

GUIDELINES FOR MARKET INVESTIGATIONS:

Their role, assessment, remedies and procedures

Draft for comment, April 2011

Market investigation guidelines

Contents

	<i>Page</i>
Foreword by the Chairman of the CC	2
Introduction	9
Note on terminology	10
Part 1: The role and origin of market investigation references	11
The making of references to the CC	12
Public interest issues	13
The statutory questions	14
Part 2: The AEC test	15
The key statutory terms	16
‘The relevant market’	16
‘AEC’	16
‘Features’	19
The application of the AEC test: the CC’s general approach	22
Theories of harm	23
The AEC test: methodologies	28
Part 3: Remedial action	28
Framework for consideration of remedies	29
The remedy questions	29
A comprehensive solution to the AEC and/or detrimental effects	31
Effectiveness and practicability	32
Reasonableness and proportionality	35
Judging the impact of remedies	36
Possible remedy outcomes	39
Relevant customer benefits	40
Possible relevant customer benefits	41
Relevant customer benefits and remedies	43
Choice of remedy	44
Remedies universe	44
Divestiture	45
Intellectual property remedies	46
Enabling measures	46
Controlling outcomes	47
Recommendations	48
Selection of remedies	49
Part 4: The conduct of a market investigation	54
Groups and staff	55
Appointment of groups	55
Staff team	56
Overarching procedural issues	56
Managing investigations with a large numbers of parties	56
Timescales	57
Information provision and disclosure	58
Procedures	59
Information gathering	60
Assessment	61
Implementation of remedies	65
Annex: The design of remedies	69

Foreword by the Chairman of the CC

1. These guidelines concern the system of market investigations established in its present form in 2002, but building on the system of monopoly control dating back to 1948. Market investigations rest on the idea, shared across the political spectrum, that under carefully controlled conditions, the State can, and from time to time should, intervene to examine and improve the operation of markets. These guidelines explain how the system works in practice, drawing on experience the Competition Commission (CC), as an independent competition authority, has gained from operating the system over the past decade.

2. The market investigation regime involves a preliminary study by a first-phase authority—normally the Office of Fair Trading (OFT)—and in-depth examination by the CC. Unlike market studies or reviews conducted by first-phase authorities, or sector inquiries conducted by the European Commission, market investigations lead to decisions, made in a comprehensive legal framework, and potentially to remedial measures that are legally enforceable. These remedies look forward, rather than backward, and focus on improving market operation (essentially in the interest of consumers), rather than punishing past misconduct by producers or suppliers. The regime sits squarely within the spectrum of competition law. It allows examination of restrictive agreements and players with market power, but it does so in the context of a wide examination of all potential problems in a market. As well as being able therefore to look into the directly observable conduct of firms, market investigations can probe for indirect indicators of a lack of effective competition, particularly any barriers to entry into the market.

3. Because market investigations can result in significant interventions in markets, they have to be conducted carefully and reliably. The right questions have to be asked and the right answers found. The results have to be credible and the way they are

reached transparent and understandable. It is for this reason that the CC follows a disciplined, thorough and sometimes lengthy process of gathering evidence, hearing argument and examining facts and (often complex) data, all under the active direction of a group of independent commissioners.

Effective competition and threats to it

4. The essential purpose of market investigations is to make competition more effective in markets that are not working well for customers, including consumers. Competition is a process of rivalry as firms seek to win customers' business. Competitive markets reward those firms that supply the goods and services that customers want at prices they find attractive. This process drives growth, innovation and productivity. The benefits of competition come from allowing customers to decide which firms should prosper. However, the full play of competitive forces is sometimes inhibited by other factors and influences, such as barriers to market entry, and competition authorities and other government institutions have an important role to play in countering these and making sure competition is as effective as possible.

5. There are many reasons why competition may not be effective. First there is the activity of the State. All businesses operate within a framework of laws and regulations, which may have an entirely legitimate public policy goal but which nonetheless may restrict or distort competition. Second, there is the effect of actions by businesses. Some firms may, either through their own efforts or through earlier privatizations or as a legacy of legal monopolies, gain advantages of scale or technology, or a network position with customers, which make it hard for others to compete effectively with them. Firms may also try to soften competitive rivalry by mergers or agreements to act together that involve less effort than competing. Or they may try to use the market power they have gained to exclude rivals from the market or to stop new potential rivals from coming in.

6. Finally, there may be threats to competition that are nothing to do with government action or action by companies to limit competition. Customers may lack information about what product to choose, or may be locked into one supplier and unable to switch to an alternative. They may be subject to marketing practices that confuse them or create pressure to buy. It may not matter to businesses whether or not they offer value to the final consumer provided their immediate customer is content. In short the market may be working badly for consumers even though no one is doing anything wrong.
7. Many of the various factors impeding competition may be present simultaneously in a market.

The response

8. Regulators, competition authorities and governments counter this array of threats to competitive rivalry in a variety of ways. Government may intervene directly in specific markets to make competition more effective (for example, in the programme of liberalizing public utilities in the 1980s and 1990s). Legal prohibitions on anti-competitive practices, or abuse of a dominant position, play an important role in limiting the extent to which firms are able to restrict competition between them, or win business from customers in non-competitive ways. The merger control regime limits the ability of firms to avoid competing with their rivals by buying them. And economic regulation of specific sectors involves measures to encourage new entry and investment, promoting the emergence of competition in markets where it has been historically weak. Regulators can also intervene directly to prevent or mitigate the harmful effects of a lack of competition in the short term.
9. The same harm can often be addressed in more than one way. For example, contracts requiring customers to purchase from one supplier may make market entry

difficult, and protect individual suppliers from pressure by rivals on their customer base. Depending on the facts, the potential harm to competition could be addressed by legislation, merger control (to prevent problems becoming worse), the prohibition on anticompetitive agreements, the prohibition on abusive conduct, regulatory licence modifications, a market investigation, or a combination of these. If there is a choice, the decision about which approach to use will depend on many factors. A market investigation might be preferred when, for example, the facts and issues underlying a perceived competition problem are complex, and the implications for parties are potentially significant, even if the final action is likely to be taken by government or competition authority.

The strength of market investigations

10. The particular strength of market investigations lies in the flexibility of the legal framework within which decisions are made and remedies implemented. The overarching framework allows market investigations to tackle the adverse effects on competition from any source. Yet within the context of a particular case the analytical framework is rigorous: there is a need not only to establish that competition is not working well, but also to identify the features underlying this, and establish their relationship. Having established a problem, and identified its causes, a wide range of remedies is available. In deciding what action to take, if any, there is a requirement to consider whether any efficiencies would be lost as a result.

11. The structural remedies available under the market investigation regime can also make a market investigation a more appropriate instrument than relying on the system of prohibitions. Prohibitions on using market power to exploit customers or exclude rivals, or on coordinating with the few rivals that remain, may not be sufficient to address issues in a market whose structure means that competition is ineffective.

12. There are also situations where a market investigation is the only alternative to direct intervention by government. The root cause of a problem may lie within the regulatory framework or the way the market operates, and cannot be addressed by prohibitions on firms' conduct. A pattern of behaviour by firms, none of which could be considered dominant in the market, may not be prohibited under the ordinary principles of competition law even if it has harmful effects on competition. Weak competition that results from customer inertia or lack of information can similarly be difficult to address using prohibitions on agreements between firms, or on anti-competitive conduct.

13. Finally, market investigations are conducted within a robust legal framework, subject to judicial oversight, ensuring transparency and fairness, with expert decision-makers who are independent of government. The result is that interventions are based on robust findings about the operation of the market, the reasons why competition is not working well, and the likely effects of any proposed intervention. Similarly, any actions the CC recommends that others take are likely to be actions it considers effective and proportionate to the competition issues identified.

The CC's experience of market investigations to date

14. There have, in practice, been fewer market investigations than had been envisaged when the Enterprise Act 2002 came into force in 2003. There have been 11 references to the CC since 2003, compared with an original estimate of around four references each year. And, although the CC has carried out some investigations in important sectors such as groceries and airports, there are other sectors where competition has not appeared to have been working effectively but where for one reason or another a market investigation reference has not been seen as the appropriate way to address any such issues.

15. Nonetheless, over the eight-year period since the CC received its first market investigation reference, the CC has gained experience in operating the regime, which has enabled it progressively to refine its policies, practices and procedures. One important development, for example, has been the CC's practice of focusing its attention as early as possible in an investigation on what hypothetically may be preventing or hindering competition in the market. Developing these hypotheses—so-called 'theories of harm'—helps the conduct of the investigation both for the CC and for the parties by narrowing down the issues that have to be addressed and the information that has to be gathered. The CC has also had to develop new skills in designing and implementing remedies.

16. Procedures too have been—and continue to be—steadily improved. The CC and the OFT have looked at streamlining the market regime to make it a more effective and efficient tool, while maintaining the robustness of decision-making. In particular, the CC now aims to deliver market investigations within 18 months of the reference in all but the most complex cases, and to complete an investigation within 12 months if the issues are relatively focused. This has involved several changes to procedure, including an improved handover from the referring body; publishing an early issues statement setting out the framework for the analysis; conducting only one round of formal hearings ahead of publishing provisional findings; and exploring possible remedies options in step with developing theories of harm.

The work on new guidelines

17. The first edition of the CC's Market Investigation Guidelines¹ was drafted in 2003 without the benefit of any experience in conducting an investigation under the new statutory framework. Much has been learnt from the practical experience of conducting actual cases since then, and the CC intends to produce revised

¹CC3, *Market Investigation References: Competition Commission Guidelines*, June 2003.

guidelines which distil the lessons the CC has absorbed since the introduction of the new regime. The text that follows also draws on comments and suggestions stakeholders made during a consultation in the first half of 2010 on a prospective revision of the market investigation guidelines. Work on drafting the guidelines will continue with a view to conducting a public consultation on the full document towards the end of this year. However, many important sections of the draft guidelines—most notably on remedial action and market investigation procedures but also on analytical issues such as features and theories of harm—are sufficiently advanced that the CC has decided to issue a second call for comments upon them. Detailed textual comments from stakeholders, as well as observations on the CC's general approach, will be greatly appreciated and will be carefully considered in finalizing the consultation text.

Peter Freeman
April 2011

Introduction

1. Market investigations were introduced for the first time by the Enterprise Act 2002 (the Act). In June 2003, the CC published *CC3, Market Investigation References: Competition Commission Guidelines* as one of the series of documents which the CC is required to publish under section 171(3) of the Act. This document revises the June 2003 guidelines in the light of the experience the CC has gained in the analysis of markets and the conduct of investigations.

2. These guidelines are set out in five parts:
 - [Part 1](#) discusses the role of market investigations, including their place within the UK and EU competition regimes. It describes the way references are made to the CC and the statutory questions it must address, namely to determine whether or not there are features of the market subject to an investigation that have an adverse effect on competition (an AEC).
 - [Part 2](#) outlines how the CC interprets the key terms of ‘relevant market’, ‘AEC’ and ‘features’. It outlines the general approach the CC follows in applying the AEC test, including its use of hypothetical ‘theories of harm’. *[Further text in preparation will discuss how the AEC test is applied, the CC’s approach to market definition, how it establishes evidence that a market is not functioning well and how it tests particular ‘theories of harm’.]*
 - [Part 3](#) discusses the remedial action the CC may prescribe, if it has found there to be an AEC; this may include divestiture, behavioural remedies or recommendations for action by Government or other agencies.
 - [Part 4](#) outlines procedures and timescales for running a market investigation, both up to the final report and during the period in which the CC, if necessary, implements remedies.

- Part 5 will list the other publications of the CC and the OFT relevant to market investigations. *[Editorial note: to be prepared.]*

The [Annex](#) deals in detail with the design of remedies.

3. The CC will have regard to these guidelines in conducting market investigations. However, the assessment of markets is inevitably case-specific. It must take account of the particular aspects of the markets being analysed, and cannot be made in a rigid and mechanistic way. The CC will therefore pay due regard to the particular circumstances of a case, including the information available and the time constraints applicable, and will apply these guidelines flexibly, departing from them where it considers it right to do so.
4. Past case references are included for illustrative purposes only and do not constrain the CC's approach.
5. These guidelines reflect the views of the CC at the time of publication. Markets, economic theory, legal thinking and best practice evolve; the CC may revise the guidelines from time to time to reflect developments and may publish new or supplemental guidance.

