

Market Investigations – how they work in practice



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Intend to cover

- **Brief overview of UK markets framework**
- **The Market Investigation process**
- **Identifying Theories of Harm**
- **Approach to Remedies**
- **End with:**
 - **Some Examples**
 - **New UK legislation**
 - **Comparison with ex ante regime**
 - **Thoughts/observations**
- **Questions**

“Essential features” of markets regime

- **Pro-active**

- (Largely) discretionary and self-initiated
- Based on assessment of strategic priorities against broad prioritisation criteria

- **Not about breaking law**

- Not punitive
- We have other legal tools for this.

- **Forward looking**

- Focus is on correcting problems for the future
- A lot of emphasis on remedy design

- **General approach**

- Evidence-based assessment against economic (consumer) welfare criterion
- Holistic approach - joining together competition and consumer law

Market studies and market investigations

- **Important similarities:**
 - **Similar basis of assessment:**
 - Adverse effect on consumers (market study)
 - Adverse effect on competition (market investigation)
 - Both also have **powers to compel provision of information** from firms
 - Criminal offence to withhold or provide misleading information
- **But there are important differences in....**
- **....how they are instigated**
- **Market studies**
 - only require a simple procedural step by CMA Board, no substantive test needed.
- **Market investigations**
 - substantive test must be met - reasonable grounds to suspect distortion of competition requires evidence that requires a reference decision to be made (intended to be a low threshold)
 - instigated by the CMA Board, or by other regulators
 - the Government also has the powers to make a references (though yet to be exercised)
- **....their governance...**
 - Market studies decided by CMA Board
 - Market investigation decisions reserved to independent panel of members
- **....their timelines and procedural demands:**
 - Market studies must be carried out within 12 months
 - Market investigations have statutory timeframe of 18 months (with possibility for 6 month extension)
 - Market studies are relatively light in terms of procedural requirements, and also resourcing requirements
 - Market investigations have significant procedural requirements so that parties rights are respected – involve hearings consultations.
 - Market investigation assess whether there is an adverse effect o competition and, if so, to remedy
- **....and importantly in terms of their remedies powers.....**

Possible outcomes and remedies

- **Only market investigations have powers to impose orders on firms** - i.e. to impose behavioural or structural remedies
- Market studies do not have remedy powers, but can lead on to:
 - a “phase 2” market investigation;
 - Action under other CMA powers – competition or consumer law enforcement
 - Recommendations to government (or other regulators)
 - In both market studies and market investigations, the government will provide a reasoned response within 90 days.
 - Commits to accepting recommendations unless clear policy reason for not doing so.

Market studies	Market investigations
<p>Possible outcomes:</p> <ul style="list-style-type: none"> • Initiate a phase 2 market investigation • Clean bill of health • Recommendations to government • Other advocacy work • Undertakings-in-lieu of reference 	<p>Possible outcomes:</p> <ul style="list-style-type: none"> • Clean bill of health • Recommendations to government • Other advocacy work • CMA introduces its own remedies through accepting undertakings or making an Order

Phase 2: Market investigation



Months

1 - 2

3

4 - 9

11 - 12

13 - 15

16

18

24

Site visits,
hearings

Analysis,
working
papers and
consultation
Final deadline
for responses

Findings &
remedies
response
hearings

Publication of
final report
(Statutory
Deadline)

'First day letter'.
Publication of issues and
remedies statement.
Responses from main
and third parties

Publication of
provisional decision
(issues & remedies)

