. As noted in paragraph 3.2 above, these features may either be structural or they may relate to conduct on both the supply- and the demand-side of the market. The CMA uses economic thinking to facilitate its analysis of competition in the market under investigation. The CMA has not laid down a definitive test of what constitutes an AEC, but its guidelines and reports indicate that it sees the issue in terms of a realistic comparison between ‘a well-functioning market’ and the competitive conditions

⁷¹ A table of all the investigations to have been completed between 20 June 2003 and 28 September 2020 will be found as Annex V to this Report.

observed in practice⁷². In recent reports the CMA has not gone into detail on what a well-functioning market would look like, but has instead focussed on identifying proportionate remedies to problems identified and the magnitude of their harm to consumers. The text that follows will briefly examine the approach that has been taken to identifying an AEC.

Market definition

6.4 In its reports the CMA identifies relevant markets in which there may be consumer harm and, in doing so, considers those products or services that currently constrain the prices of those under investigation⁷³. Market definition provides a helpful framework for evidence gathering and economic analysis; the goods or services specified in the reference may or may not correspond to the relevant market. However it is important to note that the CMA will not define relevant markets with the same particularity that it would do, for example, in an abuse of dominance case under the Chapter II prohibition, where market definition is a legal requirement. The Competition Commission undertook considerable econometric analysis and modelling to inform its market definition in *Groceries*⁷⁴. In *Private healthcare* the CMA took into account the results of its patient survey as a useful source of information about the relevant market⁷⁵. The CMA also used a customer survey to help it to determine the degree of substitutability between payday loans and other credit products in *Payday lending*⁷⁶.

Counterfactual

6.5 The CMA may seek to try to identify an appropriate 'counterfactual' against which to determine whether any feature or features of the market lead to an AEC⁷⁷. This would normally be the market under investigation in the absence of the features that appear to be producing an AEC. Identification of a counterfactual is not a legal requirement in market investigation cases; rather it is an analytical tool that may be helpful in determining the problems that exist in a market.

Theories of harm

6.6 The CMA uses economics to frame its analysis of a particular market and considers various 'theories of harm' which may arise from one or more 'features' of the market. A theory of harm is a hypothesis of how harmful effects might arise in a market and adversely affect customers⁷⁸. The *Market investigation guidelines* explain that competitive harm can flow from five main sources⁷⁹:

- unilateral market power;
- barriers to entry and expansion;
- coordinated conduct;

⁷² See eg the market investigations in *Home credit*, Final Report of 30 November 2006, paragraph 8.4; *Groceries*, Final Report of 30 April 2008, paragraph 10.7; *Rolling stock leasing*, Final Report of 7 April 2009, paragraphs 8.4–8.6 and 8.20; *Private motor insurance*, Final Report of 24 September 2014, paragraphs 6.4, 6.22, 6.56 and 6.108–6.109; see also *Market investigation guidelines*, paragraphs 30 and 320.

⁷³ This is consistent with the *Market investigation guidelines*, part 3, section 2.

⁷⁴ See the Final Report of 30 April 2008, paragraphs 4.13–4.14.

⁷⁵ Final Report of 2 April 2014, paragraphs 5.13–5.14 and fn 187.

⁷⁶ Final Report of 24 February 2015, paragraphs 5.20–5.24.

⁷⁷ See eg *Aggregates*, Final Report of 14 January 2014, paragraphs 5.78, 8.4–8.6, 8.40–8.41, 8.56, 8.228, 8.417, 8.484 and 8.494.

⁷⁸ See *Market investigations guidelines*, paragraph 163.

⁷⁹ *Ibid*, paragraph 170.

- vertical relationships;
- weak customer response.

It would be reasonable to add that these *Guidelines* are not definitive or exhaustive, and that the CMA may identify other theories of harm, depending on the characteristics of the market under investigation. As pointed out in paragraph 6.13 below, in several reports government policy and economic regulation have been identified as problematic.

6.7 The *Market investigation guidelines* provide guidance on each source of competitive harm as well as the CMA's assessment of competition, and include consideration of issues such as switching costs and barriers to entry; they also discuss market imperfections such as informational asymmetries. In *Federation of Independent Practitioner Organisations v CMA*⁸⁰ the Court of Appeal said that the existence or absence of detrimental effects on customers is 'plainly a material indication' of whether there is an AEC.

6.8 Different theories of harm have been examined in different market investigations. In *Northern Ireland personal banking*⁸¹ the features of the market harming competition were that banks had unduly complex charging structures and practices; that they did not fully or sufficiently explain them; and that customers generally did not actively search for alternative suppliers⁸². In *BAA airports*⁸³ the theory of harm was different: it was that BAA's common ownership of many airports in the UK meant that there was a lack of competition between them, resulting in problems such as limited responsiveness to the interests of airlines and passengers. This feature of the airports market could have an AEC in more than one market: for example if there were inadequate investment at an airport caused by lack of competition between airports, that may adversely affect competition between airlines⁸⁴. In *Local buses*⁸⁵ the combination of high levels of concentration in the relevant market, the presence of barriers to entry and expansion and customer conduct led to an AEC. In *Energy*⁸⁶ and *Retail banking*⁸⁷ a weak customer response to differences in price and quality gave suppliers a position of unilateral market power over their existing customers, which led to AECs.

Performance and prices

6.9 In most cases the CMA analyses pricing behaviour and relevant financial data. Profitability analysis can be a useful tool in identifying consumer detriment. In some cases the level of prices and profitability have been considered as factors indicating the lack of competitive pressure in a market⁸⁸. In *Home credit*⁸⁹ the Competition Commission concluded that the fact that excessive profits were being earned was not in itself an AEC, although it was indicative of features of the market, such as an incumbency advantage and a lack of customer switching, that did produce an AEC. In

⁸⁰ [2016] EWCA Civ 777, paragraph 39.

⁸¹ Final Report of 15 May 2007.

⁸² *Ibid*, paragraph 5.9.

⁸³ Final Report of 19 March 2009, paragraph 8.2.

⁸⁴ *Ibid*, paragraph 8.2.

⁸⁵ Final Report of 20 December 2011, paragraph 11.28.

⁸⁶ Final Report of 24 June 2016, section 9.

⁸⁷ Final Report of 9 August 2016, section 11.

⁸⁸ See eg *Store card credit services*, Final Report of 7 March 2006, paras 8.11 and 8.82; *Groceries*, Final Report of 30 April 2008, paragraph 6.76; *Classified directory advertising services*, Final Report of 21 December 2006, section 7.

⁸⁹ Final Report of 30 November 2006, paragraphs 3.61–3.143.

*Payday lending*⁹⁰ the CMA found that the largest lenders had earned profits significantly above their cost of capital from 2008 to 2013, which was consistent with a lack of effective price competition. On other occasions a number of conceptual and practical difficulties have constrained the ability to conduct informative profitability analysis⁹¹.

Findings of adverse effects on competition

6.10 In all but one of its reports the Competition Commission or the CMA have found one or more AECs⁹²; no adverse finding was made in *Movies on pay TV* owing to the emergence of new 'video on demand' services⁹³. A few comments may be helpful about the adverse findings to date.