Note on terminology

6. Throughout this publication:
 - all references to statute, unless otherwise stated, relate to the Enterprise Act 2002—referred to throughout as ‘the Act’—and all references to ‘section(s)’, unless otherwise specified, relate to the Act;
 - the term ‘referring body’ normally applies to the OFT but can also be applied to regulators with concurrent jurisdiction and to ministers;

- unless otherwise specified, the term ‘price’ is used as shorthand for all aspects of a supplier’s competitive offer;
- the term ‘customers’ includes ‘consumers’;²
- the term ‘products’ is used to apply to goods and/or services;
- the phrase ‘to harm’ competition is often used as shorthand for the language in the Act: to ‘prevent, restrict or distort’ competition.

Part 1: The role and origin of market investigation references

7. The market investigation regime operates alongside several other pieces of legislation regulating competition in markets in the UK. These include the prohibitions under Articles 101(1) and 102 of the Treaty on the Functioning of the European Union (TFEU)³ and Chapter I and II of the Competition Act 1998 (CA98)—on anti-competitive agreements, decisions by associations of undertakings, or concerted practices, or abuse of a dominant position in markets.⁴ The CC does not enforce these prohibitions, that responsibility lying with the European Commission, the OFT and certain (‘concurrent’) sectoral regulators (‘relevant authorities’).⁵
8. The market investigation regime operates effectively alongside these prohibitions. It allows the competition authorities to assess a market in which competition does not appear to be working well, where it is desirable to focus on the functioning of the market as a whole rather than on a single aspect of it or the particular conduct of firms within it. Market investigations also differ from investigations into breach of the

²See section 183(1).

³The relationship between Articles 101 and 102 TFEU and national competition law is provided for in Article 3 of Council Regulation 1/2003/EC. Where national competition authorities apply national competition law to agreements, decisions or concerted practices by associations of undertakings which fall within the scope of Article 101 or to conduct which falls within the scope of Article 102 they must also apply those articles to the agreements or practices. They must not take action which leads to the prohibition of anticompetitive agreements, decisions by associations of undertakings or concerted practices within the scope of Article 101 which are not prohibited under that article or which fulfil the conditions of Article 101(3) although they may prohibit or sanction conduct engaged in by undertakings which is not prohibited by Article 102. These provisions do not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102. The obligation to apply Articles 101 and 102 in parallel with national competition law arises at the remedies stage in a market investigation. It does not affect the CC’s powers of investigation.

⁴See also *The Chapter 1 Prohibition* (OFT401) and the *Chapter 2 Prohibition* (OFT402).

⁵The OFT, Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Director General of Water Services (Ofwat), the Northern Ireland Authority for Energy Regulation (OFREG NI), the Office of Rail Regulation (ORR) and the Civil Aviation Authority (CAA) all have concurrent powers to apply the prohibitions.

prohibitions in that they are forward-looking exercises, conducted in a non-adversarial fashion, in which the identification of anticompetitive features or imposition of remedies does not mean that market participants are suspected of having infringed the law.

9. A referring body will have considered the implications of a market investigation reference for any enforcement action that may be in contemplation or in progress in relation to infringement of the prohibitions before making the reference. Once a matter has been referred the CC will normally aim to complete the reference and impose any remedies that it considers to be required without referring matters back to the referring body. However, it is possible that the CC may acquire information in the course of a market investigation which it considers may assist a relevant authority to perform its functions in enforcing the prohibitions. In that event, the CC may pass the information to the relevant authority to enable it to consider whether, and if so when, to take any enforcement action relating to the prohibitions.

The making of references to the CC

10. The CC does not select markets for investigation. The referring bodies—the OFT, a sector regulator⁶ or a Minister⁷—make market investigation references to the CC when they have reasonable grounds for suspecting that competition is not working effectively.⁸
11. Before a case reaches the CC the referring body will have looked into the market in question, either on its own initiative or in response to a complaint, which may include

⁶See footnote 4.

⁷Section 132. Ministers have the ability to make market references as a reserve power; in addition to applying the same criteria set out in the Act for the making of a reference by the OFT or other referring body, ministers must either be dissatisfied with an OFT decision not to make a reference or they must be satisfied that the OFT is aware of whatever has led it to suspect that competition may be being harmed in a market, but is not likely to reach a reference decision within a reasonable period. As at April 2011, this power had never been used.

⁸As at February 2011, the OFT had been responsible for 9 of the 11 references made since the Act came into force.

a ‘super-complaint’ from certain designated consumer bodies.⁹ The Act¹⁰ allows the OFT to study markets that appear not to be working well for consumers. There is no statutory definition of a ‘market study’ but it was envisaged from the inception of the Act that the OFT should use market studies as a way to promote competition. The other regulators having powers concurrently with the OFT (see paragraph 7 and footnote 4) can also study markets coming within their purview. Where the market study suggests that markets are not working well, the referring body makes a judgement about what is the most effective way of addressing the problem. It may recommend legislation, or actions by consumers; it may proceed to investigate any suspected breaches of consumer protection legislation or the competition law prohibitions; and/or, where it has reasonable grounds for suspecting there are features which prevent, restrict or harm competition, make a market investigation reference.¹¹

12. Where a reference to the CC is made, the market study thus serves as the first phase in a two-phase investigation process.¹²

Public interest issues

13. Although market investigation references are generally only concerned with competition issues, in the first four months after a reference has been made, the Act allows ministers to ask the CC to consider the implications of its competition analysis for national security (or any other public interest consideration Parliament may in

⁹Section 11 of the Act allows a consumer body (acting collectively on behalf of consumers), that has been designated by Ministers, to make a ‘super-complaint’ to the OFT about features of a market that appear to be significantly harming the interests of consumers. See: www.offt.gov.uk/advice_and_resources/resource_base/super-complaints/ and www.offt.gov.uk/advice_and_resources/resource_base/market-studies/.

¹⁰Section 5.51. The Enterprise White Paper *A World Class Competition Regime* said that the OFT ‘should scrutinise markets to assess whether strong competition pressures are at work...in some case...it will need to refer the market to the Competition Commission for further study’.

¹¹See, for example, the OFT’s decision to refer local bus services to the CC: www.offt.gov.uk/shared_offt/reports/transport/OFT1158_Local_bus_services.pdf, paragraphs 5.37 & 5.38, and Ofcom’s decision to refer movies on pay TV.

¹²Three market investigations—*Market investigation into supply of bulk liquefied petroleum gas for domestic use*, 29 June 2006, (‘LPG’); *Home credit market investigation*, 30 November 2006; and *Personal current account banking services in Northern Ireland market investigation*, 15 May 2007 (‘Northern Irish personal banking’)—have been made to the CC without an intervening market study, the latter two emerging directly from super-complaints.

future identify) in the case. Correspondingly, in those four months, the CC is under a duty to bring to the attention of the Secretary of State any case that it believes raises a public interest consideration specified in the Act.¹³ (But it has not done so in any case before the issue of these guidelines.)

The statutory questions

14. During the course of a market investigation reference, the CC is required to decide:
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.¹⁴

15. If any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK, under the Act this constitutes an 'adverse effect on competition'.¹⁵ The CC uses the abbreviation 'AEC' for an adverse effect on competition and the term 'the AEC test' for the process of determining whether or not an AEC has arisen.

16. Where the CC decides that there is an adverse effect on competition, it is required to decide the following additional questions:¹⁶
 - (a) whether action should be taken by [the CC]... for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;

¹³Section 152(2).

¹⁴Section 134(1).

¹⁵Section 134(2).

¹⁶Section 134(4).

- (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

17. The following part of the guidelines describes and illustrates the CC's interpretation of the key terms of the Act and how it applies the AEC test.

Part 2: The AEC test

18. This part of the guidelines discusses the principles and techniques the CC applies in its analysis of competition in a market.
19. Its approach is broadly set by the terms of the Act (see paragraphs 14 to 16 above); the first section of the text describes and illustrates the key terms of 'relevant market', an 'AEC' and 'features'.
20. The second section deals with the CC's general approach to applying the AEC test in individual market investigations. It shows how, starting from the terms of reference from the referring body, the CC frames the assessment of competition around two overarching topics: the identification of the relevant market and the overlapping challenge of identifying features that might harm competition in that market. The section goes on to explain how hypothetical 'theories of harm' provide focus for an investigation and the principles by which they are tested.

[Editorial note: a third section is under preparation which will discuss the criteria and methodologies for the application of the AEC test (how markets are defined, how it is established that a market may not be functioning well and how particular theories of harm are tested).]

The key statutory terms

'The relevant market'

21. In referring a market for specified goods and services in the UK to the CC, the referring body outlines the market that it believes to be appropriate for investigation but does not in its terms of reference reach a conclusive view on the boundaries of a market. It is for the CC to consider what market or markets exist in connection with the supply or acquisition of the goods and services described in the reference, and to define the relevant market (s).¹⁷ *[Editorial note: market definition will be fully discussed in a section of the guidelines currently in preparation.]*

'AEC'

22. The CC sees competition as a process of rivalry between firms or other suppliers seeking to win customers' business over time by offering them a better deal.¹⁸ When this process of rivalry is harmed an AEC can arise.
23. Vigorous rivalry between firms is not only in the interests of customers—who benefit from the greater choice, value and quality competition brings—but also fosters economic growth. These beneficial effects arise partly as firms respond to competitive pressure by striving for efficiency and directing their resources to customers' priorities. Firms are encouraged in this way to meet the existing and future needs of customers as effectively and efficiently as possible; supplying the

¹⁷Section 134 ((1)–(3)). See also, for example, OFT guidance, *Market Investigation References* (OFT511).

¹⁸Other producers from which firms face competition might include non-commercial organizations, such as the Government.

products customers want rewards firms with a greater share of sales. Beneficial effects may also come from entry by new firms with innovative products, processes and business models, and the exit of less successful ones.

24. The CC interprets the phrase 'prevents, restricts or distorts' in the Act broadly, including within it any adverse effect on actual or potential competition.
25. Competition may be conducted on various fronts and firms may be competing simultaneously on not just one but several fronts. In one area, for example, the emphasis will be on achieving the lowest level of costs and prices so as to undercut competitors. In another firms may be using entrepreneurial and innovative skills to develop new products and services, exploit particular strengths, abilities or other advantages they hold and, by these means, meet consumer needs more effectively than can competitors. The nature of competition can affect the operation of a market and its effects on customers:
 - (a) Some of the benefits of greater competition may be felt in the short term: firms might respond quickly by cutting prices or reviewing input costs.
 - (b) Other effects may take longer to materialize: investments in new products or more efficient methods of manufacture, or the replacement of inefficient incumbents, may bring greater benefits overall, but these benefits are likely to be realized only over the longer term. Where enterprise and innovation are important factors, competition will often be characterized by uncertainty, turbulence and change.
 - (c) In some cases firms compete for a market opportunity, for example, by competing to be the first to claim a patent in a key area or to be the first to achieve scale in a new market. In these cases the process of rivalry in the early stages of a market may be driven in part by the prospect of advantages that insulate the winners from short-term competition later on.

How competition can be adversely affected

26. There are several circumstances in which the process of rivalry can be harmed and an AEC can arise. Broad headings under which some of these circumstances fall are set out below (see paragraphs 27 to 29). Barriers to entry or expansion are commonly found in many of these circumstances.
27. **High concentration.** Competition may not be effective if firms have few rivals. There may be little incentive to meet customer needs when those customers have few alternative suppliers they can turn to if dissatisfied, and there may be little point in investing in better products if a firm has few rivals from which it can take additional business. A firm may have few rivals if, for example:
- (a) economies of scale or network effects¹⁹ limit the number of firms in the market;
 - (b) the market could sustain more participants but, for example, government regulations prevent them coming into it; and/or
 - (c) it has access to a source of sustained advantage which makes it hard for others to compete.
28. **Weak customer response.** The incentives to offer better products at lower prices will be weak if the response of customers is muted. This might happen, for example, if customers have little information about their options or face high search costs, or if they are locked in to one supplier and cannot switch to alternatives without incurring costs.
29. **Weak supplier response.** Competition may not work well if suppliers do not respond to the choices customers make, or would make, for example because of tacit coordination between firms to avoid undercutting each other or because of the impact of

¹⁹Network effects arise when services are provided over a network or through a platform, where customers value the network or platform more highly when it is used by a greater number of other customers.

vertical relationships or contractual terms that make it costly to respond to competition to supply individual customers.

30. It is important that the CC identifies the sources of harmful effects in a market, and therefore the nature of the AEC and its likely timescale and duration so that it is in a position to devise appropriate remedies. It is equally important that the identification of an AEC is conducted without being conditioned by regard to possible remedies.

