

Updated guidance on the CMA's approach to market investigations

Consultation document

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Foreword

The Competition and Markets Authority's (CMA) mission – to make markets work well for consumers, businesses and the broader economy – has never been more relevant. Effective competition helps households and businesses by reducing prices and increasing choice, and supports economic growth by improving productivity and increasing innovation.

Market investigations are powerful tools that allow us to bring about real improvements for consumers. We have recently completed two of the largest and most complex market investigations ever undertaken, into energy and retail banking, both of which led to an ambitious package of remedies that will have a significant impact in making these markets work better. Previously many other markets have been investigated through this regime, including groceries, airports and aggregates, each of which led to substantial interventions to improve outcomes for consumers.

In our Annual Plan for 2016/17 we committed to reviewing the way in which we conduct market investigations, following the completion of our work on energy and retail banking. There were two key drivers for this review.

First, the framework in which we undertake our markets work has moved on since its inception in the Enterprise Act 2002 (EA02), notably with the Enterprise and Regulatory Reform Act 2013 (ERRA13), which introduced shorter statutory timetables of 18 months for market investigations. In order to meet our shorter statutory timetables, we need to reassess our current processes and procedures, which were developed on the basis of the previous longer timescales. ERRA13 also created the CMA as a single competition authority, with a clear expectation that this would lead to efficiencies. To realise these efficiencies in practice, we need to maximise the synergies between market studies and market investigations, while maintaining the independence of decision-making that is the cornerstone of our markets regime.

Second, as a public body it is incumbent on us to continue to find ways to improve the work that we do and to make best use of the resources that we have. Market investigations are major pieces of work which impose burdens on the businesses under investigation. We must therefore ensure that we carry out our investigations in as efficient and timely way as possible, while not compromising on the fairness and transparency of our processes, and the strength and robustness of the outcomes we can achieve.

We propose to make two key changes to the way we undertake market investigations in the future:

- (A) Streamline the market investigation process by assessing potential remedies at an earlier stage; reducing the number of formal consultations around set-piece publications; and introducing earlier, more flexible interactions with parties; and
- (B) Strengthen synergies between market studies and market investigations while maintaining independence of decision-making, and clarify the relationship between the Board in its role of referring markets for investigation, and the Group who are the independent decision-makers for that investigation.

The proposals under (A) are intended to ensure that we can reach robust conclusions over shorter timescales, delivering significant time and resource savings both for parties and the CMA, while also ensuring parties have greater opportunities to inform our thinking on the issues at an early stage.

The proposals under (B) are designed to help maximise the synergies from the creation of the CMA, by making best use of market studies and market investigations. Crucially, they preserve the independence of decision-making on market studies and investigations, thereby ensuring a fair and robust process and avoiding the risk of confirmation bias.

The proposed reforms would bring about a number of important changes to the way we conduct market investigations and we are launching this consultation to ensure that all interested parties have the opportunity to provide their views. This document describes the proposed changes in more detail, sets out the consultation process and presents our proposed amendments to the relevant guidance.

We look forward to receiving your feedback and suggestions on our proposed approach.

David Currie
CMA Chairman

1. Introduction

- 1.1 The CMA is consulting on proposals to make various changes to the way it undertakes market investigations (MIs). This consultation document sets out the changes we propose to make, explains the rationale for these changes, and attaches revised draft guidance concerning these changes at [Appendix A](#).

Scope of this consultation

- 1.2 The scope of this consultation covers the MI process, the relationship between market studies (MSs) and MIs, and the relationship between the CMA Board and the group of members (the Group) who act as decision-makers on MSs and MIs respectively. The existing guidance that will be particularly affected by the proposed changes is paragraphs 50 to 87 of [CC3: Guidelines for market investigations: Their role, procedures, assessment and remedies](#) (revised April 2013).
- 1.3 We propose to implement the revised guidance by updating the relevant paragraphs of CC3 and incorporating these paragraphs as a new subsection in [CMA3: Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#). CMA3 supplements other guidance relevant to MIs (including CC3) and should be read in conjunction with that guidance. The proposed new subsection is attached in [Appendix A](#). In [Appendix B](#) we have included a table indicating other paragraphs in CC3 and other CMA guidance which would be affected by the proposed changes. To the extent that any conflict arises between the revised guidance that will be set out in CMA3 and any other guidance, the content of CMA3 as updated will prevail.
- 1.4 We recognise that there is a need for a more comprehensive review of our guidance on MSs and MIs, much of which was written before the creation of the CMA. The current consultation should therefore be seen as the first stage in a broader longer-term process of consolidation and review of our markets guidance, as we continue to develop experience of MSs and MIs under ERRA13.

Background

- 1.5 The CMA is a non-ministerial government department, which took on its powers on 1 April 2014. It is a unified competition and consumer authority which took over a number of the functions formerly performed by the Office of Fair Trading (OFT) and the Competition Commission (CC). The CMA works to make markets work well for consumers, businesses and the broader economy.

- 1.6 MIs and MSs are powerful tools, allowing the CMA to examine, holistically and flexibly, markets that appear not to be working well for consumers even in situations in which competition and consumer laws have not been broken. MSs can lead to a range of different outcomes, for example making recommendations to government, taking enforcement action and, in some cases, making a MI reference. Unlike MSs, MIs have order-making powers, which provide a means of implementing a range of potential remedies, including structural remedies and price controls.