6.11 First, a number of references have involved oligopolistic markets where competition between suppliers was weak⁹⁴. For example in *Aggregates*⁹⁵ a combination of structural and conduct features of the cement markets in Great Britain were found to give rise to an overarching feature: coordination among the three largest cement producers Cemex, Hanson and Lafarge. In *Energy*⁹⁶ the CMA found that each of the six large energy suppliers had unilateral market power over its customer base and was able to charge standard variable tariffs materially above any level justified by the costs of an efficient domestic retail supply.

6.12 Secondly, a recurrent theme has been problems for consumers who did not have access to clear and effective information about the products or services on offer, and where there appeared to be impediments to switching on their part, whether for reasons of inertia or because of technical and practical difficulties⁹⁷. This was an important issue in both *Energy*⁹⁸ and *Retail banking*⁹⁹ and several other market investigations¹⁰⁰.

6.13 A third point is that the impact of government policy and economic regulation has been a concern in several investigations, including *Classified directory advertising services*¹⁰¹, *Rolling stock leasing*¹⁰² and *BAA airports*¹⁰³. In *Energy*¹⁰⁴ the CMA found

⁹⁰ Final Report of 24 February 2015, paragraph 6.8.

⁹¹ See eg the Final Reports in *Liquefied petroleum gas*, paragraph 5.16 (profitability analysis was inconclusive) and *Rolling stock leasing*, paragraph 8.18 (profitability analysis was not practicable).

⁹² Note that ERRA 2013, Sch 4, paragraphs 55 and 57 provide that a finding of an AEC requires at least a two-thirds majority of the CMA group; on this point see *Private healthcare*, Final Report of 2 April 2014, paragraphs 10.4–10.6.

⁹³ Final Report of 2 August 2012.

⁹⁴ See eg *Northern Ireland personal banking*, Final Report of 15 May 2007, paragraphs 4.306–4.307; *Groceries*, Final Report of 30 April 2008, paragraph 8.40; *Statutory audit services*, Final Report of 15 October 2013, paragraphs 12.1–12.3; and *Local buses*, Final Report of 20 December 2011, paragraphs 8.242–8.243.

⁹⁵ Final Report of 14 January 2014, paragraphs 12.3–12.6.

⁹⁶ Final Report of 24 June 2016, paragraph 9.283.

⁹⁷ See eg *Private healthcare*, Final Report of 2 April 2014, paragraphs 10.8–10.9.

⁹⁸ Final Report of 24 June 2016, section 9 and paragraphs 20.5–20.11.

⁹⁹ Final Report of 9 August 2016, paragraphs 11.3–11.6 (personal current accounts), 11.9–11.11 (business current accounts) and 11.14–11.16 (SME lending).

¹⁰⁰ See eg *Store card credit services*, Final Report of 7 March 2006, paragraphs 8.159 and 8.165; *Home credit*, Final Report of 30 November 2006, paragraphs 7.14–7.15; *Northern Ireland personal banking*, Final Report of 15 May 2007, paragraphs 4.222–4.228; and *Payment protection insurance*, Final Report of 29 January 2009, paragraph 9.2.

¹⁰¹ Final Report of 21 December 2006, paragraphs 8.25–8.26; *Yell's successor was released from the undertakings in light of the effects on classified directories of internet usage by consumers and advertisers*: Final Decision of 15 March 2013.

¹⁰² Final Report of 7 April 2009, paragraphs 6.212–6.226.

¹⁰³ Final Report of 19 March 2009, paragraphs 6.60–6.88.

¹⁰⁴ Final Report of 24 June 2016, paragraphs 9.478–9.513.

that some of OFGEM's regulatory measures were restricting the behaviour of suppliers and constraining the choices of consumers in ways that reduced consumer welfare¹⁰⁵.

Remedies

6.14 If the CMA concludes that there is an AEC, it must remedy the position as fully and effectively as possible. The *Market investigation guidelines* discuss different types of remedies and the principles relevant to selecting and implementing them¹⁰⁶. As noted in paragraph 4.27 above, in some cases remedies were the subject of judicial reviews.

6.15 In two investigations - *BAA airports*¹⁰⁷ and *Aggregates*¹⁰⁸ - compulsory divestiture was ordered to remedy competition problems resulting from structural features of the relevant markets¹⁰⁹.

6.16 In *Private motor insurance* the CMA identified various AECs, and was able to remedy most of them by making an order which, for example, banned the use of parity clauses whereby price comparison websites prevented car insurers from offering their products more cheaply on other platforms; consumers were also given more information about the costs and benefits of no-claims bonus protection. However, unusually, the Competition Commission was unable to remedy the inefficiencies arising from the fact that the insurer liable for a non-fault driver's claim is often not the party controlling the costs: it concluded that none of the available remedies provided an effective and proportionate solution¹¹⁰.

6.17 In *Private healthcare*¹¹¹ the CMA originally ordered the divestiture of two hospitals to remedy the AECs for the provision of insured and self-pay private healthcare services in central London. Following a successful appeal by HCA¹¹², the owner of the two hospitals, the CMA reinvestigated and decided, by a majority, that divestment was no longer proportionate, since there was insufficient certainty that the benefits of a structural remedy would outweigh its costs¹¹³. In *Energy*¹¹⁴ and *Retail banking*¹¹⁵ the CMA chose a 'package' of measures to remedy the AECs and their respective detrimental effects on customers¹¹⁶; in the latter case the remedies included the creation of a new organisation – Open Banking – to be funded by the largest banks and which would help to encourage fintech innovation as well as a temporary price cap for prepayment meter customers.

¹⁰⁵ *Ibid*, paragraphs 9.478–9.513.

¹⁰⁶ *Market investigation guidelines*, paragraphs 322–393; see also *CMA's Supplemental guidance*, paragraph 4.14.

¹⁰⁷ *Final Report of 19 March 2009*, section 10; the CMA evaluated the remedies in *BAA airports*: see the *Report of 16 May 2016*.

¹⁰⁸ *Final Report of 14 January 2014*, paragraphs 13.7–13.138.

¹⁰⁹ *The requirements for the design and implementation of divestiture remedies are set out in paragraphs 3–30 of Annex B to the Market investigation guidelines*.

¹¹⁰ *Final Report of 24 September 2014*, paragraphs 26–40 (summary).

¹¹¹ *Final Report of 2 April 2014*, paragraphs 11.9–11.244.

¹¹² *Case 1228/6/12/14 HCA International Ltd v CMA [2014] CAT 23*.

¹¹³ *Final Remittal Report of 5 September 2016*, paragraphs 12.314–12.321.

¹¹⁴ *Final Report of 24 June 2016*, paragraphs 20.22–20.31.

¹¹⁵ *Final Report of 9 August 2016*, section 19.

¹¹⁶ See generally *Market investigation guidelines*, paragraph 328.