Deadline for all
parties'
responses

Implementation
of remedies

Evidence gathering and handling

Invite submissions

Questionnaires
and information
requests

Surveys,
quantitative and
qualitative

Data analysis and
modelling

Formal and
informal meetings
and hearings

Roundtables

Expert opinions

Public sources

Consultation on
working
papers/provisional
findings

Basis for assessing harm

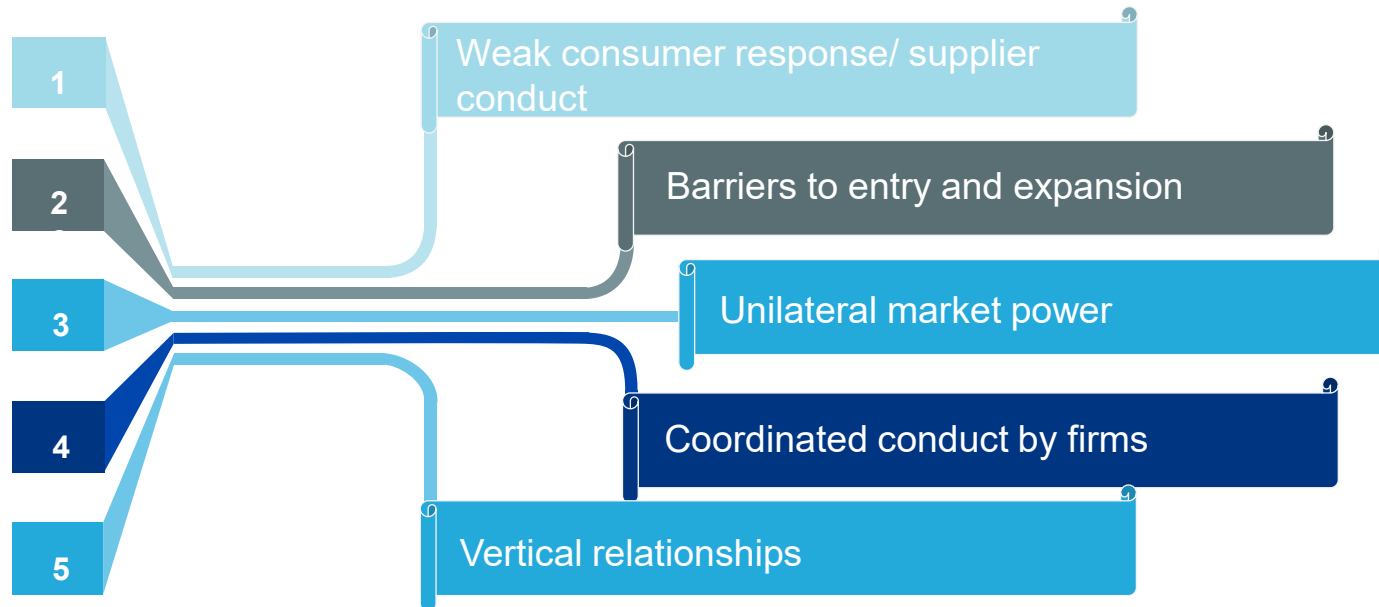
Legal Test

‘whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom’.

- **Assessment is fundamentally an economic one:**
 - Case by case assessment – not driven by precedent
- **The counterfactual**
 - Our guidance says relative to a well-functioning market
 - “...not an idealized perfectly competitive market”
 - “...but one that displays the beneficial aspects of competition....”
 - (ie competitive price, increasing output improving quality/variety, innovation...)
- **Basis of assessment is consumer welfare standard**
 - But doesn’t need to be fully measurable
 - Dynamic competition is also included (benefits on future consumers)

Theories of harm

Five sources of competitive harm set out in our guidance:



But list it not exhaustive - we often go wider than that

But this can be overly formulaic, and miss the central issues

Remedies - principles

- The extent to which our markets work is effective in making markets work well for consumers depends on the *quality of the remedies that we put in place*
- In a market study, the CMA must assess the extent to which steps can and should be taken to remedy, mitigate or prevent any adverse effects identified
- The CMA has a statutory duty to **consider remedial action** when in the case of a market investigation, there is or may be one or more adverse effects on competition (AEC)
- Remedies are a major focus of a market investigation - contrast with enforcement
- Remedies are considered throughout the market investigation process – starting with general moving to specific

Two central principles

Effectiveness

Does the remedy have the desired impact?