'Features'

31. An AEC can only arise if any 'feature, or combination of features, of a relevant market prevents, restricts or distorts competition'.²⁰The Act states that the following may be taken to be a 'feature' of the market:²¹
 - (a) the structure of the market concerned or any aspect of that structure;
 - (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
 - (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.
32. The Act does not require the CC to state whether particular features of a market are to be considered structural features or some aspect of conduct. It may not always be clear in which category the feature fits. Provided the relevant feature falls within at least one of these categories, the categorization is of little practical importance.
33. The concept of a feature is broad, allowing the CC the flexibility to investigate a wide range of candidate market features, each of which may have effects on competition, in both its static sense of price, cost and profit levels and its longer-term dynamic sense of experimentation with new ideas, innovation, differentiation and development

²⁰Section 134(2).

²¹Section 131(2).

of products and markets. Moreover, a feature does not by definition have to be the proximate cause of harm to competition; more distant harmful causes can also be features.

34. On receipt of a market investigation the CC makes no presumption that market features exist which harm competition. It has a broad range of issues to investigate, but nonetheless there could be cases in which a CC investigation found that no feature giving rise to an AEC existed in the referred market.
35. **Structural features.** Structural features may be found to include market shares, concentration, buyer power and entry barriers. Market concentration was identified as a feature, for example, in the market investigations into classified advertising services²² and the supply of groceries by retailers;²³ buyer power in the case of the supply of groceries investigation; common ownership in the case of BAA airports;²⁴ and barriers to entry in the cases of the supply of groceries and domestic bulk LPG²⁵ and the rolling stock leasing²⁶ investigations.
36. Structural features may also include less immediately obvious aspects of market structure such as government regulations and information asymmetries. Features identified in the BAA airports investigation included aspects of the planning system, government policy and the regulatory system for airports. The planning regime was also identified as a feature in the grocery retailing market, and the current criteria supplied for the award of franchises in the rolling stock leasing market were found to

²²*Classified Directory Advertising Services market investigation*, 21 December 2006.

²³*The supply of groceries in the UK market investigation*, 30 April 2008.

²⁴*BAA airports market investigation: A report on the supply of airport services by BAA in the UK*, 19 March 2009.

²⁵*Market investigation into supply of bulk liquefied petroleum gas for domestic use*, 29 June 2006.

²⁶*Rolling Stock Leasing market investigation*, 7 April 2009.

be features. Information asymmetries were a feature identified in the home credit markets.²⁷

37. **Conduct features.** Conduct features include the conduct of all participants in the market. As stated in the Act, conduct includes any failure to act, whether intentional or not and any other unintentional conduct. Conduct features identified in past investigations include: a failure of Northern Irish banks sufficiently to explain their charging structures and practices for personal current accounts;²⁸ and the failure of distributors and intermediaries in the market for payment protection insurance (PPI) to try to win customers by setting competitive price or quality levels for their policies.²⁹
38. The behaviour of customers can sometimes limit competition between firms, and conduct features can include such behaviour. Market investigations allow the competition authorities to look at consumer behaviour in relation to its implications for competition, as well as or instead of looking at it as a consumer protection issue. The insensitivity of customers to measures of price other than the level of weekly repayment was found to be a feature of the home credit market.³⁰ Similarly, the low sensitivities of customers to store card APRs³¹ and late payment charges were identified as features of store card credit services.³² A customer feature—failure to investigate alternative accounts or banks—was also found in the market for personal current accounts in Northern Ireland.³³
39. The conduct of firms which supply the market when acting in other markets can also be a feature of the market. For example, if the market investigation concerned com-

²⁷*Home credit market investigation*, 28 April 2006.

²⁸*Personal current account banking services in Northern Ireland*, 15 May 2007.

²⁹*Market investigation into payment protection insurance*, 29 January 2009.

³⁰*Home credit*, op cit.

³¹Annual Percentage Rate of the Total Charge for Credit.

³²*Store cards market investigation*, 7 March 2006.

³³*Northern Irish personal banking*, op cit.

petition to supply a particular manufactured good, the conduct of vertically integrated suppliers in the market for the input might be a feature.

A combination of features

40. In some circumstances, several candidate features may in combination harm competition. In the PPI investigation,³⁴ for example, features were found that encompassed aspects of both structure and conduct and together explained the underlying causes of the AEC. Competition was found to be adversely affected by several interconnected features, including barriers to search and switching, which hindered customers' ability to compare PPI policies or to switch to alternatives. Barriers to search included product complexity, the perception that taking PPI would increase a customer's chances of being given credit, the bundling of PPI with credit and the limited scale of stand-alone provision. Barriers to switching included contract terms which made switching expensive or which risked leaving customers uninsured.

The application of the AEC test: the CC's general approach

41. The CC's conduct of the AEC test is framed around the two interrelated topics of:
- the identification of the relevant market (or markets) within which competition may be harmed; and
 - the assessment of whether there are features that harm competition; if the CC finds there are candidate features that harm competition in the relevant market, and that some of these satisfy the conditions given in section 131(2) of the Act (see paragraph 31), the CC will consider whether these give rise to an AEC.
42. The **terms of reference** from the referring body describe the goods or services for whose supply or acquisition competition may be harmed and will indicate the feature or features that it believes may be the cause of this harm. The reference may also

³⁴Payment protection insurance, op cit.

require the CC to confine its investigations to the place where the goods and services are supplied or acquired, or the persons by or to whom they are supplied or by or from whom they are acquired.³⁵ However, within the terms of the reference, it will be for the CC to reach its own conclusions on the definition of the referred market and whether there are any adverse effects on competition. If it decides there is an AEC, the CC may base its conclusion on different features from any identified by the referring body.

43. The two issues of market definition and competition assessment are not approached as distinct chronological stages but as overlapping and continuous parts of the analysis. For example, the CC may take an initial view about the scope of the relevant market, but the analysis of competition may suggest that this initial view of the market was either too broad or too narrow.

Theories of harm

44. The CC's core task in the AEC test is to assess the effects of candidate features on competition. The emphasis on the effects of features means that any AEC finding will be grounded in a clear understanding of why competition is not working well (see paragraph 30). To structure and focus this assessment the CC sets out, as early as possible, theories of harm—a term of art used broadly in competition policy carrying no presumption that there are necessarily features in the market that harm competition. Theories of harm are hypotheses as to what might be impairing the efficient operation of the market that try to link the available facts of a case to possible outcomes. Constructing the theories involves identifying the market (initially a candidate market) and those candidate features of that market most likely to be the focus of the analysis and postulating how these might affect competition.

³⁵Section 133.

45. Focusing the investigation on theories of harm in this way facilitates the conduct of the investigation both for the CC and for the parties by narrowing down the issues that have to be addressed and the information that has to be gathered.³⁶

Formulating and refining theories of harm

46. The starting point for formulating theories of harm is the terms of reference (see paragraph 42), in which the referring body will have described the products it thinks are affected and the features it thinks may be the cause of harm to competition. The CC will generally hypothesize a theory of harm arising from these products and features. However, it may also formulate other theories involving other features.
47. The theories are kept under review as the investigation proceeds. Although the CC will aim at the outset of an investigation to focus on those features that are likely to have a significant effect on competition, this is not always clear. At this early stage, the candidate features may often be described in broad, generic terms. But, as further evidence emerges and as submissions made to the CC are developed, the theories will be refined and revised. Some candidate features will be dropped and others put forward. Nonetheless, the goal of the theories will remain to focus the CC's resources on the most important issues, grounding its investigation firmly in the facts and enabling parties to contribute effectively to the investigation.
48. The CC may consider several theories of harm, sometimes affecting the same market and involving some of the same candidate features.³⁷

³⁶Although theories of harm have guided the CC's work for some time, explicit reference to them has been made only in the most recent cases (as at April 2011). The issues statement of 4 February 2010 in the investigation into local bus services listed nine theories of harm, including theories derived from barriers to entry, supplier behaviour and aspects of the tendering and bidding systems. A published working paper for the investigation into movies on pay TV, set out the theory of harm on which that investigation was at that time focusing.

³⁷As noted in the footnote to paragraph 45, the issues statement of 4 February 2010 in the investigation into local bus services listed nine theories of harm.

49. In analysing whether competition is not working well, the CC may consider not only candidate features that may be direct causes of potential harm (for example, high concentration) but also features that explain how these direct causes have arisen or are maintained (see paragraph 33). For example, high concentration may be the result of network effects or economies of scale (as indicated in paragraph 27); for a detailed example, drawn from the PPI investigation, see paragraph 40.

50. The theories of harm considered by the CC in an investigation will inevitably depend on the detailed facts of the case and no exhaustive list of possible theories can be given. There are many circumstances in markets from which theories of harm may be developed, some of which may lead to a finding that there are features of the market giving rise to an AEC. However, one or more of the three broad market circumstances identified above (see paragraphs 27 to 29) as being potentially harmful to the process of rivalry are the sources for many theories of harm.

Testing a theory of harm

51. In assessing a theory of harm an important part of the CC's investigation will be to gather and review evidence on the way the market operates, and the impact various candidate features have on the market's operation. The CC will consider whether this evidence demonstrates that any of the candidate features, or any combination of them, can be expected to harm competition, compared with a situation where the candidate feature or combination was not present.

52. The CC may also, but need not, consider direct evidence about the effectiveness of competition in the market. Such evidence may include, for example, an analysis of profitability.

- *Range of analysis*

53. In its analysis of whether there is an adverse effect on competition the CC will consider all relevant aspects and dimensions of competition. It will often assess the incentives firms have to offer better terms to customers and to strive for efficiency, and invest in better ways of operating and in improved products and services (see paragraph 25).
54. Whatever forms the process of rivalry takes, the CC will always consider its effects over time and how rivalry may be expected to develop.
55. The CC may also consider the broader evolution of competition over time. The prospect of gaining a lasting advantage over rivals can be a spur to competition, and the CC may in some circumstances consider whether it is sensible to assess the impact on *competition for the market* as well as, or rather than, within the market (see paragraph 25(c)).

- *Consideration of efficiencies*

56. Efficiencies will enter the CC's investigation as potential relevant customer benefits (RCBs) when remedies are being considered (see paragraphs 95 to 107). Efficiencies may also be considered as part of the AEC test.
57. In assessing whether candidate features harm competition in a market the CC may take into account not only the direct effects that might limit competition, but also the effects on competition of any efficiencies to which those candidate features give rise. For example, access to a superior technology that gives one firm lower production costs may harm competition by reducing the pressure on the firm to cut costs further. However, the same feature can increase the incentives on the firm to offer better

terms to customers in the short term, and make it a more effective rival to others in the market.

58. The CC will consider the overall effect of a feature on competition within a particular market. As a result beneficial effects on competition may offset harmful effects on competition only when they occur in the same market. The effect of an efficiency in a different market may, however, be considered as an RCB when considering remedial action (see paragraphs 95 to 107). For example, vertical agreements with exclusive territory provisions can limit competition between distributors. On the other hand, they may make competition between the upstream manufacturers more intense, but because this effect is in a different market to the downstream distributors, the efficiency can only be considered at the remedy stage.

- *Quantitative and qualitative evidence*

59. In analysing the effects on competition of candidate features in the market, the CC may apply a variety of techniques, both quantitative and qualitative. The extent to which the CC will seek to quantify particular effects—and the degree of precision with which such quantification is attempted—is likely to vary from case to case. The CC will only carry out quantitative analysis that it considers necessary or proportionate to the need to reach a decision on the statutory questions. Relevant considerations in determining the extent and nature of quantification that the CC will carry out in a particular case may include:

- (a) The scale of any particular effect. If it is clear from an initial assessment that a particular effect is unlikely to be material, it may not be necessary to quantify its magnitude with much precision to reach a view about the scale of any harm to competition.
- (b) The extent to which it is possible to quantify a particular effect with any degree of accuracy. In general, it is likely to be more straightforward to quantify effects on

prices in the shorter term than to quantify the longer-term effect of candidate features on dynamic and non-price competition.

The AEC test: methodologies

60. The following sections of the guidelines describe the methodologies the CC applies in determining what is the relevant market, whether there is evidence that the market is not working well (including by analysing profitability) and in testing the particular theories of harm that have been postulated. The CC has inevitably to apply a degree of judgement in doing so, and judgements cannot be finally made until relevant evidence has been taken into account and the CC is able to form a robust understanding of why competition is not working well.