Legislation governing the markets regime

- 1.7 The markets regime was introduced in its current form by EA02. The underlying vision for this regime was set out in the preceding White Paper,¹ alongside other proposals to move the UK towards a more proactive competition policy. The OFT was given a proactive role to monitor markets, referring them to the CC when there was reason to think that the market was not working well. The CC then undertook a wide-reaching assessment of the market, and was required to assess whether there were any features of the markets referred that led to adverse effects on competition (AECs), and if there were, to consider appropriate remedies. The CC's processes directly reflected these tests, with separate consultations on the AEC test (in the form of Provisional Findings) and – if AECs were found – an initial consultation on possible remedies (in the form of the notice of possible remedies), before, some months later, consulting on provisional findings on remedies (in the form of the Provisional Decision on Remedies).
- 1.8 ERR13, which came into force on 1 April 2014, retained the MI framework in the same form, but introduced new statutory time limits of 12 months for MSs and shortened statutory time limits for MIs to 18 months (as opposed to 24 months), with the option of a six-month extension for 'special reasons'. It also created the CMA as the unitary competition authority, with a clear expectation that these changes would generate efficiencies through stronger linkages between MSs and MIs. Importantly, ERR13 also strengthened MSs, by giving them information-gathering powers. While only MIs can impose remedies through orders, the additional powers given to MSs mean that the CMA can now access more information to analyse markets and scope competition problems prior to a possible reference.

¹ [Productivity and Enterprise: A World Class Competition Regime](#) (Cm 5233).

The review of the markets regime

- 1.9 We announced in our [Annual Plan for 2016/17](#) that we would review the way in which we conduct MIs. There were two key reasons for carrying out this review.
- 1.10 First, the revised regime introduced by ERA13 has required us to reassess the way in which we conduct MIs. We have had to consider how to streamline the processes for MIs, so that they can be completed, without compromising on outcomes, in substantially less time (the vast majority of MIs have taken around 24 months to complete, compared with the new statutory timescale of 18 months). We have also had to consider how to bring about the synergies from having MSs and MIs conducted by a single body – the CMA – without compromising on the independence of decision-making between the two.
- 1.11 Second, we have a broader duty to carry out our work efficiently and effectively and to make best possible use of the resources at our disposal. Having recently undertaken two large and complex MIs into energy and retail banking, it is right, therefore, that we should draw on this experience, as well as other previous MIs, in looking for improvements and efficiencies in the way we carry out MIs in the future. In addition we have also drawn on feedback from stakeholders on the MI regime from a variety of sources, including: a recent survey undertaken by the CMA; a roundtable on disclosure hosted by the CMA; and published responses to the government consultation on refinements to the competition regime.²

Approach to our proposals

- 1.12 We have assessed our current approach against four criteria: timeliness; cost (both to the public purse and to business); rigour of analysis and robustness of outcomes; and fairness. We have developed two proposals for consultation: (A) streamlining the MI process; and (B) strengthening the synergies between MSs and MIs.
- 1.13 These proposed changes, set out in further detail in [Section 2](#), will see: earlier consultation on potential remedies alongside issues; a reduction in the number of set-piece public consultations while giving parties earlier opportunities to engage with analysis and inform decision-making; and greater efficiencies through conducting both MSs and MIs within the CMA. The main stages of our proposed new process are set out in paragraph 2.10 and are

² CMA survey of stakeholders 2016-2017; the [CMA-hosted roundtable on disclosure and the use of confidentiality rings and disclosure rooms](#) held on 7 November 2016; and the [government consultation 'Options to refine the UK competition regime: a consultation'](#) published in May 2016.

outlined in further detail in the revised guidance in [Appendix A](#). In combination, we believe the changes will help enable us to achieve shorter timescales, improve the efficiency of our work and also improve the way we engage with parties, while preserving the strength of outcomes, the depth of analysis, the transparency and fairness of the regime and the independence of the decision-makers.

- 1.14 We recognise that these reforms may raise concerns from some stakeholders regarding, for example, the impact of the changes on levels of transparency and the nature of engagement and on the independence of the Group. In developing these proposals we have been mindful of these points, and sought to address them. For example, while the proposed changes would reduce the number of set-piece consultations, we believe that the proposed increase in the opportunities given to parties at an earlier stage to input into our analysis and inform decision-making, including on potential remedies, would allow parties to engage more effectively in the MI. The underlying thrust of our proposals is to seek to work more collaboratively with parties at the right point in our investigations. And, while our proposals under (B) seek to generate efficiencies from MSs and MIs conducted within the CMA, our proposals safeguard the independence of decision-making on MSs and MIs which is central to the robustness of our markets regime.
- 1.15 Overall we believe both that we need to make changes to our current procedures if we are to meet the shorter statutory time limits and that our proposed reforms will bring additional benefits in terms of improved engagement and more robust outcomes. The purpose of this consultation is to test our proposals and to ensure that all interested parties have the opportunity to provide their views. [Section 4](#) sets out some questions to help guide responses.