Chapter 7: Analogous market investigation provisions in other jurisdictions

7.1 Very few systems of competition law contain provisions similar to the market investigation powers contained in the UK Enterprise Act. All systems of competition law contain antitrust provisions, forbidding anti-competitive agreements and certain abusive forms of unilateral behaviour by firms with significant market power. Most systems of competition law also contain some form of merger control. It is also common for competition authorities to conduct **market studies** as a way of informing themselves about the competitive conditions in markets: at the end of a market study the authority has to decide what to do next. For example a competition authority may take enforcement action under its competition law powers to address problems identified during the market study that fall within that system's antitrust rules. Alternatively the competition authority may possess consumer protection tools that could address those problems; or it could recommend that some other agency with such powers should take action. Market studies may also lead to recommendations to Government or sectoral regulators to take appropriate action.

7.2 However, as was explained above, the distinctive feature of the UK **market investigation** regime is that, if the CMA discovers during a market investigation that features of a market give rise to an AEC, remedial action can be taken, irrespective of any wrongdoing on the part of the firms investigated. The powers of the CMA to impose remedies are far-ranging, and include the possibility of imposing behavioural and/or structural remedies, including ordering the divestiture of assets.

7.3 The purpose of this chapter is to provide an outline of four systems of law that do contain provisions analogous to the market investigation powers established by the Enterprise Act. These are to be found in Greece, Iceland, Mexico and South Africa. Each of these systems will be reviewed in the same way that the UK law was presented above: first the substantive provisions of the law will be described; this will be followed by an explanation of the relevant institutional regime and the possibility of judicial review; the procedure to be followed in market investigation cases will then be discussed. In each country report there will be a brief review of whether these provisions have been applied in practice. Article 26(g) of the Romanian Competition Act of 1996 as amended contains a provision analogous to the UK market investigation provisions but it has yet to be applied in practice.

Greece

7.4 Greece's competition law is contained in Law 3959 of 2011 on the Protection of Free Competition. Apart from antitrust provisions and merger control, Article 11 of the Act permits the examination of specific sectors of the Greek economy: under this provision remedial measures can be taken to create effective competition in the sector in question. A similar power had existed in Article 5 of the Greek Competition Act of 1977. Greek competition law is enforced by the Hellenic Competition Commission. There are no specific guidelines on the market investigation provisions.

Substance

7.5 Article 11 of the Greek Competition Act provides for 'Regulation of sectors of the economy'. Specifically, Article 11(1) of the Act says that:

'The Competition Commission shall examine specific sectors of the Greek economy pertaining to its responsibility, at the request of the Minister of Economic Affairs, Competitiveness and Shipping or ex officio, and, if it finds that conditions of effective competition do not exist in that sector and that the application of Articles 1, 2 and 5 to 10 alone cannot create conditions of effective competition, it may issue a reasoned decision requiring any necessary measures to be taken to create conditions of effective competition in the sector of the economy in question'.

7.6 Article 11(5) of the Competition Act provides that, at the end of the market investigation procedure, if the Competition Commission has found that conditions of effective competition do not exist, it may issue a decision imposing the specific measures which it deems strictly necessary, suitable and proportionate for creating such conditions. If the lack of effective competition is attributable to legislative acts, Article 11(6) provides that the Commission can issue an opinion that they be repealed or amended. This opinion is submitted to the minister with jurisdiction and copied to the Minister of Economic Affairs, Competitiveness and Shipping.

7.7 Article 11(6) of the Competition Act provides that economic sectors subject to decisions under Article 11(5) should be reviewed within two years in order to ascertain whether effective competition has been restored and to decide whether more or less severe measures are required.

7.8 Article 11(1) (see paragraph 7.5 above) specifically states that a market investigation can be carried out only where 'Articles 1, 2 and 5 to 10 alone cannot create conditions of effective competition'. Articles 1 and 2 replicate Articles 101 and 102 TFEU; Articles 5 to 10 contain the provisions on Greek merger control. It follows that a market investigation can be conducted only where the conventional tools of competition law are insufficient to address the lack of effective competition in a market.

7.9 The Competition Act applies to all sectors of the economy. In the telecommunications and postal sectors the competition rules are applied exclusively by the Hellenic Post and Telecommunications Commission rather than by the Competition Commission. Article 24 of the Competition Act provides for cooperation with the sectoral regulators in the application of competition law.

Institutions and judicial review

7.10 The Competition Commission conducts market investigations under Article 11 of the Competition Act. The Commission must adopt decisions in a plenary session. Decisions made under Article 11(5) and 11(6) of the Act may be challenged by a party with a legitimate interest in an application for annulment before the Council of State.

Procedure

7.11 Article 11(2) of the Competition Act requires the Competition Commission within ninety days of the beginning of its procedure to provide a reasoned opinion of whether effective conditions of competition exist in the sector under review and why effective competition cannot be achieved through the conventional tools on antitrust and merger control. There must then be a public consultation of at least thirty days. If, after the public consultation, the Commission is of the opinion that effective competition does not exist, Article 11(3) of the Act provides that it must announce the specific measures that it deems to be strictly necessary, suitable and proportionate for the purpose of creating effective competition. There follows a further public consultation. Thereafter Article 11(5) enables the Commission to impose the measures

it considers to be necessary, and to issue an opinion to the relevant minister if the problem is attributable to legislative acts.

7.12 Fines can be imposed on firms that fail to comply with decisions pursuant to Article 11(5) and 11(6). These can be up to 20% of the firm's total turnover in the preceding financial year.

The provisions in practice

7.13 The market investigation provisions in Greek law have been used in one sector, the *Greek gasoline sector*. The Competition Commission has adopted two decisions, Decision 334/V/2007 and Decision 418/V/2008, under the previous law of 1977; it has since issued a Formal Opinion on 24 October 2012, Decision 29/2012, adopted under the law of 2011, in which it updated its position. In the Opinion of 2012 the Competition Commission identified a number of structural weaknesses and regulatory restraints affecting the conditions of competition at all levels of the fuel sector in Greece (refining, wholesale and retail). Numerous recommendations were made to improve the conditions of competition in this sector in Greece, most of which were adopted by the Greek State.

Iceland

7.14 The main provisions of Iceland's competition law are contained in Competition Law 44 of 2005. The law is enforced by the Competition Authority. There was no legal basis in the Act of 2005 for remedial action following a market investigation. However an amendment was made to the Act of 2005 by Act 14/2011 that does provide such powers. The Authority has adopted *Rules on the market investigations carried out by the Competition Authority* (the '*Rules on market investigations*'), which are available on its website¹¹⁷.

Substance

7.15 Article 16 of Iceland's Competition Act of 2005 enabled the Competition Authority to take enforcement measures in antitrust cases and against public entities to the extent that they may have detrimental effects on competition, provided that no special legislation contains any specific provisions regarding authorisation or obligations for such acts.

7.16 Act 14 of 2011 added an important provision to Article 16(1). As amended, Article 16(1)(c) provides that the Competition Authority is able to take action against:

'circumstances or conduct which prevents, limits or affects competition to the detriment of the public interest. Circumstances means, among other things, factors connected to the attributes of the market concerned, including the organisation or development of companies that operate in it. Conduct means all forms of behaviour, including failure to act, that are in some way detrimental to market competition without being in violation of the Act's ban provisions.'

7.17 Act 14 of 2011 also amended Article 16(2) of the Competition Act. Article 16(2) now provides that:

'The actions of the Competition Authority may include any measure that is necessary to enhance competition, put an end to violations or respond to actions of

¹¹⁷ www.ensamkeppni.is.

public entities that may adversely affect competition. The Competition Authority can apply necessary remedies to amend conduct or structure relating to the issues specified in the first paragraph that are proportionate to the violation that has been committed or to the circumstances or conduct concerned’.