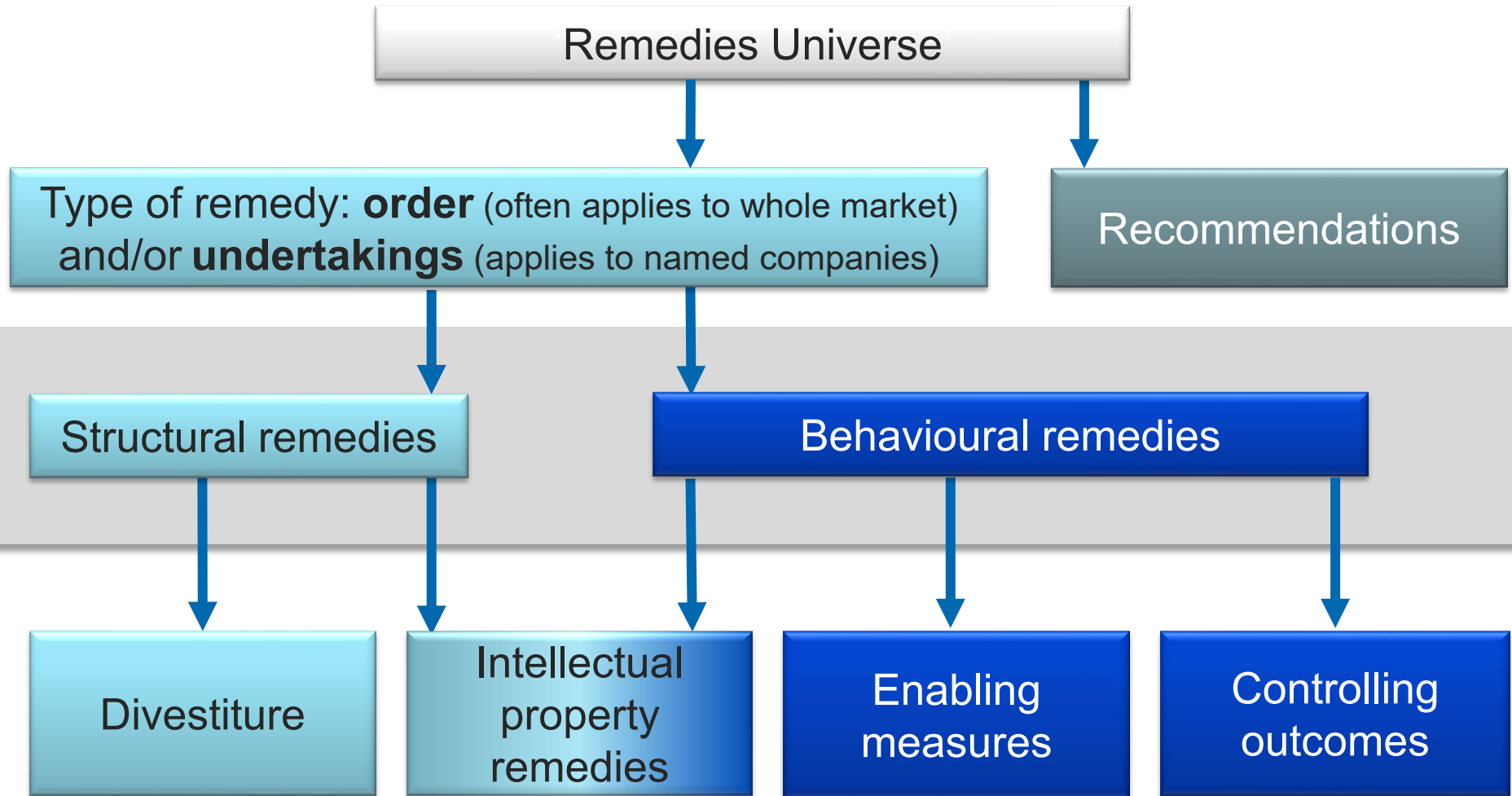
- (i) Practicability
- (ii) Timeliness
- (iii) Consider other legislation
- (iv) Interaction between measures
- (v) When making recommendations will they be acted on

Proportionality

Is this a reasonable thing to do?