2. Overview of the proposed changes

2.1 We are proposing two key changes to the way we undertake MIs in the future. These are to:

(A) streamline the MI process by:

- (i) assessing potential remedies at an earlier stage in the investigation;
- (ii) reducing the number of formal consultations around set-piece publications, in particular combining the Provisional Findings and Provisional Decision on Remedies into a single Provisional Decision Report, and removing the Updated Issues Statement; and
- (iii) introducing earlier, more flexible interactions with parties, in particular earlier hearings with parties, consulting on our approach to analysis and sequentially sharing or publishing analysis; and

(B) strengthen synergies between MSs and MIs while maintaining independence of decision-making, and clarify the relationship between the Board in its role of referring MIs, and the Group who are independent decision-makers for that investigation by:

- (i) considering remedies and undertaking preparatory work for the MI during the latter stages of MSs; and
- (ii) introducing the potential for the Board to issue an advisory steer on the scope of an MI (in cases where the CMA has undertaken the MS).

2.2 These changes will necessitate amendments to our markets guidance. [Appendix A](#) sets out the proposed new subsection to be inserted into CMA3, replacing paragraphs 50 to 87 of CC3.

(A) Streamlining the market investigation process

2.3 The current approach to MIs and its processes is largely based on the statutory time limits introduced under EA02 of 24 months. In order to meet the substantially shorter time limits of 18 months introduced in ERRA13, and to ensure we are carrying out our investigations in an efficient manner, we consider that it is necessary to streamline our processes and improve the way we engage with parties. We are therefore proposing three related changes to our MI processes to help ensure we can reach robust, fair decisions over shorter timescales.

Earlier consideration of remedies

- 2.4 Currently, the Group on an MI assesses whether the market is working well by considering whether there are competition problems and, if so, what these are, before then focusing on what remedies might be applied and whether these are effective and proportionate. Parties' views on remedies are normally only received after the remedies notice has been published. This approach limits the time available for developing and consulting on remedies and taking into account responses, where an AEC has been found.
- 2.5 We propose that in the future MIs should consider possible remedy options at the same time as assessing potential problems. This is the general approach taken by other parts of government or regulators when considering potential interventions or changes in policy. In practice, thinking about the way that markets might work better can often provide practical insights into the nature of possible problems in the current market. This change will enable more time to be spent considering potential remedies, helping to ensure that the right outcomes are reached at the end of the investigation – including no intervention where either no AECs have been found or where there is no effective and proportionate remedy.
- 2.6 Decisions arising from the MI would still distinguish between AECs and remedies, as required by statute, but the change would mean that in practice the Group would consider and discuss potential remedies from the start of the MI, alongside understanding the features of the market that may give rise to adverse effects.³ In order to achieve this change, the Group would need to consult on possible remedies at an early stage in an MI in the initial Issues Statement. This would give parties greater opportunities than they have had in the past to engage with and scrutinise potential remedy options at the start of MIs, while recognising that thinking on the issues and therefore possible remedies is likely to develop as the MI progresses.
- 2.7 The proposed change would therefore allow greater time to be spent considering potential remedies and earlier discussion with parties and scrutiny of potential remedies. We recognise there may be potential concerns that this will increase the risk of intervention bias and/or prejudgment of any AEC finding. However, no remedy can be imposed without a fully reasoned AEC and the CMA's reasoning will continue to be subject to detailed scrutiny. In the event that a potential AEC is not found, the remedy option seeking to address that potential AEC would not be considered further and, in making decisions

³ As set out in our guidance, in making its assessment of potential AECs, the Group will generally consider a well-functioning market to be one without the features causing the AEC rather than an idealised notion of a perfectly competitive market (CC3, paragraph 30).

on remedies, the Group will continue to consider how any remedy addresses an AEC, and whether it is effective and proportionate.

- 2.8 We recognise there may be some cases where there is a greater need to understand the issues in more depth before it is possible to consider potential remedies in more detail. Our proposals are not prescriptive in this respect, but provide for greater flexibility in the approach taken depending on the specifics of each case.

Reducing the number of formal consultations

- 2.9 Our current guidance states that a typical MI would involve publication of: an initial Issues Statement; an Updated (or Annotated) Issues Statement; a Provisional Findings Report and Notice of possible remedies; a Provisional Decision on Remedies Report (if needed); and a Final Report.⁴ In addition, past MIs have often required supplemental publications in relation to AECs and/or remedies. Each publication (with the exception of the Final Report) forms the basis of a consultation, in which parties are invited to make written submissions on the issues raised. This is a time-consuming and resource-intensive process for both the CMA and the parties.
- 2.10 It is vital, in the interests of ensuring that MIs deliver fair, rigorous and robust outcomes, that parties have adequate opportunities to scrutinise and challenge analysis and be appropriately consulted on the Group's provisional decisions. Our view is that the current system, which is heavily reliant on multiple consultations on lengthy publications, is not the most efficient or effective means of achieving this aim. We are therefore proposing to reduce the number of formal consultations on set-piece publications and adopt the following revised process for MIs:
- to retain an initial Issues Statement, but covering both the issues to be considered and possible remedies, which would form the basis of an initial consultation;⁵
 - not to publish an Updated Issues Statement;
 - to replace the Provisional Findings and Provisional Decision on Remedies with a single Provisional Decision Report (which would contain the

⁴ See for example [CC3](#), paragraph 58, and the table on p17 setting out the main stages of the process.