7.18 Article 2 of the *Rules on market investigations* sets out the object of such investigations:

‘The object of market investigation is to identify possible competitive restrictions and improve the competitive environment in markets where there is reason to expect that circumstances or conduct are present which prevent, limit or have harmful effects on competition to the detriment of the public interest. Such circumstances or conduct that limit the efficiency of markets may include extensive concentrations in the market in question, considerable hindrances on the ability of new competitors being able to begin operations or small competitors strengthening their position. This also includes the actions or failure to act by companies or public bodies which reduce the efficiency of markets.

Indications of such circumstances or conduct as described in the first paragraph and other aspects that give rise to an investigation may include the following:

- a. Activity or organisation in a market that appears to facilitate the harmful tacit collusion of companies in an oligopolistic market.
- b. The price, services, quality and other competitive aspects that provide an indication of the limited function of the market.
- c. The development and organisation of a company with an extremely strong position in a market that may significantly limit the competitive controls that competitors can provide.
- d. Disruption to competition that seems to be due to ownership and management ties between companies.
- e. Anti-competitive discrimination of competitors by public authorities.
- f. Fees and other costs that may limit customer options of transferring their business from one company to another.
- g. Lack of information or unclear terms that may work against customers transferring their business from one company to another.
- h. Insufficient access for companies to facilities that are necessary to enable them to compete efficiently in the market in question’.

7.19 The legislation does not contain any specific rules on whether the Competition Authority should proceed in an individual case on the basis of the antitrust rules or the provisions on market investigations. This is decided on a case-by-case basis.

7.20 Nor does the legislation contain any provisions on the relationship between the competition legislation and sectoral regulation. The Competition Authority has jurisdiction to apply the competition rules to all sectors of the economy. Sectoral regulators do not have concurrent jurisdiction to apply competition law.

Institutions and judicial review

7.21 The Competition Authority conducts market investigations in Iceland. Its decisions can be appealed on the merits to the Competition Appeals Committee and to the district courts in Iceland.

Procedure

7.22 The *Rules on market investigations* explain the procedure that the Competition Authority will follow.

7.23 Article 3 explains how market investigations originate and the criteria that the Authority will take into account when deciding whether to originate market research, including the importance of the market in question for consumers and the economic sector, the estimated cost of the investigation, its prioritisation principles and the funding allocated to market investigations.

7.24 Article 4 says that the Competition Authority will adopt an investigation schedule. According to Article 5 this schedule will be considered by the Board of Directors of the Authority. The Board's confirmation of the investigation schedule commences the investigation. The Board may appoint a consultative committee for each investigation consisting of at least two outside parties. The Director General of the Authority manages the execution of the investigation and is the responsible party in relation to external relations.

7.25 Section III of the *Rules on market investigations* contains detailed rules on procedure. Article 6 deals with notification to relevant parties of the beginning of the case study and on the Authority's website.

7.26 Article 7 provides that the parties under investigation enjoy all the rights that they would have in antitrust proceedings. Article 8 provides that, when the team conducting the market investigation has collected the information it requires and assessed the relevant data, it must adopt an initial assessment report which will be sent to the parties against whom it is directed. They will be given a reasonable period to respond in writing. The report will be published. This will be followed by an open meeting where stakeholders and others will have an opportunity to submit their views. This meeting must be announced in advance. In the event that the Authority contemplates the adoption of an onerous decision it must issue a statement of objections in connection with the initial assessment report. The statement of objections is subject to the same rules as in antitrust cases.

7.27 Section IV of the *Rules on market investigations* explains what happens at the end of an investigation.

7.28 Article 9 provides that the Competition Authority must decide how to end the market investigation. Its decision may involve one of various solutions:

- to use the powers in Article 16 of the Act to change the conduct or organisation of a party that has been investigated;
- to use the powers in Article 16 of the Act against the competitively restrictive practices of public entities;
- to conduct a special investigation of possible violations of the antitrust provisions in the Competition Act;
- a statement that no further action is required.

The provisions in practice

7.29 The Competition Authority has been conducting a market investigation into *Fossil fuels*. Preliminary findings were published in December 2015. This investigation is ongoing at the time of this Report.

Mexico

7.30 Mexican competition law is contained in the Federal Economic Competition Law of 2014. The law is enforced by the Federal Economic Competition Commission, 'COFECE'. The substantive antitrust rules and the provisions on merger control are contained in 'Book Two' of the Competition Act, entitled 'Anticompetitive Conduct' (Articles 52 to 65). Titles I, II and III of Book Three of the Act explain the procedures to be followed by COFECE in antitrust and merger cases. Title IV of Book Three of the Act is entitled 'Special Procedures'. Chapter 1 of Title IV makes provision for 'Investigations to Determine Essential Facilities or Barriers to Competition': the relevant provisions are Articles 94 and 95 of the Act. Remedial powers, including the possibility of divestiture, are available at the end of a market investigation: they are determined by the Board of Commissioners of COFECE. There are no specific guidelines on Mexican market investigations. A helpful document in understanding the competition law system in Mexico is the OECD's 2016 manual *Market Examinations in Mexico*¹¹⁸.

Substance

7.31 Article 94 of the Mexican Competition Act¹¹⁹ enables COFECE, either on its own initiative or if requested to do so by the Federal Executive Branch, to investigate whether:

'there are elements suggesting there are no effective competition conditions in a market and aiming to determine the existence of barriers to competition and free market access or of essential facilities that could generate anticompetitive effects ...'.

This test asks whether there are elements to suggest there are no effective competition conditions in a market and, if so, whether this is due to (a) the existence of barriers to competition and free market access or (b) essential facilities, or a combination of both.

7.32 Article 3(IV) of the Competition Act provides a definition of **barriers to competition and free market access**:

'Any structural market characteristic, act or deed performed by [firms] with the purpose or effect of impeding access to competitors or limiting their ability to compete in the markets; which impedes or distorts the process of competition and free market access, as well as any legal provision issued by any level of government that unduly impedes or distorts the process of competition and free market access'.

7.33 Article 60 of the Competition Act provides guidance on the meaning of an essential facility:

'To determine the existence of an essential facility, the Commission shall consider:

I. If the facility is controlled by one, or several [firms] with substantial market power or that have been found to be preponderant by the Federal Telecommunications Institute;

II. If the facility cannot feasibly be replicated by another [firm] due to technical, legal or economic conditions;

¹¹⁸ Available at www.oecd.org.

¹¹⁹ Note: the extracts of the Mexican Competition Act contained in English in this Report are taken from COFECE's website.

III. If the facility is indispensable for the provision of goods or services in one or more markets, and has no close substitutes;

IV. The circumstances under which the [firm] came to control the facility, and

V. Other criteria which, if the case may be, are provided for in the Regulatory Provisions¹²⁰.

7.34 The legislation does not contain any specific rules on whether COFECE should proceed in an individual case on the basis of the antitrust rules or the provisions on market investigations. This is decided on a case-by-case basis.

