

Review of the Competition Commission's approach to remedies in market investigations: recommendations and proposed action

Introduction

1. Following the appeals against Competition Commission (CC) remedies decisions by Tesco and Barclays Bank (PPI) in the Competition Appeal Tribunal (CAT), the Chairman of the CC, Peter Freeman, initiated a focused review of the remedies process in market investigations. The review was conducted by three members of the CC, Laura Carstensen (Chair), Roger Witcomb, and Professor Simon Evenett, and was assisted by a small staff team. The review was completed in December following a six-week programme of analysis and internal and external interviews.
2. The review was required to examine the way in which the CC assesses the effectiveness, timeliness and proportionality of remedies in market investigations and how the CC's reasoning on these issues is expressed in its reports, in the light of the CAT judgements in Tesco and PPI.
3. The CC's Council¹ considered the review, endorsed its recommendations and agreed proposed action at its meeting in January. It is intended that many of the proposed actions will be implemented, where appropriate, on a trial basis in the current CC market investigation into local bus services. The CC also intends to begin consultation in the near future on new guidance for market investigations which will incorporate proposals on the CC's approach to remedies. This guidance will supersede the CC's existing guidance (CC3)² published in 2003.
4. The recommendations of the review together with the CC's proposed action are summarized in the following section. The CC considers that adoption of the recommendations will enable it to continue to act decisively and proportionately in addressing competitive detriments identified in market investigations.

Summary of recommendations and proposed action

Issue 1: Allowance for remedies phase within market investigation timetables

5. The review group considered that work on competitive assessment leading to the identification of adverse effects on competition (AEC) tended to extend over an unduly lengthy series of iterations as a result of pressure from external and internal challenges. This tended to 'crowd out' time and resources available for consideration of remedies. This constraint on time and resources was further exacerbated by an unwillingness to consider remedies until the AEC was established and by a lack of focus in the options outlined in the Notice of Possible Remedies. The review makes several recommendations to deal with this issue.

¹The Council is the CC's strategic management board.

²CC3—*Market Investigation References: Competition Commission Guidelines*.

6. *Recommendation 1(a) The timescale for a market investigation should be recalibrated to allow equality of treatment for the AEC and the remedies.*
7. **CC Response Timescales on future market investigations will be substantially revised to allow equivalent priority and resourcing of work on remedies with work required to determine an AEC. The CC will seek to publish provisional findings (PFs) shortly after the midpoint of the investigation (eg at around 10 months of a planned investigation duration of 18 months). This contrasts with publication of PFs after about two-thirds of the investigation duration in recent cases. Faster publication of PFs will be facilitated by measures already announced³ including the use of ‘theories of harm’ and replacing publication of a consolidated ‘emerging thinking’ document with coordinated publication of working papers.**
8. *Recommendation 1(b) So as to help achieve the above recalibration there should be a cut-off point (a ‘guillotine’) for the submission of representations and evidence going to the competition assessment prior to the remedies phase of an investigation. Only in exceptional cases would late representations be taken into account. Recommendation 1(c) Investigation Groups must exercise strong discipline in terminating the competition assessment phase of a market investigation after considering final representations following PFs and move on to the remedies phase.*
9. **CC Response The CC will follow a stricter policy regarding cut-off dates for submission of evidence and, in particular, will limit supplementary submissions and iterations of analysis which would significantly prolong the competitive assessment process. The CC will seek to make clear the policy it intends to adopt in the circumstances of each investigation.**
10. *Recommendation 1(d) The Notice of Possible Remedies should be far more focused on genuinely practicable remedies options than at present.*
11. **CC Response As a result of more extensive work on remedies prior to PFs (as set out in the response to recommendation 1(f) below), the remedies notice published with PFs in future will differ in three main ways from remedies notices published on most previous market investigations:**
 - (a) **The notice will concentrate on remedies that are considered likely to be effective and will contain more detail on how they are expected to operate.**
 - (b) **The notice will contain more focused requests for information and views on the possibly effective remedies.**
 - (c) **The notice will list remedies that the CC does not consider likely to be effective together with the reasons for its views. The CC will be open to consider these remedies further if parties are able to provide proposals that overcome these initial contra-indications.**
12. *Recommendation 1(e) The management of investigations should be built around theories of harm.*
13. **CC Response In future market investigations the CC will use ‘theories of harm’ on a consistent basis to determine lines of investigation. It is proposed that theories of harm will be tracked during the investigation as a management tool**

³How to deliver CC market investigations more quickly’—CC note for the CBI Competition Committee.
http://www.competition-commission.org.uk/our_role/speeches/index.htm.

to ensure that analysis is appropriately focused and that features of an AEC are clearly identified to provide a robust basis for analysing possible remedies.