⁵ In cases where the CMA has conducted the market study leading to a reference, the expectation – subject to the Board's steer – would be that the Issues Statement would be short and cross refer to the market study report on the issues and possible remedies. See paragraphs 2.21–2.23.

provisional decision on both AECs and remedies and would form the basis of a consultation); and

- to retain the Final Report.

2.11 As under the previous process, the Group on an investigation would retain the option of publishing and consulting at other points during the MI, but this would be discretionary. For example, the Group may wish to hold additional consultations as required on detailed aspects of certain remedies. In some cases, the Group may consider that there is benefit in an additional publication before the Provisional Decision Report, for example to discontinue certain areas of investigation and to focus stakeholder interactions on the most relevant issues and possible remedies. Parties would continue to be given as much clarity as possible on the process the investigation will follow, through, for example, the publication of an Administrative Timetable which sets out the key stages in the investigation and other communications with parties.

Increasing the opportunities for early engagement with parties

2.12 Currently there is some engagement with parties on the potential issues in a market – but typically no engagement on possible remedies to those issues – early on in an investigation. The MI initially focuses on gathering information from parties and conducting analysis, before formal individual hearings with parties are held some months into the investigation (typically months 8 to 9), once a large part of the analysis has been undertaken and the Group is starting to form its thinking. Much of our engagement with parties on the issues and analysis is through formal consultation on published documents.

2.13 We propose to increase the opportunities given to parties to input into our analysis and inform decision-making at an earlier stage in an MI. This will involve different forms of engagement with parties at an early stage in the investigation, allowing for greater scrutiny and discussion of evidence, analysis and potential remedies before the Group has started to form its views. We note that stakeholders have expressed support for earlier and more interactive engagement.⁶

2.14 While it will be for the Group to decide on and communicate to parties the precise form this takes, taking into account the particular needs of the investigation, this engagement will likely take the form of:

⁶ For example, in the recent CMA survey of stakeholders 2016–2017, when asked what the CMA could have done to improve their involvement with stakeholders, the most popular response from stakeholders involved in MIs was that they would have preferred more interaction/face-to-face meetings. Support was also expressed for earlier planning and engagement with parties at the CMA roundtable on disclosure.

- holding hearings with parties earlier in the investigation to help shape the issues and discuss possible remedies. These would replace the later formal hearings that currently take place in advance of the publication of Provisional Findings. They would be additional to response hearings held after the Provisional Decision Report;
- making more use of multi-party hearings and other forms of flexible engagement where feasible and desirable;
- consulting on the approach to analysis through, for example, greater use of roundtables;⁷
- sequential sharing or publishing of the results from our analysis through, for example, the use of confidentiality rings where appropriate or disclosure rooms; and
- publishing working papers or extracts from them, setting out analysis and elements of interpretation on select areas. Where appropriate, other forms of papers, including slide packs, will be considered.

Summary of the rationale for proposal (A)

- 2.15 We believe these changes will bring a number of benefits. First, they will ensure MIs become more clearly focused on the potential improvements that could be made to markets and will give parties greater opportunities to discuss and scrutinise both the desirability and practicability of different remedy options. Earlier consideration of possible remedies will also mean that parties have more time in which to feed into their development.
- 2.16 Second, they will improve the efficiency of MIs by reducing the need for burdensome set-piece consultations on formal publications, allowing for greater interaction with parties at an early stage – before any provisional decisions have been reached – when such interactions are best able to inform thinking. In short, we believe the changes will help the MI get to the right answer, quicker and, notably, will help to ensure the shorter statutory timescales introduced by ERRA13 can be met, while maintaining a fair and transparent process.

⁷ We note that as part of the [CMA-hosted roundtable on disclosure and the use of confidentiality rings and disclosure rooms](#), stakeholders supported the greater use of roundtables to discuss the approach to analysis and greater use of confidentiality rings.

(B) Strengthening synergies between market studies and market investigations and clarifying Board/Group interactions

2.17 The second set of proposals concerns the interrelationship between MSs and MIs, and between the CMA Board and the Group, who are the independent decision makers for MSs and MIs respectively. Together, we believe the proposals will help both to maximise the synergies from the creation of the CMA as a single competition authority and to clarify the respective roles of the Group and the Board, whilst preserving their respective independence.

Strengthening synergies between market studies and market investigations

2.18 Where the CMA is undertaking an MS and has consulted on a possible reference, we propose that, to ensure a smooth and efficient handover to the MI, work would be undertaken in the latter stages to:

- explore explicitly the possibility of narrowing the scope of the issues for consideration in an MI;⁸
- prepare and scope potential analysis to be completed in an MI; and
- consider potential remedies (which the MS team currently already need to do as part of a reference decision).⁹

2.19 We note that in certain cases there may need to be a broader MI which looks at all potential issues in the markets referred because, for instance, there is perceived to be a need to ‘clear the air’ through a broader review of the market and/or where there is limited opportunity for the CMA to be involved in shaping the work prior to the MI. This may be the case in, for example, references from regulators or super-complaints. There may also be cases where the issues in a market are already more narrowly defined at the beginning of the MS, in which case it may be desirable to move to an MI following a shorter MS. We note that, even with a narrowly scoped MI, the Group would be able to consider other issues outside of those identified by the MS, should these arise in the course of the investigation.