7.35 In the event that COFECE investigates a possible case of abuse of dominance contrary to Article 54 of the Competition Act in the form of denial of or discriminatory access to an essential facility, Article 56 of the Act establishes that it does **not** have to make use of the special procedure set out in Articles 94 and 95.

7.36 When a market investigation has been completed, a preliminary report will be published by the Investigative Authority. Article 94(VII) of the Competition Act provides that the Board of Commissioners of COFECE must then issue a final resolution within 60 days of the report. The Board of Commissioner's resolution may include:

- recommendations to public authorities. These may, for example, determine that legal provisions unduly impede or distort free market access; the competent authorities will then act accordingly pursuant to their scope of jurisdiction and under the procedures provided for in the laws in force;
- an order to a firm that has been investigated that it should eliminate a barrier to entry that unduly affects free market access and the process of competition;
- a determination as to the existence of essential facilities and guidelines to regulate access, prices or rates and technical and quality conditions;
- divestiture of a firm's assets, rights, partnership interest or stock, in the necessary proportions to eliminate the anticompetitive effects.

7.37 In the case of a finding of an essential facility, Article 94 specifically provides that, if the owner of the facility considers that it is no longer essential in the sense of Article 60 of the Act, it may request COFECE to review whether the requirements of that provision are still being met.

7.38 Whenever COFECE proposes measures under Article 94 of the Competition Act to address the problem of a market in which there is no effective competition, it is required, by the final paragraph of that Article, to verify that the measures that it proposes will generate efficiencies. The test for COFECE is as follows:

'In all cases, the Commission shall verify that the proposed measures will generate efficiency gains in the markets, consequently these measures shall not be imposed when the Economic Agent with legal standing in the procedure demonstrates, in due course, that the barriers to competition and essential facilities generate efficiency gains and have a favorable impact on the economic competition process and free market access, thus overcoming their possible anticompetitive effects, and resulting in an increased consumer welfare. Among the gains in efficiency for consideration are those which result from innovation in the production, distribution, and marketing of goods and services.'

¹²⁰ Article 10 of the Regulatory Provisions requires the Investigative Authority to evaluate whether access to an essential facility would increase efficiency in the market.

Institutions and judicial review

7.39 COFECE is the institution that conducts market investigations in Mexico, except in relation to the radiobroadcasting and telecommunications sectors (see paragraph 8.41 below).

7.40 Within COFECE the Investigative Authority initiates the investigation, and when the investigation has ended it produces a preliminary report within 60 days. Thereafter the case is conducted by the Commission, and it is the Board of Commissioners that makes the final decision in a case. There is an appeal to courts that specialise in competition and/or telecommunications cases.

7.41 Article 5 of the Mexican Competition Act provides that the Federal Telecommunications Institute (the 'FTI') is the competent authority for competition matters in the radiobroadcasting and telecommunications sectors and has exclusive powers to apply competition law in those sectors. Article 5 makes provision for jurisdictional issues between the FTI and COFECE to be resolved.

7.42 As far as other sectors are concerned, Article 94(III) provides that, where the Investigative Authority of COFECE decides in its preliminary report that corrective measures are necessary, it may request a non-binding opinion from the sector's coordinating public entity or the corresponding public authority on the proposed measures.

7.43 Article 95 of the Competition Act requires that resolutions determining the existence of barriers to competition and free market access, or essential facilities, shall be notified to the relevant sectoral regulator for it to determine, within the scope of its jurisdiction and according to the procedures in prevailing legislation, what actions should be taken to achieve competitive conditions.

Procedure

7.44 COFECE's procedure in market investigations is set out in Article 94 of the Competition Act. When the Investigative Authority initiates an investigation it must publish the fact in the Federal Official Gazette, identifying the market subject to the investigation. Its investigation shall last not less than thirty days and not more than one hundred and twenty. The Commission may extend this period two times.

7.45 The Investigative Authority has the same powers in a market investigation that it would have in an antitrust case.

7.46 At the end of its investigation the Investigative Authority must issue its preliminary report within sixty days. If the Authority finds no competition problems it will propose to the Board of Commissioners that the case should be closed.

7.47 If the Investigative Authority does identify competition problems, it must notify the firms under investigation. Precise time limits are set out in Article 94(IV) to 94(VII) as to the next steps. At this stage there is a trial-like procedure, as would happen in an antitrust case; however, unlike in an antitrust case, the Investigative Authority is not a formal party to the procedure in market cases. The firm or firms under investigation may offer 'suitable and economically feasible measures to eliminate the competition problems at any moment until the file is complete'. Such a proposal can be made only once. If the Board of Commissioners decide to reject these proposals it must justify its decision. Assuming that the remedies proposed are not

accepted the Board of Commissioners will then complete the case, and can exercise the powers described in paragraph 8.36 above.

The provisions in practice

7.48 COFECE has carried out seven market investigations under Article 94 of the Competition Act:

- Case IEBC-001-2015 *Slot allocation at Mexican airports*¹²¹;
- Case IEBC-002-2015 *Local cargo transportation in Sinaloa*¹²²;
- Case IEBC-001-2016 *Barley production and distribution for beer factories*¹²³;
- Case IEBC-002-2016 *Port services and transportation for bulk grains in Puerto Progreso Yucatan*¹²⁴;
- Case IEBC-002-2017 *Distribution and transportation of unprocessed milk in Chihuahua*¹²⁵;
- Case IEBC-003-2017 *Norms and standards for conformity assessment*¹²⁶;
- Case IEBC-005-2018 *Card Payment Systems*¹²⁷.

South Africa

7.49 The main provisions of South African competition law are contained in the Competition Act, No. 89 of 1998, which contains antitrust provisions and provides for merger control. The 1998 Act did not provide an explicit legal basis for the Competition Commission of South Africa ('CCSA') to conduct market inquiries; however in 2006 it conducted a market inquiry into the banking sector, invoking section 21 of the Competition Act, which provides that one of the functions of the CCSA is to 'implement measures to increase market transparency'. An explicit basis for the conduct of market inquiries was contained in amendments made to the Competition Act in 2013, but this did not provide for any remedial powers at the end of the inquiry. The position was changed by the Competition Amendment Act, No 18 of 2018. This Act amended the South African competition legislation in numerous ways. Specifically sections 23 to 26 of the Amendment Act inserted new provisions, sections 43A to 43G, into the Competition Act 1998; remedial powers, including the possibility of divestiture, are available at the end of a market inquiry. As will be seen, the South African provisions closely resemble the market investigation provisions in the UK. There are no specific guidelines on South African market inquiries.

Substance

¹²¹ See Press Release COFECE-030-2019, available at www.cofece.mx/wp-content/uploads/2019/05/COFECE-030-2019-English.pdf.

¹²² See Press Release COFECE-041-2016, available at www.cofece.mx/la-autoridad-investigadora-de-la-cofece-dictamino-la-existencia-de-barreras-a-la-competencia-en-el-marco-normativo-del-servicio-publico-de-transporte-de-carga-en-sinaloa/ (in Spanish). See also Press Release COFECE 032-2017, available at www.cofece.mx/wp-content/uploads/2018/02/COFECE-032-2017.pdf#pdf.