[Editorial note: the following sections are under preparation:

- *Market definition.*
- *Evidence that a market is not working well.*
- *Testing particular theories of harm.]*

Part 3: Remedial action

61. When identifying and implementing a remedy to an AEC the CC may have to intervene directly in the structure of established markets and/or address the conduct of firms and their customers. Identification of the right remedy is highly dependent on the facts and context of the investigation and requires the exercise of fine judgements by the group conducting the reference.³⁸ The starting point for the CC's remedies assessment is its finding of features that give rise to an AEC and the related findings of fact. More broadly, the CC will have developed, through the course of its investigation, a detailed understanding of the market and an appreciation of the way in which it is capable of working.

³⁸See paragraph 133, for information on groups.

62. In choosing a remedy the CC will normally have to consider the interaction of a range of factual and economic considerations relevant to the development of a more competitive market. In doing so, it will seek to minimize the scope for unintended consequences and to take account of interactions between the market (or markets) in which an AEC is found and other markets, as well as the timescale over which remedies will have effect.
63. This part first sets out the framework for consideration of remedies. It then provides an overview of the different types of remedy and their characteristics before setting out some of the main considerations that go into the selection of remedies from the options available. A more detailed discussion of particular types of remedy is included in the [Annex](#).

Framework for consideration of remedies

The remedy questions

64. Where the CC decides that there is an adverse effect on competition, it is required to decide the following additional questions:³⁹
- (a) whether action should be taken by [the CC]... for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;
 - (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and

³⁹Section 134(4).

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

65. A detrimental effect on customers is defined as one taking the form of:⁴⁰

(a) higher prices, lower quality or less choice of goods or services in any market in the UK (whether or not the market to which the feature or features concerned relate); or

(b) less innovation in relation to such goods or services.

66. Whether action should be taken therefore involves consideration both of the action the CC can take and the action the CC can recommend others to take. Action can be taken by the CC itself through its order-making powers or through accepting undertakings from the parties (see paragraphs 174 and 175). Alternatively or in addition, the CC may recommend that remedial action should be taken by others, such as government, regulators and public authorities. Such recommendations do not bind the person to whom they are addressed, although the Government has committed to respond to any recommendation within 90 days of publication of the CC's final report.⁴¹ When deciding on certain remedial actions in regulated sectors the CC has to have regard to the relevant statutory functions of the sectoral regulator concerned.⁴² Whether taking action itself or making recommendations to others, the CC must state the action that should be taken and what it is designed to address.

67. In practice, the CC may decide to take several discrete actions itself and/or make several discrete recommendations. This combination of measures is often referred to as a package of remedies. Unless otherwise specified, reference to a remedy or a

⁴⁰Section 134(5). The reference to customers includes future customers.

⁴¹The Enterprise White Paper, *A World Class Competition Regime*, Department of Trade and Industry, July 2001 Cm 5233, p12.

⁴²Section 168.

remedy option in this section encompasses the package of actions the CC is taking and/or recommending.

68. The Act requires the CC, in considering these questions:

in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition.⁴³

69. When deciding whether any remedial action should be taken and, if so, what that action should be, the CC will consider how comprehensively possible remedy options address the AEC and/or its detrimental effects, and whether they are reasonable and practicable.

A comprehensive solution to the AEC and/or detrimental effects

70. Remedies can remedy, mitigate or prevent the AEC or its detrimental effects on customers. The clear preference of the CC is to deal comprehensively with the cause or causes of AECs wherever possible, and by this means significantly increase competitive pressures in a market within a reasonable period of time.

71. Adverse effects on competition are likely to result in costs to the UK economy in general and to customers in particular. Remedies that are effective in generating competition in markets are likely to deliver substantial benefits, by driving down prices and costs and increasing innovation and productivity and thereby increasing the quality and diversity of choice available to customers.

⁴³Section 134(6).

72. In deciding what action to take, the CC will typically consider whether tackling some or all of the features it has identified (see paragraphs 31 to 40) will remedy, mitigate or prevent the AEC. In some situations, for example where an AEC arises from a combination of features, it may be necessary to devise a package of complementary remedies to address the AEC. Conversely, the remedy that is ultimately selected need not directly address every feature identified.
73. Where it is not feasible for the CC to introduce measures which transform the functioning of markets by introducing more competition, the CC will consider introducing measures which mitigate the harm to consumers created by competition problems.⁴⁴ Such measures to control outcomes may be able to mitigate the harm to customers associated with high prices, for example, but are unlikely to generate the dynamic benefits, such as innovation, that are normally associated with competitive markets. These measures are therefore likely to represent a less comprehensive remedy to the adverse effect on competition and any detrimental effects.

Effectiveness and practicability

74. The CC will assess the extent to which different remedy options are likely to be effective in achieving their aims including whether they can be made to work in practice (ie whether they are practicable).
75. The effect of any remedy is always uncertain to some degree. In evaluating the effectiveness of potential remedies, the CC will consider the risks associated with different remedy options and will tend to favour remedies that have a higher likelihood of achieving their intended effect. Assessing the effectiveness and practicability

⁴⁴Section 138(6). However, the CC is prevented from taking action to address future detrimental effects on customers if no detrimental effects on customers currently exist and the CC is not remedying the AEC (that is, the source of the problem).

of a remedy may involve consideration of several dimensions discussed further below.

76. First, a remedy should be capable of effective implementation, monitoring and enforcement. To facilitate this, the operation and implications of the remedy need to be clear to the persons to whom it is directed and also to other interested persons. Other interested persons may include customers, other businesses that may be affected by the remedy, sectoral regulators, and the OFT (and/or any other body) which has responsibility for monitoring compliance. The effectiveness of any remedy may be reduced if elaborate monitoring and compliance programmes are required. Remedies regulating behaviour generally have the disadvantage of requiring ongoing monitoring of compliance and may constrain beneficial aspects of competitive rivalry.
77. Second, the timescale over which a remedy is likely to have effect will be considered. The CC will generally look for remedies that prevent an AEC by extinguishing its causes, or that can otherwise be sustained for as long as the AEC is expected to endure. The CC will also tend to favour remedies that can be expected to show results within a relatively short time. Some remedies will have an almost immediate impact while the effects of others will be delayed.
78. The CC will consider whether to specify a limited duration—for example, by means of a long-stop date in a ‘sunset clause’—for individual measures, where these are designed to have a transitional effect.⁴⁵ This might occur if the CC expects an AEC to be time-limited, for example because a specific future event is expected to bring it to an end, or if a particular element of a remedy package is intended to be a temporary arrangement to deliver improvements in the short term, while other longer-term measures take effect. However, the period used for any long-stop or review date will

⁴⁵For example, in the report on *Veterinary Medicines* (April 2003) under the Fair Trading Act 1973, the package of remedies included an obligation on veterinary surgeons not to charge for writing prescriptions for a period of three years.

depend on the circumstances of the case. The duration of an AEC, in the absence of an intervention by the CC, cannot normally be predicted during the course of an investigation and there will normally be some uncertainty about the precise timescale over which remedies will take effect. For these reasons, the CC will generally rely on parties applying for variation or cancellation of remedies on the basis of a change of circumstances⁴⁶ or possibly recommend that the OFT reviews the need for particular measures at some future date.⁴⁷ Alternatively, the OFT might identify a change of circumstances following a review conducted on its own initiative.

79. Third, remedies may need to take account of other legislation applying to the parties or that is expected to be introduced in the near future. Such other legislation may include competition legislation or other relevant laws or regulations (eg health and safety, data protection). Where there is a tension between existing laws or regulations and the actions that the CC considers necessary to achieve an effective remedy, the CC may make recommendations to the body responsible for the laws or regulations in question.
80. Fourth, where more than one measure is being introduced as part of a remedy package, the CC will consider the way in which the measures are expected to interact with each other. As a general rule, measures which have a shared aim of introducing, or strengthening competition within a market will tend to be mutually reinforcing. For example, where market opening measures are being introduced that increase customer choice by facilitating entry or removing barriers to switching, these may be

⁴⁶For example, in 2011, the CC has made minor changes to the Orders for *Store cards* and *Home credit* (July 2006 and September 2007, respectively) and more substantial changes to the *Northern Ireland Personal Current Account Banking Order* (2008), following the introduction of new European Directives.

⁴⁷For example, in the 2002 report on *The supply of banking services by clearing banks to small and medium-sized enterprises* (SMEs) under the Fair Trading Act 1973, the CC recommended that, three years after implementation of the remedies, the OFT should review whether further measures were needed or, on the other hand, in the light of market developments, whether any or all of the measures in the CC's package of remedies could be modified or discontinued. Following a review by the OFT, the CC decided in 2007 to release the UK's four largest clearing banks from most of the Transitional Undertakings given by them in 2002.

accompanied by information remedies that help customers choose the best product available to them.⁴⁸

Reasonableness and proportionality

81. The CC will consider the reasonableness of different options to remedy an AEC and/or resulting customer detriment. In doing so the CC will have regard to the proportionality of different remedy options.
82. The CC's assessment of proportionality will depend on the particular facts and circumstances of the case. It often depends on what other remedy options are also being considered and on judgements about the respective merits of each option, including whether or not a remedy option is likely to be effective in practice.
83. In making an assessment of proportionality, the CC is guided by the following principles. A proportionate remedy is one that:
 - (a) is effective in achieving its legitimate aim;
 - (b) is no more onerous than needed to achieve its aim;
 - (c) is the least onerous if there is a choice between several effective measures; and
 - (d) does not produce disadvantages which are disproportionate to the aim.⁴⁹
84. Applying these principles to the circumstances of particular cases will involve consideration of remedy options relative to each other and also relative to taking no action.

⁴⁸For example, the packages of remedies in the market investigations into *Home credit* (November 2006), *Liquefied petroleum gas* (June 2006) and *Payment Protection Insurance* (January 2009) each included a combination of market-opening measures and information remedies.

⁴⁹These principles have been referred to by the Competition Appeal Tribunal (CAT) in the judgment on *Tesco v CC* (4 March 2009) and the PPI appeal (*Barclays and others v CC*, 16 October 2009). See *Tesco* judgment, paragraph 137:

A useful summary of the proportionality principles is contained in the following passage from the judgment of the ECJ in Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023, paragraph [13], to which we were referred by the Commission: 'By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'.

85. The CC will apply these principles to the evaluation of individual measures within a package of remedies as well as to the package taken as a whole. The CC will seek to ensure that each element of a package of remedies contributes to remedying the AEC and/or resulting customer detriment and that the design of individual measures is no more onerous than is necessary to achieve their aim.
86. Where the CC is considering whether to modify licence conditions in a regulated sector would be proportionate it will have regard to the relevant statutory functions of the regulator concerned.⁵⁰

Judging the impact of remedies

87. In reaching a judgement about whether to proceed with a particular remedy, the CC will consider its potential effects—both positive and negative—on those persons most likely to be affected by it. The CC will pay particular regard to the impact of remedies on consumers. The CC will also have regard to the impact of remedies on those businesses subject to them and on other affected parties, such as other businesses (eg potential entrants, or firms active in upstream or downstream markets), government and regulatory bodies, the OFT and other monitoring agencies.
88. The CC will explain what effects it expects to result from a remedy option and will form a view of their significance. As in its assessment of competition in a market (see paragraph 59), the CC may take into account a variety of evidence and use a variety of techniques—both qualitative and, where appropriate, quantitative—to analyse effects of remedy options.
89. The extent to which the CC will seek to quantify particular effects of remedies—and the degree of precision with which such quantification is attempted—is likely to vary

⁵⁰Section 168.

from case to case. The CC will not carry out quantitative analysis that it considers unnecessary or otherwise not justified by the need to identify a remedy that meets the statutory tests. The general principles the CC follows in its use of evidence are set out in paragraph 59.

90. The CC will consider the potential beneficial effects of its interventions. In considering how markets may develop with remedies in place, the CC will consider both benefits that are relatively easy to quantify (such as lower prices) and benefits that are more difficult to quantify (for example, the dynamic benefits of increased rivalry on productivity and innovation). Both are important. The more an AEC reflects longer-term and structural problems within a market, the greater the significance the CC is likely to accord to the long-term development of competition in the market and to the less quantifiable consequences of an improvement in the competitive pressures in the market.⁵¹ Conversely, if addressing the AEC requires a remedy focused on achieving relatively predictable changes to outcomes in the shorter term, then quantification of these changes is more likely to be a material aspect of the CC's assessment of the beneficial effects of the remedy.