2.20 Before the formal reference is made, a preparatory MI team (including staff and potential Group members) would begin preparing for the reference by understanding the nature of the market and the work that has been undertaken. Once the MI has begun, the Group would publish an Issues

⁸ This would be to inform the advisory steer on scope that the Board may wish to append to the terms of reference, as described in paragraph 2.22 below.

⁹ See [OFT511: Market investigation references](#), paragraphs 2.20–2.26 and 2.30–2.31.

Statement, drawing as appropriate on the MS decision on both issues and potential remedies, and this will form the basis for initial engagement with parties.

Clarifying the relationship between Board and Group

- 2.21 We propose to clarify the relationship between the Board and the Group with regard to the scope of an MI.
- 2.22 We propose that where the CMA has carried out the MS, the Board may wish to issue an advisory steer on scope at the start of the MI (which would be included as an annex to the reference decision alongside the terms of reference required by statute).¹⁰ This steer would set out the Board's expectations regarding the scope of the MI and issues to be addressed following work undertaken in the MS. We note that the Board's views here would be advisory only – the legislation does not provide for the MS decision to restrict an investigation formally to specific issues – but we believe it is right that the Board have the opportunity of providing a steer to the Group on scope to avoid duplication and realise the efficiencies from being a single competition authority.
- 2.23 The Group would be expected to take into account any steer from the Board on scope but would continue to make its decisions on the substance of an MI independently of the Board.

Summary of the rationale for proposal (B)

- 2.24 These changes would ensure a smoother transition and help maximise the potential synergies between MSs and MIs carried out by the CMA. They would enable an end-to-end approach to our markets work and reduce the risk of unnecessary duplication, by allowing the Board to take more explicit account of the work undertaken in a MS in setting out its views on the appropriate scope of an MI.
- 2.25 Overall, we consider that these changes are consistent with the regime changes (see paragraphs 1.7 and 1.8) and the creation of a single competition authority (the rationale for which was, among other reasons, to avoid duplication and to bring about greater efficiencies in markets work), while preserving the independence of decision-making between MSs and MIs which remains central to the regime.

¹⁰ Section 133 of EA02, requires that a market investigation reference shall specify the enactment under which it is made, the date on which it is made, and the description of the goods or services to which the feature or combination of features concerned relates.

3. Consultation process

- 3.1 We are publishing this consultation on the CMA webpages and sending it to a range of interested parties to invite comments. We would welcome your comments on the content of the updated draft guidance and on the questions raised in this document.
- 3.2 We will be holding a roundtable event to give stakeholders the opportunity to participate in facilitated discussions about the proposals. The roundtable will be held on the afternoon of **Wednesday 29 March** at our offices in London. If you would like to attend, please email the project team at MarketInvestigations-Review@cma.gsi.gov.uk to book your place. Due to space restrictions, we regret that we can only offer one place per organisation.

How to respond

- 3.3 We are seeking interested parties' views on the updated draft guidance in [Appendix A](#) and the questions set out in [Section 4](#) of this document. Please respond to as many of the questions as you are able to and, where relevant, support your answers with any evidence or examples you may have.
- 3.4 When responding to this consultation please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role.
- 3.5 In accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on the CMA's webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on the CMA's webpages and explain why you regard the information excluded as sensitive (see paragraph 3.8).

Duration

- 3.6 The consultation will run for eight weeks, from 6 March 2017 to 2 May 2017. Responses should be submitted by post or email, by no later than **5pm on 2 May 2017** and should be sent to:

The Market Investigations Review team
7th Floor
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD

Email: MarketInvestigations-Review@cma.gsi.gov.uk

Compliance with government consultation principles

- 3.7 In consulting, the CMA has taken into account the government consultation principles, which sets out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on [GOV.UK](https://www.gov.uk).

Data use statement for responses

- 3.8 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of EA02. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interest, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
- 3.9 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of EA02.

After the consultation

- 3.10 After the consultation we will publish a final version of the revised guidance on the MI process and a summary of the responses received that fall within the scope of the consultation. As noted above, we also propose to publish non-

confidential versions of the responses received. These documents will be available on our webpages at www.gov.uk/cma and respondents will be notified when they are available.

4. Questions for consideration

- 4.1 Do you agree with the proposed changes to MIs set out under proposal (A) (streamlining the MI process)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11?
- 4.2 Do you agree with the proposed changes set out under proposal (B) (strengthening synergies between market studies and market investigations, and clarifying the relationship between the Board and the Group in relation to the scope of MIs)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11?
- 4.3 What do you consider to be the potential benefits arising from the changes? Are there any possible risks arising from the proposals, and how could these be mitigated?
- 4.4 Is the updated text of the guidance sufficiently clear and does it adequately reflect the proposed changes? If there are particular aspects of the amended text where you feel greater clarity is necessary, please be specific about the aspects concerned and the changes you would propose to improve them.
- 4.5 Do you have any other comments about the proposed changes and the resulting amendments to the guidance?

Appendix A: Draft amendments to the guidance

The following text would replace paragraphs 50 to 87 of CC3:

Market investigation procedures

1. The following paragraphs provide an overview of the procedures for a market investigation. In practice some detailed aspects of the procedures used in a particular case may vary from those set out below. This is inevitable because no two market investigations are alike in all respects. The sectors under investigation can range in size from small, highly specialised industries to large-scale multi-faceted markets. Some references can encompass both upstream and downstream markets.¹¹ Moreover, the numbers of parties with an interest in the investigation may vary from a few to several hundred.

