

# Markets regime guidance – response to the CMA’s consultation

A submission by Frontier Economics

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1. Frontier Economics is an economic consultancy that regularly advises clients on competition investigations, including a significant number of market studies and investigations before the UK Competition and Markets Authority (CMA).
2. In this document, we share our views on the CMA’s proposed changes to its markets regime and its revised Markets Regime Guidance (“Guidance”). We welcome the CMA’s focus on improving the efficiency of its markets work. These are wide-ranging studies and investigations that inevitably demand significant time and resources from market participants and stakeholders, given the CMA’s ability to impose potentially intrusive remedies without a finding of fault.
3. It is important that the CMA prioritises markets work in areas where there is clear evidence of competition not working well and where intervention can deliver substantial consumer benefits and support economic growth. Although the regime provides powerful tools to enhance economic performance, market studies and market investigations are costly and can deter investment while ongoing. They will deliver net benefits only where significant problems exist and can be effectively addressed.
4. From our experience across a range of cases, including advising on the ongoing veterinary services investigation, there is scope to improve the efficiency of the CMA’s casework once opened. Greater transparency and engagement with industry should be central to this, as insufficient engagement risks the CMA pursuing unproductive lines of inquiry.
5. Once a case is launched, the CMA’s processes must ensure that businesses and stakeholders are properly heard and are kept abreast of its thinking and progress. While there is significant scope for efficiency improvements in the markets process, these should not come at the expense of meaningful engagement or of the CMA clearly setting out its thinking and evidence for scrutiny. Improvements in industry engagement should drive improved efficiency, enabling the CMA to diagnose issues accurately and identify effective and proportionate remedies in a timely manner.
6. We have considered the CMA’s proposals against this broader context. They align with the CMA’s ‘4Ps’ framework (pace, predictability, proportionality and process) and include sensible measures to improve efficiency, strengthen sector expertise, enhance

engagement with market participants, and adopt a more focused approach to remedies and their monitoring.

7. We make the following observations on these themes:
  - a. We welcome the CMA's **changes to improve the efficiency and pace of the process**, such as the introduction of a 'Project Roadmap' and KPIs, and issuing RFIs in a timely manner at the beginning of a market investigation (which can be prepared in parallel with consultation on a proposed decision to refer). Recent experience in the veterinary care market investigation highlights the importance of efficient project management in minimising disruption to the sector (including through reputational impacts and potentially reduced investment). The CMA should also regularly review the proportionality of its interventions and adjust their scope where appropriate.
  - b. Stakeholder engagement can be a key driver of efficiency. We welcome the CMA's **increased focus on sector expertise and external engagement**, enabling it quickly to build industry knowledge. By working collaboratively with main parties and the wider sector, the CMA will be better placed to identify the most salient issues and develop more targeted remedial options.
  - c. Proportionality and transparency need to be at the core of the remedies process. We welcome the CMA's focus on **efficiency in remedy design, monitoring and review**. A more collaborative approach with industry, combined with a holistic assessment of proportionality, would help the CMA identify effective, proportionate remedies more quickly and with greater certainty.
8. Across these three themes, we set out our views on the key challenges and potential benefits. In each case, we have considered the CMA's consultation questions on whether the revised Guidance provides sufficient clarity.

## 1 Improving efficiencies in markets work

9. CMA markets work requires significant input from the sector under investigation, and in particular from senior management. There are examples of market reviews that have lasted several years from beginning to end, such as the investigations into Retail Banking and Private Healthcare. Markets work also affects the whole industry, requiring engagement from mid-sized and small firms which generally do not have experience of such regulatory engagement, and may struggle to deal with the demands which the markets regime places upon them.
10. It is crucial that the CMA ensures that the benefits of its markets work outweigh the costs by explicitly considering the **burdens it imposes on businesses and stakeholders at each project stage** and weighing these costs against the potential benefits. The CMA

identifies some of these measures in the revised Guidance at paragraphs 9.87 to 9.89. We consider that there are (at least) three categories of costs that the CMA should consider when evaluating the impact of its work, and which should more explicitly be called out in the Guidance:

- a. The **cost of engaging in the investigation**, which as mentioned above are significant both in cash terms and in terms of internal management and staff time. We encourage the CMA to regularly consider this (especially in the context of market investigations). This also includes managing the range of remedies that are put to consultation with the market.
  - b. The **chilling effect of investigations on investment and business growth (including through reputational effects)**. Firms in the sector may not invest during a market investigation, because potential future remedies (such as price caps) may radically affect the return on their investment in a way that is difficult to predict. This applies not only to capital investment, but also to corporate activity such as M&A. Moreover, over the course of market reviews, the CMA's interim findings and proposed remedies affect market participants through reputational effects, as certain results are picked up (and sometimes misinterpreted) in the media. These effects can be significant, and in the case of a market investigation can affect the market for several years. The CMA should consider this when selecting its markets work, determining how best to communicate its interim findings, and which remedies proposals should be publicly consulted on.
  - c. **The cost of implementing and monitoring remedies**. The CMA should conduct a proportionality assessment of remedies (including in terms of effectiveness) at an early stage, such that remedies where costs are likely to outweigh benefits are ruled out at an early stage. This would also help manage the risks described above.
11. Against this background, we consider that there is significant scope for the CMA to increase the efficiency of the process. The package of changes proposed by the CMA represents a welcome step forward in this regard. This is particularly important for markets work, given the large number of stakeholders involved and the CMA's ability to impose highly intrusive remedies.
12. In terms of the specific proposals set out by the CMA:
- a. We agree that it is important that the CMA **carefully considers the appropriate market tools**, and in particular that where the CMA progresses from a lighter-touch tool to a more intensive one, it should focus on the core issues identified in its earlier work and **tightly scope** this. Such scope should be reviewed regularly with industry and experts through the CMA's proposed external stakeholder engagement (see below). We also agree with the CMA's proposal of **prioritising issues in the pipeline**

**with the greatest potential harm and / or prospect of successful remedies** and where there is evidence that the harm is caused by markets not functioning well.

- b. In principle, **streamlining evidence gathering** would reduce the significant burden that CMA markets work places on industry participants. The ongoing veterinary services market investigation, for example, involved a large number of Requests for Information (RFIs) over a period of almost a year. Responding to these requests imposes significant costs on the industry. The CMA should ensure consistency with previous practice to improve predictability – the lack of a Market Questionnaire and Financial Questionnaire in the veterinary services market investigation was a source of inefficiency compared to previous market investigations, where more concentrated larger requests allowed the businesses and stakeholders to better plan their input.
- c. A **Project Roadmap** would provide more predictability and transparency for market participants. The inclusion of KPIs would also be useful for efficiency, but should not become targets in themselves or come at the expense of adequate engagement with stakeholders and appropriate scrutiny of the CMA’s evidence and thinking. In particular, it would be inappropriate if, in order to meet a KPI, the time that market participants had to respond to putbacks, working papers and RFIs were compressed, rather than the CMA itself operating more expeditiously. The CMA has set out other proposals in terms of end-to-end timeline efficiencies: bespoke timelines; a more streamlined approach to ‘put back’; and focusing on key issues where a market study precedes a market investigation. In principle, these all appear to be sensible adjustments to ensure that the process is run efficiently, and the CMA should consider how these can be embedded into its day-to-day practice on projects.

## 2 Increased focus on sector expertise and external engagement

- 13. Market reviews can involve a large number of stakeholders, and therefore pose significant challenges for the CMA in terms of stakeholder engagement. However, market players hold the key information to diagnose issues and devise solutions where markets are not functioning well. Stakeholder engagement is the cornerstone of an efficient and effective markets regime, and we consider that there is ample scope to improve the CMA’s engagement throughout the process.
- 14. The CMA has set out a number of welcome changes to the way it interacts with industry in the course of its markets work. We consider this to be crucial in ensuring that the work is appropriately focused and efficiently delivered, and that consumer benefits are delivered in a timely manner.
- 15. In terms of the specific proposals set out by the CMA:

- a. **Engage expert advisors early:** We consider that it would be constructive to have business knowledge embedded in the case team from an early stage, to support the CMA in quickly understanding the fundamentals of a market. The CMA should ensure that the expert panel it assembles is representative of different categories of stakeholders across the sector.
- b. **Increase transparency on case priorities:** More transparency on priorities would be welcome at an early stage, to help manage the cost and expectations surrounding a market inquiry. The CMA needs to consider how it can sequence its work in a way which allows it to properly focus its priorities (for example, in how it chooses which tools to use), and should be transparent in that process with industry.
- c. **Hold state of play meetings and updates throughout the investigation:** We consider this would be a useful update to the CMA's process. We would welcome further CMA guidance on the frequency and structure of these meetings, considering the unique challenges that markets work presents in terms of the number of issues and stakeholders involved. The Guidance – as currently published – does not provide significant clarity on the nature or frequency of such meetings. It would be helpful for market participants and their advisors to have a clearer steer on this – either more generally (i.e. via an update to the Guidance), or on a case-by-case basis at the outset of each review. We also consider that the CMA should engage in economist-to-economist discussions with the market participants' advisors (which are more common in other areas of its work). This would help advisors to support the CMA in its evolving thinking and create efficiencies in evidence gathering and analysis.
- d. **Prioritise meetings and 'teach-ins':** We consider that a more collaborative approach between the CMA and industry is crucial in order to ensure any issues are appropriately and efficiently diagnosed. More frequent and detailed engagement with the market participants can also ensure that any remedial action is focused from an early stage on the more effective and proportionate remedies. The Guidance – as currently published – does not provide significant clarity on the nature or frequency of such meetings. It would be helpful for market participants and their advisors to have a clearer steer on this – either more generally (i.e. via an update to the Guidance), or on a case-by-case basis at the outset of each review.

### 3 Efficiency in remedy design, monitoring and review

- 16. We welcome the CMA's focus on streamlining the remedies process. Remedial action is crucial to ensure that the benefits of market work are delivered. However, ineffective remedies, or remedies that are retained beyond the point at which they deliver benefits, can impose unnecessary costs on the sector. In the context of market investigations,

when intrusive remedies can be introduced, even consulting on remedies can affect market players and this should be appropriately accounted for by the CMA.

17. We consider that some of the comments we have made in our recent response on remedies in the context of CMA mergers can have read-across to the CMA's markets regime. In particular:
  - a. The CMA should remain mindful of the effectiveness of information and behavioural remedies, and favour these lower-cost remedies over more intrusive remedies wherever possible. This is captured in existing guidance, and in the revised Guidance under consultation.
  - b. Generally, the CMA should pursue a joint assessment of the **effectiveness and proportionality of different remedies**. This would ensure that the CMA focuses on remedies that can be implemented, making the process more efficient. Moreover, this reduces the risk of uncertainty and of chilling effects on the market (for example, where the CMA may provide a "long list" of potentially highly disruptive remedies, which are ultimately not pursued). We therefore recommend that the CMA instead adopts an integrated approach – one that fully reflects the interplay between effectiveness and proportionality and applies the same evidentiary standard as used in the AEC assessment.
  - c. Where structural remedies are considered, the CMA should consider **structural outcomes** over **structural remedies**. In some cases, behavioural and information remedies can achieve structural outcomes just as effectively – and in a more flexible, market-driven manner. For example, **enabling measures** that stimulate entry and expansion by third-party rivals. These may include commitments to share intellectual property with rivals, establish a customer-accessible 'prize fund' to support new entrants, or underwrite the switching costs faced by customers when moving to alternative suppliers. One example of this is the investment into the Current Account Switch Service and Open Banking, which formed part of the Retail Banking Market Investigation remedy package.
  - d. **Measures to control outcomes**, such as price controls, should only be implemented when no other alternative option has been identified which addresses the observed AEC. Even in those situations, the remedy should be a temporary solution to manage the cost to consumers, while other remedies act to improve the functioning of the market.
18. In terms of specific proposals set out by the CMA in terms of outcomes:
  - a. **Trial remedies only where the outcome improves efficiently:** We agree that it is sensible to restrict trialling of remedies where it can deliver efficiencies; and to do this

with the measure(s) which would most benefit from trialling. To that end, the CMA should look for efficiencies in exploring solutions as part of its evidence gathering.

- b. Accelerate reviews of outdated remedies and remove or amend ineffective remedies:** We welcome the CMA calling out these important aspects of its remedies work. To the extent possible, it would support transparency and predictability if the CMA could set out in advance which remedies it would monitor and on the basis of which outcomes.
- c. Use of sunset clauses on orders:** We agree with the CMA's proposal that it should include a 'sunset' clause as default, meaning that the orders will fall away after a set period, unless the CMA judges that there is good reason to keep them in place. As noted above, more intrusive remedies should only be a stopgap to a well-functioning market, where CMA intervention is not needed. We would also consider that at the time the CMA considers whether remedies should be extended past the timing of the sunset clause, there should be a statutory duty to consult with affected parties.