91. Similarly, the CC will consider the potential negative effects of a remedy including the costs to business. Such negative effects may arise in various forms, for example:

(a) A remedy may result in unintended distortions to market outcomes. This is more likely to be the case where behavioural remedies are used which intervene directly in market outcomes, especially over a long period. Such distortions may adversely affect the economic interests of consumers and reduce economic efficiency.

⁵¹For example, in the *BAA airports* market investigation (March 2009), the CC concluded that the main benefits from the divestitures of Gatwick and Stansted airports would result from the dynamic aspects of competition, for example in relation to the delivery and allocation of airport capacity. While it was not possible to quantify the benefits of divesting these airports, given among other things the interaction with the regulatory regime, the CC was confident that the expected benefits would outweigh the costs of divestiture.

- (b) A remedy may result in implementation costs (for example, modifying a distribution system), ongoing compliance costs (for example, providing the OFT with periodic information on prices), and monitoring costs (for example, the costs of the OFT or other agencies in monitoring compliance). The CC will normally collect information from parties about the potential cost of implementing and complying with its remedies. In evaluating such information, the CC will bear in mind that it has less information than the parties have about how such potential costs have been estimated and that there might be incentives for parties to overstate the cost of those remedies that they do not support. The CC is likely to place most weight on estimates of implementation and compliance costs where parties have provided a clear explanation of how the estimate was reached, together with supporting evidence as to the assumptions used to derive those estimates.
- (c) If remedies extinguish RCBs, the amount of RCBs foregone may be considered to be a relevant cost of the remedy (see discussion of RCBs, paragraphs 95 to 107).

92. To avoid imposing unnecessary burdens on business, the CC will seek to ensure that its remedies are no more onerous than is necessary to remedy the AEC it has identified. In selecting and designing remedies, the CC will also have regard to the potential for more competitive markets to create profitable opportunities for new and innovative competitors as well as the cost of remedial measures on established businesses. However, where businesses have been found to be earning profits in excess of their cost of capital as a direct result of a feature of the market, and are likely to continue to do so in the absence of intervention, the CC will not usually give any significant weight to the anticipated reduction of such profits as a negative effect of a remedy.

Possible remedy outcomes

93. In reaching a decision on what remedial action to take, the CC will (as stated above) take into account several factors including comprehensiveness, practicability and reasonableness.
94. The CC will seek a comprehensive solution to the AEC and resulting consumer detriment. In so doing, it will have regard to the need for the solution to be both reasonable and practicable. A consequence of balancing these considerations is that there may be circumstances where the CC judges, for example on the basis of considerations of proportionality, that it should not pursue a remedy option that is potentially available to it. There may also be rare cases where the CC chooses not to take any remedial action, for example:
- (a) Where there are no practicable remedy options available to the CC, including any possible recommendations to others.
 - (b) Where the cost of each practicable remedy option is disproportionate compared with the extent that the remedy option resolves the AEC. This might be the case, for example, if the market in which the AEC was found was small in relation to the costs of each practicable remedy option and/or if it was only practicable to mitigate some of the negative consequences of an AEC and the costs of doing so were prohibitively high.
 - (c) Where RCBs accruing from the market features are both large in relation to the AEC and would be lost as a consequence of any practicable remedy (see paragraphs 95 to 107).

Relevant customer benefits

95. The CC, in deciding the question of remedies, may in particular 'have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned'.⁵²
96. It would normally be expected that market features that adversely affect competition would have detrimental effects on customers. For example, one usual consequence of a failure of competition is that prices will be higher than they would be in a more competitive market. Nevertheless, it is possible, in certain situations, that features that adversely affect competition could result in beneficial effects on customers (but see paragraphs 56 to 58 on efficiencies).
97. RCBs are limited to benefits to relevant customers in the form of:⁵³
- (a) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or
 - (b) greater innovation in relation to such goods or services.
98. The Act provides that a benefit is only an RCB if the CC believes that:
- (a) the benefit has accrued as a result (whether wholly or partly) of the feature or features concerned or may be expected to accrue within a reasonable period of time as a result (whether wholly or partly) of that feature or those features; and
 - (b) the benefit was, or is, unlikely to accrue without the feature or features concerned.⁵⁴

⁵²Section 134(7).

⁵³Section 134(8)(a).

⁵⁴Section 134(8)(b).

99. In considering potential RCBs, the CC will therefore need to ascertain that the market feature(s) with which it has been concerned does, or is likely to, result in lower prices, higher quality, wider choice or greater innovation, and that such benefits are unlikely to arise in the absence of those features. The CC will tend to disregard proposed RCBs that are purely speculative, might only arise at some time in the distant future or are otherwise uncertain or unsubstantiated. RCBs may include benefits to customers in the market in which the CC has found an AEC and to customers in other markets within the UK,⁵⁵ provided these benefits meet the criteria set out in paragraph 98.

Possible relevant customer benefits

100. Whether a particular effect of a claimed benefit to customers is found to be an RCB will depend on the facts of the case and the characteristics of a particular market. In the following paragraphs, examples of possible RCBs are given. In all instances the CC will need to consider whether the criteria set out in paragraphs 97 and 98 are met.

101. Aspects of market structure that could adversely affect competition, such as a high level of concentration, might enable economies of scale to be obtained that would not be available if there were a larger number of firms in the market. Scale economies would only be of benefit to customers if they meant that the customer offer would be superior than if there were more firms competing in the market. Whether scale economies would constitute an RCB in a particular case would therefore depend partly on the extent to which, in practice, any cost economies were being passed on to customers as lower prices, improved quality, greater innovation or more choice.

⁵⁵For example, in the *Payment Protection Insurance* market investigation (January 2009), the CC found that credit prices, and credit cut-off scores, were lower than they otherwise would be because of PPI income generated at the credit point of sale and that this was an RCB.

102. Generally, customers are unlikely to enjoy any benefits as a direct result of entry barriers. However, some entry barriers may indirectly secure other kinds of benefit. For example, regulations that limit entry to persons of proven competence or with adequate capital resources may lead to an improvement in product or service quality. Likewise regulations that protect intellectual property rights, while potentially restricting access to markets, may lead to improvements in innovation by enabling innovative companies to benefit from the new ideas that they generate. The CC will generally have regard to the wider purpose of such regulations in considering their effects on customers. In the absence of clear, countervailing customer benefits from a restriction of entry, the CC would normally expect customers to benefit from any reduction of entry barriers as this would be expected to facilitate the dynamic process of rivalry, which drives competition and better outcomes in markets.
103. Vertical integration and vertical agreements ('vertical relationships') can have beneficial effects through the better coordination of activities at different stages of the supply chain and savings in transaction and inventory costs. With vertical integration, this is achieved by internalizing activities which would otherwise be carried out in separately owned businesses. With vertical agreements it is achieved by a closer alignment of the incentives of, say, the supplier and its distributor, towards the achievement of complementary objectives. Vertical relationships within a supply chain may also help to resolve the free-rider problem⁵⁶ in markets where suppliers need their distributors to incur certain necessary costs if advice and other pre-sale services are to be provided on a sustained basis.
104. Where an AEC has arisen from vertical relationships within a market the CC will consider whether these relationships have resulted in RCBs and whether these

⁵⁶Free-rider problems exist where other parties benefit from the provision of a good or service without paying for its provision.

RCBs would outweigh any foreclosure or competition-dampening effects on customers.

105. Many forms of business conduct can similarly have ambiguous effects. Tie-in sales or product bundling, for example, may sometimes be convenient to customers, reduce transaction costs or provide quality assurance. Where an AEC has arisen from such conduct the CC will consider whether these relationships have resulted in RCBs and whether these RCBs would outweigh any foreclosure or competition-dampening effects on customers.

Relevant customer benefits and remedies

106. If the CC is satisfied that there are RCBs deriving from a market feature that also has adverse effects on competition, the CC will consider whether to modify the remedy that it might otherwise have imposed or recommended. The CC will consider several factors including the size and nature of the expected RCB, what proportion of the benefit will be preserved through the modification, and how long the RCB may be sustained. The CC will also consider the different impacts of the features on different customers or groups of customers. It is possible that the RCBs are of such significance compared with the effects of the market feature(s) on competition that the CC will decide that no remedy is called for if remedies are unable to preserve RCBs whilst effectively addressing the AEC and/or the resulting consumer detriment. Given, however, that the CC will have found adverse effects on competition this is likely to be unusual and this has not happened to date on a market investigation.
107. Alternatively, the CC, as a result of identifying RCBs, may choose a different remedy, for example a behavioural remedy rather than a structural remedy (see paragraph 109 for an explanation of this distinction). In this case, the CC will have to weigh the

disadvantage of a less comprehensive solution to the competition problem against the preservation of the RCBs that result from the feature concerned.⁵⁷

Choice of remedy

108. Paragraphs 109 to 118 provide an overview of the various types of remedy and their characteristics. Paragraphs 119 to 129 consider the selection from these types of remedy by applying the decision framework (outlined in paragraphs 64 to 107).

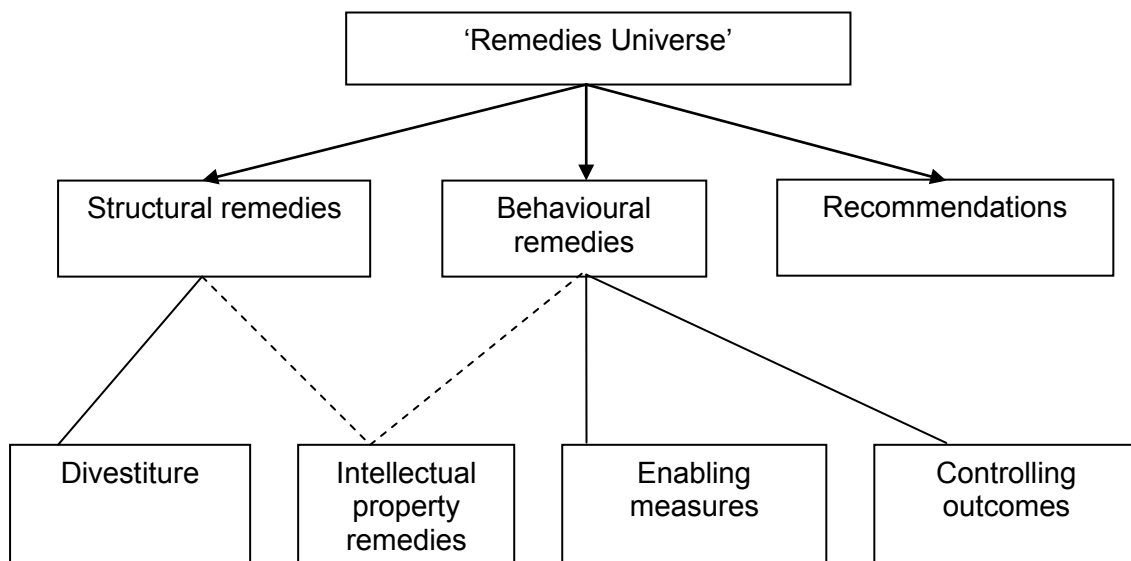
Remedies universe

109. A diagrammatic representation of the universe of possible remedies is shown below. Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off measures that seek, in market investigations, to increase competition by altering the competitive structure of the market. Behavioural remedies are generally ongoing measures that are designed to regulate or constrain the behaviour of parties in a market. Some remedies, such as those relating to access to intellectual property rights, may have characteristics of structural or behavioural remedies depending on their particular formulation. Likewise, recommendations to others may be either structural or behavioural in nature, depending on their content. Further discussion of the different categories of remedy may be found in the [Annex](#).

⁵⁷For example, in the [Macquarie UK Broadcast Ventures/National Grid Wireless Group](#) merger inquiry (March 2008), the CC required the merged company to agree a package of measures with the CC, including price reductions for customers on new and existing contracts and the appointment of an adjudicator to resolve disputes. The CC decided that these measures would be effective in addressing the adverse effects of the acquisition, whilst preserving the RCBs that could arise from the acquisition, including reducing the risks associated with the digital switchover process and passing back cost savings to customers.

FIGURE 1

Overview of the universe of possible remedies



Divestiture

110. The aim of divestiture in market investigations is to address competition problems resulting from structural features of a market.⁵⁸ This may be done by either creating a new source of competition through disposal of a business or assets to a new market participant, or by strengthening an existing source of competition through disposal of a business or assets to an existing participant that is independent of the divesting party (or parties).