Managing investigations with a large number of parties

2. All providers of the goods or services in a market under investigation are potentially main parties to an investigation. However, the degree of each party's engagement with the CMA may vary, particularly where there are substantial numbers of main parties. The CMA may need more information and evidence from some than from others. Some firms may choose to engage more with the CMA than others. Differences in communication by the CMA with different main parties may consequently reflect the different levels of party engagement.
3. In addition, there will be parties which are not providers of the goods or services in the market but which may be materially affected by the investigation (including super-complainants, customers and consumer groups, upstream suppliers, and trade and professional bodies). Levels of engagement with these parties will also vary. For example, the CMA may seek information from some of them, while others may volunteer information and views to the CMA.
4. The CMA makes extensive use in market investigations of its website to communicate or to make disclosures, enabling any number of parties to follow the progress of an investigation (as far as possible the CMA alerts parties when relevant material is posted). While the detail of its processes might vary, the CMA will ensure that its procedures are fair and give parties the opportunity to participate appropriately in an investigation.

Timescales

5. The Act, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA) requires the CMA to publish its report on a market investigation within

¹¹ An upstream firm provides raw materials or manufactures inputs for processing and/or distribution by a downstream firm.

18 months of the reference.¹² There is scope to extend the investigation by up to a further six months if the CMA considers there are special reasons for doing so.¹³

6. The timescales for the different stages of a market investigation cannot be exactly prescribed and will be decided by the Group on a case-by-case basis. The following timetable illustrates the progressive stages of procedures for an 18-month investigation. But in practice, some of the stages may overlap and on occasions developments in the investigation, for example a revision of the Provisional Decision Report and a consequent need for additional consultations, may require adjustments to the timings and procedures.

Stage of process	18-month process
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

¹² Section 137(1) of the Act.

¹³ Section 137(2A) of the Act.

7. The CMA draws up and publishes an administrative timetable at an early stage in the investigation. A draft is first sent to main parties for comment. The administrative timetable is updated as necessary during the investigation.

Information provision and disclosure

8. While the time taken to conclude a market investigation depends on several factors, including the complexity of the investigation and the number of parties involved, a key factor is timely provision of information. The CMA aims to be fair and reasonable in its requests for information and the deadlines it sets for parties to respond to such requests. It expects parties to meet the timescales set. The CMA is empowered to require information and the attendance of witnesses.¹⁴ It will use its mandatory powers if necessary to ensure that its information requests are answered completely and in a timely fashion. The provision of false or misleading information to the CMA is a criminal offence, regardless of whether that information has been provided voluntarily or in response to a statutory notice.¹⁵
9. In pursuing its aim to conduct investigations in a fair and transparent manner, the CMA discloses its key documents, mainly by publishing them (in particular an Issues Statement, key results from its analysis, a Provisional Decision Report and Final Report). Typically, it also publishes a large amount of other documentation, for example non-confidential versions of key submissions from parties, including their submissions on the Issues Statement, the Provisional Decision Report and responses to other publications, key submissions of third parties, details of points arising in hearings, survey reports and some working papers.
10. The Act provides for the protection of confidential information relating to individuals and businesses.¹⁶ But the CMA may disclose information under certain circumstances and having taken into account the considerations specified in the Act.¹⁷
11. Where issues arise as to the confidentiality of some information in the CMA's possession that underlies a decision or a piece of analysis, but the CMA nevertheless considers that disclosure of some sort is necessary to allow a party to comment on it, the CMA may decide on some form of limited disclosure.¹⁸

¹⁴ Section 174 of the Act.

¹⁵ Section 180 of the Act deals with the provision of false or misleading information and the commission of offences by bodies corporate. Section 125 states that offences of bodies corporate may be an offence of the secretary, director or other officer of the body corporate.

¹⁶ Part 9 of the Act, in particular section 245, provides that a person commits an offence if he or she discloses or uses specified information unless in the circumstances permitted by the Act or the information is already in the public domain in the circumstances described by section 237(3).

¹⁷ Section 244.

¹⁸ For example, to enable disclosure of some data used in its analysis, the CMA might set up a disclosure room or confidentiality ring in which the parties' external legal and economic advisers can review it. Rules relating to access, use and non-disclosure are applied and participants are required to sign undertakings that they will comply with the restrictions. See the [CMA's guidance and templates](#) for confidentiality rings and disclosure rooms.

12. For further details on the statutory provisions relating to the information obtained during the course of an investigation and to its disclosure, see the Chairman's guidance on disclosure (CC7 Revised) and the CMA's guidance on transparency and disclosure (CMA6).¹⁹

D. The main stages of an investigation

13. The following paragraphs describe the main stages of a market investigation and outline the key interactions which the CMA has with parties and their advisers in the course of a typical investigation.²⁰ This procedural guidance is not intended to be binding and may be adapted to take account of the particular circumstances of an investigation, in which case parties will be notified of the reasons for departures from usual procedures.