¹²³ See Press Release COFECE-003-2016, available at www.cofece.mx/inicia-cofece-investigacion-por-probables-barreras-a-la-competencia-en-mercado-de-semilla-y-grano-de-cebada-maltera-par-la-produccion-de-cerveza/ (in Spanish).

¹²⁴ See Press Release COFECE-60-2016, available at www.cofece.mx/investiga-cofece-posibles-barreras-a-la-competencia-en-los-servicios-portuarios-y-de-transporte-en-puerto-progreso/ (in Spanish).

¹²⁵ See Press Release COFECE-050-2017, available at www.cofece.mx/wp-content/uploads/2018/02/COFECE-050-2017.pdf#pdf. Also See Press Release COFECE-056-2018, available at www.cofece.mx/wp-content/uploads/2018/12/COFECE-056-2018-English.pdf.

¹²⁶ See Press Release COFECE-052-2017, available at www.cofece.mx/wp-content/uploads/2018/02/COFECE-052-2017.pdf#pdf.

¹²⁷ See Press Release COFECE-047-2018, available at www.cofece.mx/wp-content/uploads/2018/11/COFECE-047-2018-English-.pdf.

7.50 Section 43A(1) of the Competition Act 1998 as amended sets out the circumstances in which a market inquiry may be conducted. It provides for the conduct of a market inquiry into:

‘the general state of competition, the levels of concentration in and structure of a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm.’

7.51 Section 43A(2) of the 1998 Act as amended provides that:

‘An adverse effect on competition is established if any feature, or combination of features, of a market for goods or services impedes, restricts or distorts competition in that market.’

7.52 Section 43A(3) of the Act provides that features of a market include:

‘(a) the structure of that market or any aspect of that structure, including:
(i) the level and trends of concentration and ownership in the market;
(ii) the barriers to entry in the market, the regulation of the market, including the instruments in place to foster transformation in the market and past or current advantage that is not due to the respondent’s own commercial efforts or investment, such as direct or indirect state support for a firm or firms in the market;
(b) the outcomes observed in the market, including—
(i) levels of concentration and ownership;
(ii) prices, customer choice, the quality of goods or services and innovation;
(iii) employment;
(iv) entry into and exit from the market;
(v) the ability of national industries to compete in international markets;
(c) conduct, whether in or outside the market which is the subject of the inquiry, by a firm or firms that supply or acquire goods or services in the market concerned;
(d) conscious parallel or co-ordinated conduct by two or more firms in a concentrated market without the firms having an agreement between or among themselves; or
(e) conduct relating to the market which is the subject of the inquiry of any customers of firms who supply or acquire goods or services.’

7.53 Section 43C of the amended Competition Act 1998 sets out the matters to be decided in a market inquiry; specifically the CCSA must decide whether any features of a market impede, restrict or distort competition, having regard to the impact of any adverse effect on competition on small and medium businesses, or firms controlled or owned by historically disadvantaged persons. If the CCSA does find there to be an adverse effect on competition it must decide what action should be taken. It is required to have regard to the need to achieve as comprehensive solution as is reasonable and practicable.

7.54 Section 43D of the Act provides that the CCSA may take action to remedy, mitigate or prevent any adverse effect on competition that it has identified. In so far as it considers that it is appropriate that there should be a divestiture of assets, it must make a recommendation to this effect to the Competition Tribunal and the latter institution may make an order to that effect.

7.55 The legislation does not contain any specific rules on whether the Competition Authority should proceed in an individual case on the basis of the antitrust rules or the provisions on market investigations. This is decided on a case-by-case basis.

Institutions and judicial review

7.56 Market inquiries under South African competition law are conducted by the CCSA. The CCSA may initiate an inquiry on its own initiative or if required to do so by the Minister. When determining whether to initiate a market inquiry on its own initiative the CCSA will be guided by its *Prioritisation Framework*; its prioritisation criteria include impact on consumers, especially the poor; alignment with the Government's economic growth and development objectives; and the prevalence of anti-competitive conduct in the economy.

7.57 Section 3(1A) of the amended Competition Act provides that the CCSA is able to exercise its jurisdiction under the Competition Act notwithstanding that the sector in question may be subject also to a sector-specific regulator. Provision is made for the CCSA to negotiate agreements with any regulatory authority to coordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to ensure the consistent application of the principles of the Competition Act. Memoranda of Understanding have been concluded between the CCSA and 13 sectoral regulators¹²⁸.

7.58 Section 43B(2B) of the amended Competition Act 1998 provides that a Deputy Commissioner of the CCSA will be appointed to chair the market inquiry. The inquiry panel may be undertaken solely by staff of the CCSA; however external experts may also be utilised.

7.59 Section 43F provides that various persons, as set out in section 43G(1)(below), may appeal to the Competition Tribunal against the CCSA's decision. The Tribunal may confirm the CCSA's determination, amend it or set it aside, or make any determination or order that it (the Tribunal) considers appropriate. There is a further appeal to the Competition Appeal Court.

7.60 As noted in paragraph 7.54 above, the CCSA cannot order a divestiture, but can make a recommendation to this effect to the Competition Tribunal; the Tribunal can make such an order if it considers it appropriate to do so.

Procedure

7.61 Section 43B(2) of the amended Competition Act requires that, at least 20 days before commencing a market inquiry, the CCSA must publish a notice in the Gazette, setting out its terms of reference and inviting members of the public to provide written representations. If the market inquiry will investigate a sector over which a regulatory authority has jurisdiction, the CCSA must notify and consult with that authority before publishing the notice in the Gazette. The notice must explain the scope of the inquiry and its duration, which may not be more than 18 months.

7.62 Section 43G(1) of the amended Act specifies the persons who may participate in a market inquiry. These include firms in the market that is the subject of the inquiry; trades unions; officials and staff of the CCSA and witnesses who are able to substantially assist with the inquiry; any relevant regulatory authority; any Minister

¹²⁸

See www.compcom.co.uk/mou-with-sector-regulators-in-south-africa.

with responsibility for the sector under investigation; and any other person with a material interest in the market inquiry or who may be able to assist its work.

7.63 Provision is made for the protection of confidential information. Determinations of the CCSA as to confidentiality may be appealed to the Competition Tribunal.

The provisions in practice

7.64 There have been no market inquiries under the Competition Act as amended in 2018. Details of market inquiries prior to the 2018 amendments can be found on the website of the CCSA¹²⁹. By the time of this Report the CCSA had completed five market inquiries under the law as it stood before the 2018 amendments:

- *Banking Inquiry*, June 2008;
- *Liquefied Petroleum Gas Market Inquiry*, March 2017;
- *Private Healthcare Market Study*, September 2019;
- *Data Services Market Inquiry*, November 2019;
- *Grocery Retail Market Inquiry*, December 2019.

There is an ongoing market inquiry into *Public Passenger Transportation*. This was initiated under the pre-2018 law.