111. A successful divestiture will address at source the lack of rivalry resulting from structural features of a market. Divestiture remedies will generally not require detailed ongoing monitoring beyond the completion of the disposal of the business or assets in question, although, in some cases, an effective divestiture may require supplementary behavioural measures for an interim period (eg to secure supplies of an essential input or service from the divesting party to the divested business). The

⁵⁸For example, in the *BAA airports* market investigation (March 2009), the CC required the divestiture of Gatwick and Stansted airports and a Scottish airport as part of its package of remedies.

requirements for design and implementation of divestiture remedies are considered in detail in the [Annex](#).

Intellectual property remedies

112. A remedy that provides access to intellectual property (IP) by licensing or assignment of those rights may be viewed as a specialized form of divestiture remedy.⁵⁹ The aim of such a remedy is that the party or parties acquiring the IP rights should thereby be able to compete effectively with other companies in the market. Where the terms of an IP remedy result in a material ongoing link between the original owner of the IP and the parties gaining the IP (eg providing access to new releases or upgrades of technology) an IP remedy may take on some of the characteristics of a behavioural commitment, which may require ongoing monitoring and enforcement. Considerations regarding the design and implementation of IP remedies are outlined in the [Annex](#).

Enabling measures

113. Certain forms of behavioural remedy operate principally to enable competition by removing obstacles to competition or stimulating actual or potential competition.

114. Within the category of enabling measures, there are further distinctions between:

(a) market-opening measures, which are intended to open up a market to new sources of competition by removing or reducing barriers to entry, expansion or switching. Such measures may, for instance, limit parties' ability to require their customers to enter into long-term or exclusive contracts or to otherwise create switching costs for customers;⁶⁰

⁵⁹The CC has not used an IP remedy in any of the market investigations to report to date. The package of remedies applied in the *Nufarm/AH Marks* merger inquiry (February 2009) had some characteristics of an IP remedy.

⁶⁰For example, the remedies introduced following the *Liquefied petroleum gas* market investigation (June 2006) included measures designed to facilitate the transfer of tank ownership when a customer wishes to switch supplier and other measures to make the switching process easier.

- (b) informational remedies, which are aimed at giving customers information to help them make choices and thereby increase competitive pressure on firms in the market,⁶¹ and
- (c) remedies that restrict the adverse effects of vertical relationships. Such measures may include restriction of access to confidential information ('firewall provisions'), or obligations to provide access to facilities on fair, reasonable and non-discriminatory (FRND) terms.⁶²

115. Enabling measures are generally likely to require ongoing intervention and monitoring. In some instances this may involve complex issues, for instance the pricing of access to facilities that are subject to rapid technological change. Considerations regarding the design and implementation of enabling measures are outlined in the [Annex](#).

Controlling outcomes

116. Certain forms of behavioural remedy seek to prevent the exercise of market power and thereby control the detrimental effects arising from an AEC. For example, price caps, supply commitments and service level undertakings all control the way a business can operate to limit any possible detrimental effects on a customer.⁶³ Such measures are often used in regulated sectors, where it may not be feasible to introduce effective competition. However, this type of behavioural remedy can be complex to implement and monitor, given informational asymmetries between the parties and the authorities and the associated risk of circumvention. There is also a

⁶¹For example, the remedies introduced following the *Home credit* market investigation (November 2006) included an obligation to publish price and other information on a comparative website www.lenderscompared.org.uk.

⁶²The CC has not used this type of remedy in any of the market investigations to report to date. The *Centrica/Dynegy Storage* merger inquiry (2003) provides an example of a case in which firewall provisions and an access remedy were introduced to restrict the adverse effects of vertical relationships following a merger.

⁶³In the *Classified Directories* market investigation, the CC found that prices of Yell, the largest provider, had been largely constrained by an existing price cap rather than competition. Were it not for the price cap, customers of Yell would be paying more for advertisements in Yellow Pages than they would if the market was functioning well. However, the CC expected that growing competition would increasingly constrain Yell's prices and that Yell would feel more pressure due to the Internet. The CC's remedies included a revised price control to prevent Yell from exploiting its market power and other measures designed to preserve developing competition from actions that could be targeted at competitors.

risk that such controls create market distortions, particularly if they are kept in place over a long period. Ensuring that measures to control outcomes remain fit for purpose in the light of market developments may involve costs for monitoring and enforcement agencies as well as for the parties subject to them. Further considerations regarding this type of remedy are outlined in the [Annex](#).

Recommendations

117. The CC can decide to make recommendations to other bodies, rather than taking action itself. Such recommendations can be thought of as falling into one of two categories:

(a) The legal framework, regulations or conduct applicable to a market may be a structural feature giving rise to an AEC; for example, planning or certification requirements may inhibit entry or restrict market outcomes. In such cases the CC may recommend modifications of these requirements to the Government or other controlling body to help address the AEC or control its detrimental effects. For example, the CC may recommend the removal or reform of regulatory requirements that have been found to constitute a barrier to entry.

(b) The CC may also make recommendations in situations where it is more practicable, or otherwise preferable, to implement a remedy by means of a recommendation.

118. It will, of course, be for the Government or other person to whom a recommendation is addressed to decide whether to act on the recommendation and the CC will consult with the relevant body prior to making the recommendation. Further considerations regarding this type of remedy are outlined in the [Annex](#).

Selection of remedies

119. As set out in paragraph 61, in deciding what remedial action should be taken, the CC will first look for a remedy that would address the AEC directly and thereby deal with any detrimental effects on consumers of the AEC.

120. The type of action that will be effective in increasing competition will depend on the nature of the AEC concerned. The range of potential competition problems that may be identified as giving rise to an AEC is wide, as is the range of potential remedies. The relative merits of different remedy options will be determined by the facts of the case and, in particular, the nature of the underlying competition problem that gives rise to the need for remedial action.

121. Table 1 illustrates some possible approaches to remedying some of the different types of competition problem that may give rise to an AEC.

TABLE 1 Illustration of potential solutions to different types of competition problem

<i>Situation in the market</i>	<i>Example of problem arising</i>	<i>Possible remedy approaches</i>
High concentration	Concentrated market structure means that the market is dominated by one, or a small number of players, whose position is protected by high barriers to entry and/or expansion.	<ul style="list-style-type: none"> • Structural measures (eg divestiture, IP licensing) to create directly a less concentrated market structure. • Market-opening measures (eg reduction of entry barriers) to address market structure indirectly and thereby increase competitive threat to incumbents • Recommendations to Government or regulatory bodies to address any barriers to entry which are caused or created by government laws or regulatory actions (eg planning rules). • Measures to control outcomes (eg price caps) to mitigate the harm to consumers, if market concentration is difficult or costly to alter in practice (eg natural monopoly) and/or if concentration gives rise to substantial RCBs (eg network effects) that would be lost in a more fragmented market structure.
Weak supplier response	Vertical effects. Competition problems arise where a single firm operates at a number of levels of the supply chain or where there are vertical agreements between firms active at different levels of a supply chain.	<ul style="list-style-type: none"> • Structural measures—for example, to separate ‘natural monopoly’ activities from potentially competitive activities. • Remedies to restrict the effects of vertical relationships to ensure access to key facilities, prevent discrimination or prohibit vertical arrangements that restrict competition. • Measures to control outcomes—for example, to mitigate the detrimental effects in ‘natural monopoly’ activities.
Weak customer response	High switching costs act as a barrier to entry or expansion and/or lack of competition for consumers who are ‘locked in’.	<ul style="list-style-type: none"> • Market-opening measures to address the sources of switching costs. • Informational remedies to address ‘consumer’ barriers to switching (eg lack of awareness, inertia) and/or to encourage whole-life costing (eg upfront disclosure of ‘hidden’ charges).
	Search costs. Where consumers find it hard to identify good value products in a market, competition can be weak.	<ul style="list-style-type: none"> • Informational remedies to make it easier for consumers to find out about products in the market and to facilitate comparisons. • Measures to control outcomes—eg product regulation to simplify the choices facing customers or to protect customer interests, where search on a particular aspect is unlikely to occur. • Market-opening measures to encourage entry and expansion by firms with incentives to reduce search costs (eg by advertising) in order to grow market share.

Source: CC.

122. As Table 1 shows, structural remedies such as divestiture are a potential solution where horizontal market concentration or vertical integration are among the principal market features that give rise to an AEC. Likewise, IP licensing may be used to remedy AECs that result from highly concentrated markets, if, by virtue of an IP remedy, new or expanding suppliers would be able to provide an effective competitive constraint on powerful incumbents.
123. An alternative approach to remedying structural problems may be to pursue measures that impact on market structure indirectly. Such measures may include introducing enabling measures that remove or reduce barriers to entry or measures to restrict the adverse effects of vertical relationships.
124. In choosing between structural remedies and measures that impact on market structure indirectly, the CC will consider whether the market response to these measures will be timely and of sufficient scale to represent a comprehensive solution to the AEC. Structural remedies such as divestitures are likely to have some important advantages over other measures to remedy competition problems arising from market structure. Once implemented, structural remedies may be expected to increase competitive constraints on the behaviour of firms in the market within a short timescale and without requiring ongoing detailed monitoring by the OFT and/or any other body such as the relevant sector regulator.
125. However, in some circumstances, structural remedies may not address the features giving rise to the AEC and behavioural remedies are likely to be preferred. An important difference between remedies in merger and market investigations is that structural remedies, even if they are available in a market investigation, may not always be an appropriate solution to a particular AEC because of the wide range of

features, including non-structural features that can give rise to an AEC. For example, behavioural remedies are likely to be chosen where:

- the conduct of firms has given rise to an AEC—for example, by raising barriers to entry. In such situations the CC may consider behavioural remedies that constrain firms' future ability to engage in such conduct;
- search costs and other information shortfalls are among the features giving rise to an AEC. In such situations, informational remedies that make it easier for customers to search and switch may be an appropriate response;
- switching costs are among the features that give rise to an AEC. Here, the CC may consider remedies that address the main barriers to switching it has identified.

126. As stated in paragraph 117, recommendations may be considered where an aspect of regulation or government behaviour is itself giving rise to an AEC or where it would be more practicable, or otherwise preferable, for the CC to implement a remedy by means of a recommendation rather than taking action itself. This may include situations in which other government bodies have powers that are unavailable to the CC or where a recommendation enables a remedy to be better integrated with existing interventions in a sector.⁶⁴ It may also include cases where a remedy to increase competition in a market has the potential to come into conflict with other important public policy objectives and it is more appropriate for Government, rather than the CC, to balance these conflicting objectives.⁶⁵ The CC will need to take into account the inherent uncertainty about whether a recommendation will be accepted and, if so, over what time period, in deciding whether to make a recommendation rather than take action itself. In reaching its view about whether to make a

⁶⁴For example, in the *PPI* market investigation, the CC made a recommendation to the Consumer Financial Education Body—now known as the Money Advice Service—to publish information on its existing price comparisons website, rather than requiring the creation of a new price comparisons site.

⁶⁵For example, in the *ROSCOs* market investigation, the CC made recommendations in relation to the operation of the rail franchising system to increase competition in the supply of rolling stock. In making these recommendations, the CC was mindful of the Government's wider public policy objectives in relation to rail franchising.

recommendation, the CC will have regard both to the stated policy of the body to which the recommendation is to be directed and to the possibility that that stated policy may change, either in light of the CC's recommendation or subsequent events.

127. Remedial action may also be required to address customer detriment directly, for example where effective remedies aimed at introducing competition by addressing the AEC are unavailable or will not bear fruit for some time. Price controls are the most obvious example. However, such measures to control outcomes are not likely, by their nature, to provide a solution to the underlying problem and may also give rise to distortion risks, if retained over a long period. For these reasons, remedial action to control outcomes will not generally be preferred as a long-term solution.

128. In looking for remedies that would be likely to increase competition in the relevant market(s), the CC will give attention to the time period within which the remedy can be expected to show results. If a remedy is not likely to have rapid results, the CC may choose an alternative remedy or implement additional remedies such as measures to address the detrimental effects on customers during the interim period. Otherwise, not only might there be uncertainty as to whether the beneficial effects of the remedy would materialize, but, in the meantime, customers would continue to suffer from the consequences of the AEC.

129. The CC's experience to date suggests that remedies in market investigations may take the form of a 'package' of measures, rather than the implementation of a single measure. This may be because there are several features giving rise to an AEC, and consequently an individual measure may be incapable of addressing the AEC in its entirety. For example, to deal with problems associated with a lack of customer switching it may be necessary both to remove contractual barriers to switching and also to put in place informational remedies that raise consumer awareness of the

potential benefits of switching. Where more than one measure is being introduced, the CC will consider the way in which the measures are expected to interact with each other. As a general rule, (as stated in paragraph 80) measures which share the aim of introducing competition into a market will tend to be mutually reinforcing.