Handover between a market study and a market investigation

14. Where the CMA (as opposed to one of the other referring bodies) undertakes the market study, the CMA's market study team considers the appropriate scope of the market investigation following consultation on a possible reference. It will also consider whether remedies are potentially available as part of its decision to make the market investigation reference (and sometimes also in the context of an offer of undertakings in lieu of a reference from the parties).²¹
15. To ensure an efficient handover, the CMA begins preparatory work on a market investigation on a contingency basis before the final decision on whether or not to make a reference is taken. This will include consideration of the further information-gathering and analysis likely to be required in the market investigation. A preparatory market investigation team of staff and members is normally established to prepare for the reference and they receive briefings on the work undertaken in the market study and the key concerns underpinning any anticipated reference.
16. In addition to drafting the formal terms of reference for the market investigation, the CMA Board may append an advisory steer to the reference decision setting out its expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation. The Inquiry Group would be expected to take this into account. However the Inquiry Group will continue, as required by the legislation, to make its statutory decisions independently of the CMA Board.

Information-gathering

17. Once the market investigation reference has been made, the CMA formally launches its investigation with a 'first day letter' to key main parties. The letter includes information on the terms of the reference, the statutory deadline for

¹⁹ CC7 (Revised) and CMA6, January 2014.

²⁰ On possible variations in the timing and content of procedures see paragraph 6.

²¹ See OFT511, paragraphs 2.20–2.26 and 2.30–2.31.

the CMA's report, relevant guidance material, the key CMA staff working on the investigation, and the next steps to be taken. (Subsequently the CMA, having consulted the key main parties, prepares the administrative timetable, see paragraph 7). The first day letter also takes forward the information-gathering process by requesting specified initial factual and financial information.

18. At an early stage, informal meetings are held between the staff team and selected main parties (and, where relevant, with other parties such as the super-complainant). Such meetings usually cover the procedures to be adopted for the conduct of the investigation, and seek information and views on the market. In addition, the CMA holds 'data meetings' as early as possible with appropriate main parties to discuss the organisation and availability of technical data. (There may be subsequent staff meetings as the investigation progresses—see, for example, paragraph 29.)
19. A detailed market and financial questionnaire is next sent to the main parties; and, in many cases, other information is collected from a wider range of parties. The information-gathering will be informed by the developing 'theories of harm'. When practicable, parties are consulted on questionnaires to facilitate efficient collection of useful and consistent information, whilst as far as possible minimising the burden to business.
20. The CMA may decide to conduct one or more surveys as part of the information-gathering process.²² If the decision is taken to conduct a survey, relevant parties are consulted on the draft survey design and content. In some cases, so as to construct the sample for questioning, parties may be required to provide contact details for some or all of their customers or suppliers.
21. In many cases, the CMA organises early site visits to several parties. These are designed to be helpful to both the CMA and the parties involved. A site visit offers a chance for the Inquiry Group members and staff to gain a greater understanding of the party's business by visiting key facilities and meeting key operational staff. A party receiving a site visit is encouraged to organise a short presentation, and take some questions, on its business so as to explain its nature and the market context in which it is operating. In some cases, a site visit may be combined with a more formal hearing.

- *Issues Statement*

22. An Issues Statement is released by the CMA at an early stage in the investigation process. This generally discusses the theories of harm framing the analysis the CMA intends to pursue, as well as welcoming views on potential remedies. Where the CMA conducted the market study, the Issues Statement is likely to be a short document that cross refers to the market study report and (if applicable) the Board's advisory steer. Parties are invited

²² The survey results will usually be disclosed through publication (accompanied by an explanation of the methodology) but there may be instances when it is inappropriate to publish the whole report. The Inquiry Group will consider whether other information relating to the survey should be disclosed, for example cross-tabulations of the survey results.

to provide submissions commenting on the issues and possible remedies set out in the statement.

- *Hearings*

23. The Inquiry Group holds a round of formal hearings with parties (individually or multi-party where appropriate) at an early stage in the investigation. The primary purpose of these hearings is to enable the CMA to understand the market, discuss the parties' submissions, and discuss the issues and possible remedies with the parties. They also provide an opportunity for the parties to explain their views in person directly to the decision-makers as their thinking is developing. The CMA aims to ensure that hearings are held with as wide a range of parties as possible. However, decisions on which main and third parties to invite to hearings, and the sequencing of any hearings, rest with the CMA.
24. Although the format of hearings varies, parties are normally given an opportunity to make brief opening and/or closing statements, and should expect to respond to the CMA's questions. A transcript of the hearing will be taken and will be sent to the relevant party for checking. Additionally, staff-led hearings (sometimes via teleconferencing) are conducted with some parties not attending hearings with the Inquiry Group, including some main parties when there are large numbers of them. Some members of the Inquiry Group may also participate. Transcripts or written notes are taken and sent to the relevant party for checking.
25. A summary of the key points raised at a hearing may be prepared by the CMA or a transcript may be published, and the parties involved are given the opportunity to comment on both content and confidentiality before these are published. The party is also invited to follow up in correspondence any issue raised during the hearing.