14. *Recommendation 1(f) A new internal framework for analysis should be agreed to ensure remedies are considered at an earlier stage. This can be developed and trialled in the short term and embodied in due course in revised MIR Guidelines.*
15. **CC Response In future, initial theories of harm will be set out at an early stage of the investigation and this will then facilitate preliminary thinking on hypothetical possible remedies corresponding to these initial theories. More extensive work on remedies will be conducted when the set of theories of harm becomes more focused following a significant period of analysis. This work will concentrate on how the possible remedies will operate, in terms of the mechanisms which address or mitigate adverse features, the economic effects which result and how the remedy can be structured and enforced. As noted above, this work will facilitate greater focus in the Notice of Possible Remedies.**

Issue 2: Clarity of roles

16. Review of investigation processes showed a tendency for work on remedies to be insufficiently multi-disciplinary to ensure that all aspects of remedies issues were appropriately covered. Lack of continuity in staff involvement also appeared to hinder effective work on remedies.
17. *Recommendation 2 The multi-disciplinary team assigned to the investigation should, as far as possible, remain together throughout the investigation. In particular, economists and business advisers should work together in remedy design and lawyers should be encouraged to adopt a more integrated approach to working within an investigation team.*
18. **CC Response The CC's proposed changes in the approach to market investigations will involve a greater degree of multi-disciplinary working on various aspects of the investigation, including remedies. This will imply that the overall team size may be greater at certain points in the process than on previous market investigations. However, the team should be required for a shorter period than on previous investigations which should reduce overall cost and assist continuity. Changes in the team should be avoided as far as possible.**

Issue 3: Rigour of analysis

19. The recent judgements of the CAT made clear that it expected greater rigour of analysis to be displayed in CC decisions in relation to remedies and especially in relation to the assessment of proportionality. The CAT did not require specified techniques to be adopted as it regarded this to be a matter for the CC. However, whether the CC adopts quantitative or qualitative means of assessment in particular circumstances, the overriding requirement is that the assessment should be logical, sufficiently rigorous and fully articulated to support the CC's decision.

20. *Recommendation 3 The CC should develop guidance on the use of economic techniques and on the assessment of 'proportionality'.*
21. **CC Response The CC intends to set out its approach to proportionality and assessing costs and benefits of remedies in new market investigation guidance. In general, the CC will seek to quantify costs and benefits of remedies where it is practical to do so and where it can place reasonable reliance on the results.**

Issue 4: Clarity of expression

22. In CC investigation reports there is a tendency for specialist economic or econometric analysis to be drafted in a form that is not clearly understandable to non-specialist readers or the CAT. There also appears to be a general risk that in seeking to express a consensus view of the investigation group in final reports that the clarity of expression of reasoning can be compromised.
23. *Recommendation 4(a) Every effort should be made by staff and members to ensure that the economic analysis is fully comprehensible. Recommendation 4(b) The CC should explain clearly all the reasoning and calculations behind the remedies it proposes; if it cannot be specific or provide economic evidence, it should fully explain the reasons.*
24. **CC Response Given the range and complexity of arguments and evidence encountered in a market investigation it is a high priority for the CC to cut through this complexity and express the reasoning supporting its case for remedies clearly and logically. This clarity will also be assisted by further scrutiny measures to be introduced under issue 5 below.**

Issue 5: Rigour of scrutiny

25. The Tesco and PPI judgements suggest that there is scope to improve and integrate economic and legal scrutiny within the work of the investigation group to ensure that the case for remedies is supported by logically consistent chains of analysis and evidence.
26. *Recommendation 5(a) Internal multi-disciplinary peer review of the draft Provisional Decision on Remedies to be introduced. Recommendation 5(b) A 'logic tree analysis flowchart' for the remedies phase to be routinely used. Recommendation 5(c) Consideration should be given to improving forensic scrutiny of remedies.*
27. **CC Response Internal multi-disciplinary peer review will be introduced for the draft Provisional Decision on Remedies. Further consideration will given to the best means of setting out the logic underpinning remedies decisions to ensure that any loose ends or omissions are identified. The need to enhance forensic scrutiny of remedies is agreed but further consideration will be required to identify the most efficient approach.**

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