Part 4: The conduct of a market investigation

130. The following section of the guidelines explains the role of groups, how they are appointed, and the composition of the staff teams which support them. Subsequent sections describe the overarching procedural issues the CC faces in conducting the wide range and varying sizes of market investigations referred to it, and the procedures the CC follows in a typical investigation and in the implementation of remedies.
131. The Chairman of the CC is required to issue rules of procedure for market reference groups. The current rules of procedure⁶⁶ are published on the CC website and may be revised from time to time. The rules require groups:
- (a) to draw up and notify the parties of the administrative timetable for each inquiry (and to prepare a revised timetable if required);
 - (b) to decide the forms of hearings (public or private, joint or individual) and who should attend them;
 - (c) to notify the main parties of their provisional findings on the statutory questions and allow the parties at least 21 days to comment on the provisional findings; and
 - (d) to notify affected parties of actions which may be taken to remedy the AEC and give the parties the chance to make representations about its proposed actions.

⁶⁶CC1, *Competition Commission Rules of Procedure 2006*.
www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc1.pdf.

132. Subject to complying with these rules, and with any guidance issued by the CC Chairman, CC groups are free to decide how they conduct a market investigation. The procedures followed in a typical market investigation are described in these guidelines.

Groups and staff

133. Market investigations are performed by small groups of independent CC members⁶⁷ (commonly between four and six), normally chaired by the Chairman of the CC or by one of the Deputy Chairmen.⁶⁸ A group conducting an investigation provides its strategic direction, weighs the evidence and arguments from parties, both received in writing and given orally, and directs and assesses the analysis produced by the staff team. It makes the final decisions on whether or not there are features of a market that give rise to an AEC and if so on the remedies to be applied.

Appointment of groups

134. As soon as possible after receiving the reference, the CC Chairman identifies and appoints a group of CC members to conduct the investigation. CC groups are generally appointed for the duration of the investigation,⁶⁹ up to the point at which the reference is 'finally determined'.⁷⁰
135. Before they are appointed to a group, the CC will consider whether members' outside interests could affect the impartiality of the CC. Outside interests of appointed members are disclosed on the CC website. In some cases it may be appropriate to inform parties of specific interests and give them the opportunity to comment before

⁶⁷There are around 40 members appointed by the Department for Business, Innovation and Skills (BIS) for eight years, following open competition. They are selected for their experience, ability and diversity of skills in competition economics, law, finance and industry. All except the CC Chairman and Deputy Chairmen work part-time for the CC.

⁶⁸Occasionally, a member who is neither the Chairman nor one of the Deputy Chairmen will be asked to chair a group conducting a market investigation.

⁶⁹Members may step down or be replaced if necessary or required; they may be reappointed to deal with ongoing remedy issues or litigation.

⁷⁰As defined in section 183(3) to (6) of the Act.

deciding whether to make a proposed appointment. In addition, the CC may take action to deal with any relevant and significant changes in members' interests that may arise during the course of the investigation.⁷¹

Staff team

136. Each group is supported by a staff team. The team is led by an Inquiry Director and includes both administrative and specialist professional staff. The administrative staff are responsible for the day-to-day running of the investigation; the key point of contact at the CC for the parties is likely to be the Inquiry Manager. The specialist professional staff provide advice to the group in their areas of expertise (including economics, law, business and finance). They conduct the analysis on the substantive issues that arise during the investigation and develop remedies where needed.

Overarching procedural issues

137. No two market investigations are alike in all respects. The markets under investigation can range in size from small, highly specialized markets to large-scale markets. Some references can encompass both upstream (eg manufacturing) and downstream (eg supply/distribution) markets. Moreover, the numbers of parties with an interest in the investigation may vary from a few to several hundred. The CC will therefore adopt a flexible attitude to the composition of the investigation group and staff teams to make sure that the appropriate resources are allocated in an efficient way to meet the needs of the case.

Managing investigations with a large numbers of parties

138. While all providers of the goods and services in the market concerned are 'main parties', the degree of engagement and the method of communication between the

⁷¹If at any time during an investigation it appears to the Chairman that because of a particular interest of a member it is inappropriate for them to remain in the group, the Chairman may appoint a replacement. Competition Act 1998, Schedule 7, paragraph 17(1)(c). See guidance on conflicts of interest on the CC website: www.competition-commission.org.uk/our_people/members/conflicts_interest/110407_Conflicts_guidance_for_publication.pdf.

CC and main parties may vary, particularly where there are substantial numbers of main parties. Some firms may choose to engage more with the CC than others. The CC may draft its information requests having regard to the resources available to the parties concerned. Where there are large numbers of parties, communication is more likely to be via the CC website. While the detail of the CC's processes might vary, the CC will ensure that its procedures are fair and give parties the opportunity to participate appropriately in an investigation.

139. In addition, there will be parties which are not providers of the goods and services in the market but which may be materially affected by the investigation (including super-complainants⁷²) and, like the main parties, often need to be consulted. The CC will seek to include as many third parties in its consideration as is reasonably practicable.

Timescales

140. The Act requires the CC to publish its report on a market investigation within two years of the reference. However, the CC aims to complete a 'standard' investigation within 18 months and to taking less time where possible.⁷³
141. While procedural timescales for a market investigation cannot be exactly prescribed, the following timetable illustrates a possible sequence of procedures for an 18-month investigation.

⁷²See paragraph 11.

⁷³The CC has made a public commitment to these timescales; see: www.competition-commission.org.uk/press_rel/2009/apr/pdf/17-09.pdf and www.competition-commission.org.uk/our_role/speeches/pdf/cbi_note_070709.pdf.

Stage of the process	18-month process
Reference	Pre-reference sharing of appropriate information with the CC by the referring body
Initial information requests Publication of issues statement (setting out theories of harm) Initial submissions from main and third parties	Months 1–2
Site visits	Month 3
Publication of working papers Hearings with parties	Months 5–9
Publication of provisional findings Publication of remedies notice (if relevant)	Month 12
Further consideration of findings and consultation on remedies	Months 13–15
Publication of provisional decision on remedies	Month 16
Publication of final report	Month 18

142. The CC draws up and publishes an administrative timetable at an early stage in the investigation. A draft is first sent to main parties for comment.⁷⁴ The administrative timetable is updated throughout the investigation to keep parties informed about the anticipated process.

Information provision and disclosure

143. 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 CC expects parties to meet the timescales set for the investigation. The CC is empowered legally to require

⁷⁴Rule 6.4 provides that the administrative timetable should be produced having regard to the views of the main parties (CC1, Competition Commission Rules of Procedure, June 2003).

information and the attendance of witnesses.⁷⁵ 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 is a criminal offence, regardless of whether that information has been provided voluntarily or in response to a statutory notice.⁷⁶

144. The CC aims to conduct its inquiries in a transparent manner. In addition to publishing its key documents (in particular an issues statement, provisional findings, provisional decision on remedies—if needed—and final report), it may also publish non-confidential versions of major submissions from parties including their initial submissions and responses to formal CC documents. It will also disclose or publish a range of evidence and views, including, as appropriate, summaries of hearings and certain working papers.
145. There is a general duty on the CC not to disclose information about individuals and businesses that has come to it in the course of an investigation.⁷⁷ However, the CC may disclose such information under certain, specified circumstances and subject to the considerations in the Act. Further details are set out in the Chairman's guidance to groups on disclosure.⁷⁸

Procedures

146. The following paragraphs outline the key steps in the conduct of a typical market investigation. The precise timing and content of these steps will vary depending on the specifics of the case.

⁷⁵Section 109 of the Act, which applies to market investigations by virtue of section 176 of the Act.

⁷⁶See *CC5, Statement of Policy on Penalties*, June 2003.

⁷⁷Section 244 of the Act.

⁷⁸*CC6, Chairman's Guidance to Groups*, March 2006, paragraphs 19–26 and *CC7, Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries*, July 2003.

Information gathering

147. The CC begins preparatory work on an investigation on a contingency basis immediately before the formal reference arrives. It identifies any relevant information that is publicly available and makes use of any market or company information that can be shared by the referring body⁷⁹ so as to avoid duplication of effort by the parties or the authorities between the first phase (typically an OFT market study) and the second-phase market investigation.
148. Once the reference has been received, the CC formally launches its investigation. The early stages of the inquiry will involve a period of information gathering which will include, in the first instance, a 'first day letter' with a request for initial factual information (as well as general information and guidance on the coming investigation), a more detailed market and financial questionnaire and, in many cases, the collection of other data from a range of parties. The information gathering will be guided by the developing 'theories of harm' (see paragraphs 44 to 50). As far as possible, parties will be consulted on draft information requests to facilitate collection of useful information whilst minimizing as far as possible the burden to business. When making submissions involving technical economic analysis, parties should refer to the principles set out in the CC's publication *Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission*.⁸⁰
149. An initial informal meeting will be held between the staff team and selected main parties (and, where relevant, with the super-complainant or other party enjoying a special status).⁸¹ The meetings cover the procedures to be adopted for the conduct of the investigation, and will often seek information and views on the market. In

⁷⁹After the referring body has decided internally that such a reference will be made.

⁸⁰Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission, www.competition-commission.org.uk/rep_pub/corporate_documents/corporate_policies/best_practice.pdf.

⁸¹See paragraph 139 above.

addition, the CC will hold data meetings with appropriate main parties to discuss the organization and availability of technical data. (There may be subsequent information-gathering meetings as the investigation progresses.)

150. The CC may decide to conduct one or more surveys as part of the information-gathering process. If the decision is taken to conduct a survey, the parties will be 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 a sample of their customers or suppliers.
151. In many cases, the CC will organize early site visits to several parties. These are designed to be helpful to both the CC and the parties involved. They allow the CC to improve its understanding of the market and give the parties an opportunity to present their initial views on the relevant competition issues as they see them.

Issues statement

152. An issues statement is released by the CC at an early stage in the investigation process. This will generally discuss the theories of harm the CC intends to investigate and set out the framework of the analysis. Parties are invited to provide initial submissions commenting on the issues set out in the statement.

Assessment

153. As soon as the relevant information has been gathered, the competition assessment gets under way. Staff prepare working papers dealing with the substance of the investigation. These cover background issues, including the operation of the market or the performance of the parties, market definition, and assessment of the relevant competition issues based on the framework set out in the issues statement.

Transparency

154. As thinking develops, relevant working papers may be disclosed or published on the CC website. Ahead of the main party hearings, depending in part on what has been disclosed or published as working papers, the CC will generally seek to disclose an annotated issues statement or hearing agenda giving an overview of its analysis to date.
155. Where relevant working papers are made available, the parties will generally have an opportunity to comment on their substance. In some cases, they will include specific pieces of technical analysis which may be sent to the parties for comment. The CC may sometimes decide to hold a round-table discussion with the parties and their technical experts to discuss the methodology used and, possibly, the results found.
156. Where issues arise as to the confidentiality of the data underlying a particular piece of analysis, but the CC nevertheless considers that disclosure of some sort is necessary to allow the parties to comment on the analysis, the CC may decide to set up a data room. This allows the data concerned to be reviewed by the parties' external advisers whilst preserving its confidentiality. In such cases, disclosure is made pursuant to the Act⁸² and it is an offence for any person receiving access to such data to disclose it to any other person without the CC's prior agreement. As a result, strict rules relating to access and non-disclosure, together with relevant sanctions, are applied and participants are required to sign undertakings that they will comply with the restrictions imposed.

Put-back

157. The CC may send ('put back') some working papers (or relevant extracts) to parties for the purpose of enabling disclosure or publication of the material (for example, in

⁸²Section 241(2).

working papers or within published provisional findings). Recipients are therefore asked to:

- (a) verify the factual correctness of certain content (usually information supplied by them); and
- (b) identify any confidential material and provide reasons for any requests for excisions of the material from published versions of the working papers.

The purpose of 'put-back is not to provoke comments on the substance of the material.