Assessment

26. Using the information gathered and the theories of harm postulated, the CMA progresses the competition assessment. The issues addressed will be diverse, covering the many aspects raised by the investigation: for example, background on the market, the operation of the market or the performance of parties, market definition and assessments of the relevant competition issues set out in the Issues Statement. The CMA will also consider possible remedies at the same time as assessing the problems, and provisional decisions on both are included in the Provisional Decision Report. In practice this means the CMA will consider and discuss potential remedies alongside working on understanding what features of the market give rise to adverse effects. The consideration of possible remedies is always contingent on an AEC finding having been reached.
27. The staff and the Inquiry Group work together on these issues, and many internal working papers/presentations are typically prepared on the various aspects of the investigation. Generally, internal communications are not disclosable.

28. The Inquiry Group’s analysis is included in the Provisional Decision Report (see paragraph 33). However, the Inquiry Group will disclose key elements of its analysis before publication of the Provisional Decision Report through, for example, the use of confidentiality rings where appropriate or disclosure rooms, and/or it may disclose some of the working papers, or parts of working papers, often through publication.²³
29. On occasions, specific pieces of technical analysis merit discussion between a party and the CMA on the methodology used and, possibly, the results found. The CMA arranges meetings or roundtables with one or more parties for this purpose. These are generally attended by CMA staff (together, on occasion, with members of the Inquiry Group), the party and its technical advisers.
30. The administrative timetable will include a deadline for the receipt of all parties’ responses and submissions for consideration by the Inquiry Group in forming its provisional decision.
- *Put-back*
31. The CMA may also send (‘put back’) text to parties for the purpose of enabling them to:
- (a) verify the factual correctness of certain content (usually information supplied by them); and
 - (b) identify any confidential material, prior to publication; parties are asked to provide reasons for any requests for excisions of the material from published documents.
32. The put-back process is separate from disclosure of the CMA’s developing thinking.
- *Provisional Decision Report*
33. When the Inquiry Group has provisionally formed a view on whether or not there are features of the market(s) that give rise to an AEC, its provisional findings will be published in the Provisional Decision Report, and a public consultation on them will be held.
34. If an AEC has provisionally been found, the Provisional Decision Report will also contain the CMA’s provisional decision on remedies. The Provisional Decision Report will contain details of remedies the CMA has identified as addressing the AEC effectively, and may also outline details of remedies the CMA considers unlikely to be effective and the reasons why it has reached this provisional decision.

²³ See [CC7 \(Revised\)](#), paragraphs 7.1–7.3. Disclosed working papers provide a snapshot of the issues, analysis and views that are relevant at the time of disclosure and may change.

35. As set out in the Rules, the time allowed for the consultation will be no less than 21 days and the CMA applies some flexibility in setting reasonable deadlines case by case in light of the relevant circumstances.

- *Response hearings*

36. Once the CMA has published the Provisional Decision Report, response hearings (individually or multi-party where appropriate) will take place with main parties and potentially with key third parties. At a response hearing, parties will be given the opportunity to comment orally on the provisional decision on the AEC and remedies, and the CMA may seek clarification of particular points made in written submissions or at the hearing. Transcripts, or alternatively notes, of response hearings will be taken and, in most cases, summaries prepared and both will be processed in a similar way to those relating to hearings held earlier in the investigation (see paragraphs 23 to 25).

37. Having considered the responses from parties, the CMA may undertake additional consultations with parties as required. If further consultation is not needed, the CMA will proceed to publishing its final decision on the AEC and remedies in its Final Report.

38. Separately, a deadline will have been set in the administrative timetable for the receipt of all parties' responses and submissions for consideration by the Inquiry Group ahead of reaching its final decision.

- *Final Report*

39. The CMA will publish its final decision on the competition question and (if necessary) remedies together with supporting reasons and information in a Final Report.²⁴ The report will, if it confirms the finding of an AEC, contain sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CMA.

40. Parties may, during the two months following the notification of the CMA's Final Report, lodge an appeal with the CAT against the decisions. If a judgment of the CAT upholds an aspect of an appeal, this could lead to the investigation or a part of it being remitted to the CMA for reconsideration.²⁵ (Appeals against CAT judgments can, if allowed, go forward to the Court of Appeal or, in Scotland, the Court of Session and, ultimately, to the Supreme Court.)

²⁴ [Section 136](#).

²⁵ For example, following appeals against CC decisions, the CAT ordered the CC to reconsider parts of the remedies packages in the Final Reports on [Groceries](#) (April 2008) and [Payment Protection Insurance \(PPI\)](#) (January 2009). These aspects were, respectively, the competition test applied to grocery retail planning applications and the inclusion of a prohibition of the issuing of PPI at the point of sale.

Appendix B: Proposed amendments to other pieces of markets guidance

1. The attached table provides references to those sections in CMA markets guidance that would be affected by the changes proposed in the present consultation.
2. The relevant pieces of markets guidance affected are:
 - (a) CMA3: [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#)
 - (b) CMA7 (Revised): [Chairman's guidance on disclosure of information in merger and market inquiries](#)
 - (c) CC3: [Guidelines for market investigations](#)

Guidance	Paragraph reference
CMA3: Market Studies and MIs: Supplemental guidance on the CMA's approach (Revised Sept 2015)	3.7
	Footnote 79
CC7 (revised): Chairman's guidance on disclosure of information in merger and market inquiries (April 2013)	6.5
	6.13
	7.1–7.3
	8.3
	8.4
	9.8
	Table in <i>Explanatory note</i>
CC3: Guidelines for market investigation (April 2013)	321
	322