Chapter 8: Conclusions

8.1 The market investigation provisions contained in the UK Enterprise Act are an important complement to the antitrust provisions in the Competition Act. Although it may be possible that conduct that infringes the Chapter I and II prohibitions might be investigated under the Enterprise Act, in practice this is not what happens. The market investigation systems focusses on detriments to competition that occur across a market and aims at remedying them, whereas Competition Act cases focus on the past or ongoing behaviour of a firm or firms and aims to stop such behaviour, punish it and deter it in the future. Market investigation cases typically focus on issues that cannot be adequately addressed under the Competition Act. Furthermore, whereas remedies in antitrust cases are designed to prevent the unlawful behaviour from occurring again, remedies in market investigation cases are focussed on improving the way that competition functions in the market going forward. The range of remedies available to the CMA is very extensive.

8.2 Market investigations look at the structure of markets, but they are not limited to structural issues. The CMA also looks at conduct on the market, including conduct on the demand side as well as the supply side of the market. For example obstacles to switching or switching inertia on the part of consumers can (and have been) investigated under Part 4 of the Enterprise Act.

8.3 There are relatively few countries with legislation that resembles the market investigation provisions in the Enterprise Act. However the competition laws of Greece, Iceland, Mexico and South Africa are similar in numerous respects. The South African legislation is the one that is most like UK law. These provisions are for the most part fairly new, and to date there is not a lot of decisional practice on the part of the relevant competition authorities.

¹²⁹ www.compcom.co.za.

8.4 Market investigations in the UK are typified by a great degree of transparency and consultation, and extensive information will be found on the relevant page of the CMA in relation to any particular case.

8.5 The outcome of market investigations in the UK are subject to judicial review, though not an appeal on the merits, to the CAT.

Annexes

Annex I – consolidated Enterprise Act 2002

<https://www.legislation.gov.uk/ukpga/2002/40/part/4>

Annex II – Guidance on making references – OFT 511

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf

Annex III – Market investigation guidelines – CC3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284390/cc3_revised.pdf

Annex IV – Supplemental guidance – CMA3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/624706/cma3-markets-supplemental-guidance-updated-june-2017.pdf

Annex V

Table of Market Investigation References

	Title of Report	Date of reference	Date of report	AEC?	Outcome
1	<i>Store card credit services</i>	18 March 2004	7 March 2006	Yes	<p>Adverse effect on competition in relation to the supply of consumer credit through store cards and associated insurance in the UK; in particular most store card holders pay higher prices for their credit than would be expected in a competitive market</p> <p>The <i>Store Cards Market Investigation Order 2006</i> requires full information to be made available to store card users; and the provision of payment protection insurance as a separate product</p> <p>Slight variation to the <i>Store Cards Order</i> in 2011 to take into account the EU Consumer Credit Directive</p>
2	<i>Domestic bulk liquefied petroleum gas ('LPG')</i>	7 July 2004	29 June 2006	Yes	<p>Adverse effect on competition in relation to the supply of domestic bulk LPG in the UK; in particular there was little switching by customers between suppliers for a variety of reasons leading to higher prices for the large majority of customers</p> <p><i>See the Domestic Bulk Liquefied Petroleum</i></p>

					<i>Gas Market Investigation Order 2008 and the Domestic Bulk Liquefied Petroleum Market Investigation (Metered Estates) Order 2009</i>
3	<i>Home credit</i> This reference followed a super-complaint from the National Consumer Council	20 December 2004	30 November 2006	Yes	Adverse effect on competition in relation to the supply of home credit; in particular the weakness of price competition led to higher prices than could be expected in a competitive market <i>The Home Credit Market Investigation Order 2007</i> requires home credit lenders to share customer repayment data with other potential lenders; to publish information about the loans they offer; and to provide, at most every three months, an account statement, free of charge, when any of their borrowers ask for one The Order was slightly varied in 2011 to take into account the EU Consumer Credit Directive
4	<i>Classified directory advertising services</i>	5 April 2005	21 December 2006	Yes	Adverse effect on competition in relation to classified directory advertising services; Yell's prices for advertising in Yellow Pages would be higher than in a well-functioning market if it were not for the fact that it was already subject to price control as a result of

					<p>an earlier investigation under the (now repealed) Fair Trading Act 1973</p> <p>On 3 April 2007 the Competition Commission accepted final undertakings from Yell capping its advertising prices; undertakings were also given in relation to other matters such as tying and bundling</p> <p>On 15 March 2013 hibu (formerly Yell) was released from its undertakings as attitudes to, and demand for, classified directory advertising services had changed</p>
5	<p><i>Northern Ireland personal banking</i></p> <p><i>This followed a super-complaint from Which? in conjunction with the General Consumer Council for Northern Ireland</i></p>	26 May 2005	15 May 2007	Yes	<p>Adverse effect on competition in relation to personal current accounts in Northern Ireland; competition limited by banks' unduly complex charging structures and practices, their failure adequately to explain them and customers' reluctance to switch to another bank</p> <p>The <i>Northern Ireland PCA Banking Market Investigation Order 2008</i> requires Northern Irish banks to ensure that certain types of communications with customers are easy to understand and to inform customers that they can switch</p> <p>The Order was varied in 2011 to take into</p>

					account EU Directives on consumer credit and payment services
6	<i>Groceries</i>	9 May 2006	30 April 2008	Yes	<p>Grocery markets in many respects provide a good deal for consumers; however action was needed to improve competition in local markets and to address relationships between retailers and their suppliers</p> <p>A recommendation that a 'competition test' be inserted into UK planning legislation was successfully challenged before the CAT; on remittal the Competition Commission conducted further analysis and amended the scope of its recommendation to allow for small extensions to stores to be excluded from the competition test</p> <p>The <i>Groceries Supply Code of Practice</i> entered into force on 4 February 2010; the <i>Groceries Code Adjudicator Act 2013</i> entered into force on 25 June 2013 and created an Adjudicator to enforce the Code</p> <p>The <i>Groceries Market Investigation (Controlled Land) Order 2010</i> addresses the issue of exclusive agreements and restrictive covenants</p>
7	<i>Payment protection</i>	7 February	29	Yes	Serious competition

	<p><i>insurance ('PPI')</i></p> <p><i>This followed a super-complaint from Citizens Advice</i></p>	2007	January 2009		<p>problems in the PPI market; various remedies adopted, including a ban on the sale of PPI during the sale of the credit product and for seven days afterwards; also informational remedies</p> <p>The ban on the sale of PPI at the point of sale was successfully challenged before the CAT; on remittal the Competition Commission made essentially the same recommendation, which led to the <i>Payment Protection Insurance Market Investigation Order 2011</i></p>
8	<i>BAA airports</i>	29 March 2007	19 March 2009	Yes	<p>Serious competition problems arising from BAA's common ownership of seven airports in the UK; the Competition Commission concluded that BAA must sell three airports, including Gatwick and Stansted (to different purchasers) and one of Glasgow or Edinburgh airports. BAA sold Gatwick in November 2009</p> <p>On 19 July 2011 the Competition Commission concluded that there was no material change of circumstances following BAA's first appeal that would require it to amend its remedies</p> <p>On 23 April 2012 the</p>