- (i) Effective in achieving its aim
- (ii) No more onerous than needed to achieve its aim
- (iii) Least onerous if choice
- (iv) Does not produce disadvantages that are disproportionate to its aim

Types of remedy



Remedies implementation

Undertakings: Drafted by the CMA, agreed with parties, signed undertakings published by CMA

Orders: CMA drafts orders, consults with parties (informally/formally) and then publishes the final order



CMA has 6 months to publish finalised orders / undertakings

Recommendations: Government has made a commitment to respond to all formal recommendations within 90 days

CMA role tends to be limited to advocacy

Once orders / undertakings are in place, the CMA has an on-going role in monitoring compliance

Market investigations - some examples

BAA (2009)

- Owned seven airports – including three London airports, and three Scottish airports.
- 60 % of UK air passengers – 90 percent in south easts England, 85 % in Scotland
- Privatised in 1986.
- Remedies – order to sell-off two London Airports and one Scottish airport

Energy market investigation (2016)

- Background of significant price rises in deregulated retail energy sector
- Referred by energy regulator to “clear the air”
- Market investigation found consumer detriment of c£1.4bn a year
- CMA imposed price cap on pre-payment sector of the market and put in place measures to drive switching and choice
- Government then decided to impose wider price cap on basic energy tariff.

Retail Banking (2017)

- Lack of consumer switching leading to poor outcomes for consumers of bigger, longer-standing banks
- Remedies to improve switching and comparison and in particular to introduce “open-banking” enforcing banking data to be held in API standard
- By requiring the larger banks to create and fund a body
- Has taken 5 years to implement – now moving to longer term framework

Funerals (2020)

- Limited capacity for people to shop around between funeral providers
- Against a backdrop of sustained real terms price increases
- Imposed requirement on all funeral providers to publish standard prices.

Mobile Radio Networks for Emergency Services (2023)

- Government “locked in” to contract with Motorola due to delayed implementation of next generation network
- Imposing a time-limited price cap on network to reduce costs by c£200m pa, with recommendation to the government to come up with a plan for securing competitive terms if needed beyond that period

Digital markets competition and consumer bill:

- Ability to focus a reference on specific issues in a market
- Potential to accept undertakings at any stage of an MI or MS
- Power to conduct trials of remedies before implementation
- Potential to change remedies without reopening the case
- Stronger enforcement powers against breaches of remedies
- Also includes measures to establish Digital Markets Unit.

Market investigation or ex ante regime

- Market investigations allow for bespoke regulatory framework to be put in place.
- Have benefit of requiring bespoke diagnosis of competition concerns
- They allow for careful remedy development

But:

- They are resource intensive exercises with constrained scope
- They are one-shot exercises – can be difficult in fast moving markets
- Remedies development in digital markets can be complex and need testing/trialling and adapting as we understand what works, what doesn't and as the markets change.

Market Investigations still have a potential role to play in digital markets:

- Can effect change – especially when one-off interventions are good options.
- Structural remedies.

- **We have therefore argued that a new regulatory regime is needed for a comprehensive solution**
 - The DMU regime being proposed is effects-based and proportionate – not rules-driven

Thoughts/Observations on market investigations regime

- A form of market investigations has been in place in the UK since 1973, and has been enhanced through subsequent legislation.
- Impact of markets work assessed to be £1.9bn in 3 year period to 2020. (About 73% of overall CMA impact)
- Key to credibility of markets work is evidence-based and robust objective analysis taken by independent authority
- Accountabilities are also important - decisions appealable to independent tribunal on judicial review principle
- Past criticisms have focused excessive risk aversion in remedies
- Move to digital economy changes nature of remedies:
 - Distinction between structural and behavioural remedies less clear
 - Open data measure can provide major opportunity

Market studies	Market investigations
<p>Digital advertising Mobile eco-systems Electric Vehicle charging Children's social care Legal services Audit Care homes for the elderly Digital comparison tools</p>	<p>Emergency Mobile Radio Networks Funerals Retail banking Energy Aggregates and cement Private health care Payday lending Movies – pay TV Local buses Payment protection insurance British Airports Authority Groceries (supermarkets) Personal current bank accounts</p>



THANK YOU

QUESTIONS?

Thank you

Questions