					<p>Commission approved the sale of Edinburgh airport</p> <p>On 21 January 2013 the Commission approved the sale of Stansted airport</p>
9	<p><i>Rolling stock leasing market investigation</i></p> <p>Reference by the Office of the Rail Regulator (now the Office of Rail and Road)</p>	26 April 2007	7 April 2009	Yes	<p>Competition in the market for rolling stock is restricted by the limited number of alternative fleets available to train operating companies. Various recommendations made</p> <p><i>See the Rolling Stock Leasing Market Investigation Order 2009</i></p>
10	<i>Local bus services</i>	7 January 2010	20 December 2011	Yes	<p>A number of features of the market were found to restrict entry into local areas by rivals and otherwise stifle competition. The Competition Commission made recommendations, in particular to the Department for Transport, the OFT and Local Transport Authorities to make the market more competitive</p> <p><i>See also the Local Bus Services Market Investigation (Access to Bus Stations) Order 2012</i></p>
11	<p><i>Movies on pay TV</i></p> <p>Reference by OFCOM</p>	4 August 2010	2 August 2012	No	<p>No adverse effect on competition was found in the market for the supply and acquisition of certain major studio movie rights or in the market for the</p>

					wholesale supply and acquisition of packages including Sky Movies. No remedial action was therefore necessary
12	<i>Statutory audit for large companies</i>	21 October 2011	15 October 2013	Yes	<p>Adverse effect on competition in relation to the supply of statutory audit services to large companies in the UK; in particular there were barriers to switching, barriers to entry and expansion by mid-tier audit firms, and an information asymmetry between shareholders and auditors</p> <p>The Competition Commission proposed remedies to open up the UK audit market to greater competition and to ensure that audits would better serve the needs of shareholders</p> <p>See the <i>Statutory Audit Services for Large Companies Market Investigation (Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities) Order 2014</i></p> <p>This Order took into account reforms to statutory audits that had been made at EU level</p>
13	<i>Aggregates, cement and ready-mix concrete</i>	18 January 2012	14 January 2014	Yes	Adverse effect on competition in the British cement markets, but no adverse effect in

					<p>aggregates or ready-mix concrete markets</p> <p>In order to remedy the competition problems identified the Competition Commission required a divestiture by Lafarge Tarmac to facilitate the entry of a new producer; it also accepted an undertaking by Hanson to divest itself of a blast furnace slag facility. The Commission also proposed to introduce measures to limit the flow of information and data concerning cement production and price announcements</p> <p>Subsequently the European Commission approved a merger between Holcim and Lafarge (Case M. 7252, decision of 15 December 2014), subject to the same divestiture required by the Competition Commission: the European Commission approved the proposed purchaser, CRH of Ireland, on 24 April 2015</p>
14	<i>Private healthcare</i>	4 April 2012	2 April 2014	Yes	Adverse effect on competition in relation to privately-funded health care; in particular many private hospitals face little competition in local areas across the UK and there are high barriers to entry; this leads to higher prices for self-pay patients in

					<p>local areas and for both self-pay patients and insured patients in London</p> <p>The CMA required a series of remedies, including provision of greater information for patients about private hospitals' standards of performance, a crackdown on incentives offered to referring clinicians and the divestiture of certain hospitals by HCA Healthcare; subsequently the CMA abandoned the requirement to divest</p> <p>An Order was made on 1 October 2014, the <i>Private Healthcare Market Investigation Order 2014</i></p>
15	<i>Private motor insurance</i>	28 September 2012	24 September 2014	Yes	<p>Adverse effect on competition in relation to private motor insurance; in particular there were some price parity clauses in contracts between price comparison websites and motor insurers that prohibit insurers from making their products available more cheaply on other online platforms. The CMA recommended measures to increase competition in the car insurance market and to reduce the cost of premiums for drivers</p> <p>See the <i>Private Motor Insurance Market Investigation Order 2015</i> requiring</p>

					<p>insurers to provide better information for consumers on the costs and benefits of no-claim bonus protection and banning certain price parity clauses</p> <p>The CMA also recommended that the Financial Conduct Authority look into the provision of information in the sale of motor insurance add-on products that would make it easier for consumers to compare these products</p> <p>The CMA could not identify an appropriate and proportionate remedy to address the problem of 'cost separation'</p>
16	<i>Payday lending</i>	27 June 2013	24 February 2015	Yes	Adverse effect on competition in relation to payday lending. Various measures proposed to increase price competition between payday lenders and to help borrowers to get a better deal
17	<i>Energy</i> Reference by the Office of Gas and Electricity Management (OFGEM)	26 June 2014	24 June 2016	Yes	Adverse effect on competition at the retail level of energy supply, but not at the wholesale level. A core concern was that many individual customers and microbusinesses were still on default tariffs. Various measures proposed to encourage and enable consumers to switch to cheaper energy

					<p>suppliers. The CMA also suggested a transitional price cap for customers on prepayment meters until the introduction of smart meters enables them to access better supply offers</p> <p>Numerous orders were made, and undertakings given, in 2016; the Government responded to the findings in the market investigation in February 2018</p>
18	<p><i>Retail banking</i></p>	6 November 2014	9 August 2016	Yes	<p>Adverse effect on competition in retail banking. In particular established banks do not have to compete hard enough to win and/or retain individual customers and new and smaller market entrants face expansion barriers. Consumers pay supra-competitive prices for retail banking services without benefitting from new technology</p> <p>See the <i>Retail Banking Market Investigation Order 2017</i>; it was varied in 2019</p>
19	<p><i>Investment consultancy and fiduciary management services</i></p> <p>Reference by the Financial Conduct Authority</p>	14 September 2017	12 December 2018	Yes	<p>Pension trustees receive advice from investment consultants; some trustees delegate investment decisions to fiduciary managers. The CMA identified competition problems in relation both to investment consultancy and, in</p>

					<p>particular, fiduciary management.</p> <p>A specific problem arises where investment consultants also provide fiduciary management services and steer customers towards their own services. The CMA was also concerned that pension trustees may not have sufficient information on the fees or quality of investment consultancy and fiduciary management to make sensible decisions. The CMA required some competitive tendering for the provision of fiduciary management services and greater transparency on fees</p> <p>The CMA also recommended that the regulatory scope of the Pensions Regulator and the Financial Conduct Authority should be expanded to ensure greater oversight of the sector in the future</p> <p><i>See The Investment Consultancy and Fiduciary Management Market Investigation Order 2019</i></p>
--	--	--	--	--	---

Abstract

Competition problems may exist in markets that cannot adequately be addressed using the 'antitrust' rules in Articles 101 and 102 TFEU or through the use of *ex ante* merger control. The question then arises whether other mechanisms can be devised to identify harms to competition and to identify remedies to reduce or eliminate them.

This Report provides an account of the market investigation provisions on the UK Enterprise Act of 2002, which enables the CMA to investigate markets and to determine whether any 'features' of a market prevent, restrict or distort competition. If the CMA discovers an 'adverse effect on competition', powers are available to achieve as 'comprehensive solution as possible' through the imposition of remedies, up to and including mandatory divestiture. This Report describes these powers, explains the institutional regime within which decisions are made and the procedure that the CMA follows in market investigation cases.

Some other jurisdictions possess similar powers to those contained in the Enterprise Act. In particular the Report describes the powers available to the competition authorities in Greece, Iceland, Mexico and South Africa.

 other
publications
and subscriptions 

<http://ec.europa.eu/competition/publications>