Hearings

- 158. The CC holds a round of formal hearings with parties. The primary purpose of these hearings is to enable the CC to test the evidence and explore key issues with the parties. They also provide an opportunity for the parties to explain their position in person directly to the decision-makers. They are not to be viewed as an opportunity for parties to put questions about the substantive analysis to the CC.
- 159. Parties are usually given an opportunity to make brief opening and/or closing statements. Parties should expect to provide a concise explanation of their case and to respond to the CC's questions. A transcript of the hearing will be taken and will be sent to the relevant party for checking. A summary of the key points raised will normally be prepared by the CC. The party will be given the opportunity to comment on both content and confidentiality ahead of the summary's publication on the CC website. It will also be invited to follow up in correspondence any issue raised during the hearing.

Provisional findings

- 160. The CC will start to gather information on possible remedies and evaluate relevant options after the basis of a possible AEC has been identified. However, this

investigation of possible remedies will remain hypothetical until a decision regarding a provisional finding of an AEC has been made.

161. When the group has provisionally formed a view on whether or not there are features of the markets that give rise to an AEC, its provisional findings will be published and a 21-day public consultation on them will be held.
162. If an AEC has provisionally been found, the CC will publish, in addition to its provisional findings, a Notice of Possible Remedies. The Notice will contain details of remedies that may address the AEC effectively, if implemented by the CC or others, and is a starting point for discussion of remedies with the relevant parties to the investigation, including main parties, customers, competitors, any sectoral regulator and the OFT. The Notice may also outline details of remedies the CC considers unlikely to be effective and the reasons for these opinions.

Response hearings

163. Where the CC provisionally finds that there is an AEC, response hearings will take place with main parties and potentially with key third parties. Parties will be given the opportunity to comment orally on the provisional findings and the CC may seek clarification of particular points made in written submissions or at the hearing. However, the hearing is likely to focus on possible remedies. Transcripts of the hearings will be taken and, often, summaries prepared and both will be processed in a similar way to those relating to hearings held earlier in the investigation.
164. Having considered the responses from parties, the CC will disclose its provisional decision on remedies, normally through publication on its website, for comment before reaching its final decision.

Final report

165. The CC will publish its final decision on the competition question and remedies together with supporting reasons and information in a final report.⁸³ The report will contain sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CC.
166. In cases where no AEC is found, the CC will seek to publish its final report swiftly, taking account of responses received to its provisional findings. Where no AEC is found on some of the issues under investigation, the CC will seek to bring its consideration of such matters to a close as swiftly as possible.
167. The publication of the final report does not end the CC's involvement in the investigation. Measures have to be put in place to implement any remedies that may be needed.
168. Moreover, parties may, during the two months following the release of the CC's findings, lodge an appeal with the CAT against the decisions. If a judgment of the CAT upholds any aspect of an appeal, this could lead to the investigation or a part of it being remitted to the CC for reconsideration.⁸⁴

Implementation of remedies

169. Following publication of the final report, if the CC has determined to take action itself, the CC has the choice of implementing remedies by accepting Undertakings from the relevant parties or making an order (see paragraphs 174 and 175 for a discussion of the considerations relevant to this choice).

⁸³Section 136.

⁸⁴Following 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 *PPI* (January 2009). These aspects were, respectively, the competition test applied to grocery retail planning applications and the inclusion of a point-of-sale prohibition of the issuing of PPI at the point of sale.

170. The CC will publish an administrative timetable for the implementation of remedies. The action the CC takes in implementing remedies must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the CC has a special reason for acting differently.⁸⁵
171. The CC will consult all parties affected by the remedies in determining the required undertakings or order. This will include a period of formal public consultation.⁸⁶
172. A group will normally be disbanded following its acceptance of final undertakings or the imposition of an order to implement remedies. Responsibility for overseeing any further implementation activity that falls to the CC, such as the implementation of any divestiture remedy, will fall to either the CC's Remedies Standing Group or to a specifically appointed group.⁸⁷ Where a group is specifically appointed to oversee further implementation activity, this may include some or all members of the original group. The identity of the group charged with overseeing any further implementation activity will be determined in light of factors such as the availability and expertise of members, the type of remedy to be implemented and the extent to which such implementation is expected to be resource- and/or time-intensive. If all remedies are being implemented by means of recommendations to other bodies, the group originally appointed will normally be disbanded following publication of the final report. The

⁸⁵For example, following the Court of Appeal's judgment on 13 October 2010 to reinstate the CC's findings on the *BAA airports* investigation (March 2009), the CC invited representations from all interested parties as to whether there had been any developments since the publication of the CC's report which constituted a material change in circumstances or a special reason within the scope of section 138(3) of the Act, to the extent that it should amend the remedy package set out in the report, for example the timing of proposed airport divestitures.

⁸⁶As specified in Schedule 10 to the Act.

⁸⁷For more information about Undertakings and Orders, and the procedures that will apply when remedies are being considered, see [CC4, General Advice and Information, March 2006](#), Parts 6 and 7.

OFT is responsible for monitoring and enforcement of behavioural remedies⁸⁸ following acceptance of undertakings or the imposition of an order by the CC.

173. If a person fails to comply with any undertakings that it has given or any order imposed on it by the CC, compliance may be enforced by means of civil proceedings brought by the OFT or the CC.⁸⁹ In addition to enforcement by the OFT or the CC, any person affected by the contravention of undertakings or an order who has sustained resulting loss or damage may also bring an action against the relevant party.

Undertakings and orders

174. In general, the CC's decision as to whether to implement remedies by means of accepting undertakings or making an order will be determined by practical issues such as the numbers of parties concerned, and their willingness to negotiate and agree undertakings. Another consideration will be the scope of the CC's order-making powers and whether the remedy it is considering falls within those powers.
175. The content of any orders made by the CC is limited by the Act.⁹⁰ In contrast, the subject matter of an undertaking is not similarly limited by the Act.⁹¹ This, and the process involved in agreeing them, can be helpful, in terms of flexibility and suitability, in implementing remedies. However, because market investigations are likely to be market-wide rather than focused on the conduct of one firm, it may often be more practical to implement remedies by order rather than through undertakings, so as to avoid the likely delay and complexity of negotiating undertakings with several

⁸⁸Section 162.

⁸⁹Section 167.

⁹⁰Schedule 8 sets out the types of provisions that could be included in an order and Part 1 of Schedule 9 enables the CC to modify, by order, licence conditions in various regulated markets.

⁹¹Section 164(1).

parties.⁹² In regulated sectors, if the CC decides to modify licence conditions⁹³ to give effect to, or take account of, any provision of a proposed remedy, it will make an order.

⁹²For example, in *Home credit* and *PPI*, the remedies applied to large number of parties and this was a reason for implementing these measures by means of an Order. By contrast, in *Classified Directories*, the remedies applied to only one party and undertakings were preferred. In other cases (eg *Groceries*, *ROSCOs*), some measures were implemented by means of an order, while others were implemented through undertakings

⁹³Part 1 of Schedule 9 to the Act. See also paragraph 88 above.

The design of remedies

Section 1: Divestiture and IP remedies

Divestiture principles

Introduction

1. In essence, a divestiture seeks to remedy an AEC by either creating a new source of competition through disposal of a business or set of assets to a new market participant or strengthening an existing source of competition through disposal to an existing market participant independent of the divesting party (or parties).
2. To be effective in increasing rivalry a divestiture remedy should involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. These critical elements of the design of a divestiture remedy are discussed in detail in subsequent sections.
3. The CC has required divestiture in one market investigation to report to date (BAA). This guidance reflects the CC's experience in that case and also, where relevant, the experience of designing and implementing divestiture remedies in merger inquiries, where divestiture is the most frequently used remedy option.⁹⁴
4. The design of a divestiture remedy will seek to address the underlying cause of an AEC and will take account of any risks of not addressing the AEC and any RCBs that may be affected by the form of divestiture.

⁹⁴As a consequence, many of the examples cited in this section relate to divestitures in merger inquiries, where these examples illustrate a point that is also relevant to market investigations.

Divestiture risks

5. Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an AEC. It is helpful to distinguish between three broad categories of risks that may impair the effectiveness of divestiture remedies as follows:
 - (a) *Composition risks*—these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract suitable purchasers or may not allow a purchaser to operate as an effective competitor in the market.
 - (b) *Purchaser risks*—these are risks that a suitable purchaser is not available or that the divesting party (or parties) will dispose to a weak or otherwise inappropriate purchaser.
 - (c) *Asset risks*—these are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key members of staff.

6. The incentives of divesting parties may serve to increase the risks of divestiture. Although divesting parties will normally have an incentive to maximize the disposal proceeds of a divestiture they will also have incentives to limit the future competitive impact of a divestiture on themselves. Parties may therefore have, on balance, an incentive to make divestitures to weaker competitors of less competitive assets or businesses and may also allow the competitiveness of divestiture packages to decline during the divestiture process.⁹⁵

7. Divestiture risks can be overcome, at least in part, through the design of the divestiture and by adopting protective measures such as appointment of monitoring and divestiture trustees and alternative divestiture packages as shown later in this section.

⁹⁵See, for example, the *SCR Sibelco/Fife Silica Sands* inquiry (2001) as discussed in the CC's report *Understanding past merger remedies; report on case study research* (2010). See also the Federal Trade Commission's *A Study of the Commission's Divestiture Process* (1999) and DG COMP's *Merger remedies study* (2005) (for example, paragraph 44 of Summary and Conclusions).

Scope of divestiture packages

Package definition

8. In defining the scope of a divestiture package that will satisfactorily address an AEC, the CC will normally seek to identify a divestiture package that comprises a viable, stand-alone business that can compete successfully on an ongoing basis and is of sufficient scale and scope to enable its acquirer to become an effective competitor. This may comprise a division or the whole of an operating company functioning in the market affected by the AEC. Depending on the nature of the AEC, it may be necessary to identify more than one divestiture package to achieve a comprehensive solution—for example, if several distinct businesses under common ownership need to be divested to remedy the AEC.⁹⁶

9. In order to achieve a proportionate solution, the CC will seek to identify the smallest such package (or packages) that is likely to be a viable competitor and satisfactorily addresses the AEC. Following discussion with parties, the CC may modify the scope of the proposed divestiture package (or packages) provided that the parties can demonstrate, to the CC's satisfaction, that the modified package (or packages) addresses the AEC and the modification does not create significant additional new costs or composition, purchaser or asset risks after taking account of protective measures.

10. The scope of a divestiture package will be outlined, with reasons, in the CC's report. The package will generally be specified in greater detail in the undertakings accepted or orders made by the CC when implementing the remedy. The divesting parties may also add further assets to the specified package at their request with the approval of the CC, or may be required to do so by the CC, to secure divestment to a suitable purchaser. The divesting parties will generally be prohibited from subsequently

⁹⁶As was the case in the BAA market investigation.

purchasing assets or shareholdings sold as part of a divestiture package or acquiring material influence over them. The CC will normally limit this prohibition to a sunset clause period of ten years.

Divestiture of an existing business or package of assets

11. The CC will generally prefer divestiture of an existing business that can compete effectively on a stand-alone basis independently of the divesting party (or parties), to divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved more quickly.

12. Where a proposed divestiture comprises part of a business or specified assets, such as IP rights, the capabilities and resources of prospective buyers are likely to be more critical to a successful outcome than for a stand-alone business. A package of assets proposed for divestiture may, for example, lack an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities of the purchaser. A package of assets may also be far more difficult to define or 'carve out' from an underlying business⁹⁷ and the CC may have less assurance that the purchaser will be supplied with all it requires to operate competitively. In such circumstances, the CC is likely to require additional protective measures such as identification of an alternative divestiture package (see paragraphs 14 and 15 below) to mitigate increased purchaser and composition risk. Where a package of assets is proposed for divestiture, the CC will require the divesting parties to specify the composition and operation of the package in detail.

⁹⁷DG COMP's *Merger Remedies Study* (2005) found that carve-out problems were a common cause of serious design and implementation issues in a significant proportion of divestiture remedies within its purview—see section 6 of Summary and Conclusions (pp152–155, public version).

13. In particular circumstances, parties may propose a 'virtual divestiture' consisting of divestiture of production capacity⁹⁸ for a specified period rather than conventional disposal of a business or package of assets. Such a proposal may have higher risks and costs than a conventional divestiture, and require continuing monitoring and compliance activity. The CC would need to satisfy itself that there was good reason to justify such a proposal in preference to a conventional divestiture and that the risks of the proposal could be appropriately contained.

Alternative divestiture packages

14. In some circumstances, it may be appropriate to define a more extensive and/or more marketable divestiture package ('alternative divestiture packages'⁹⁹) which the CC would require the parties to sell if the initially proposed divestiture package were not sold within a specified period. Alternative divestiture packages may be appropriate if there is doubt as to the marketability of the initially proposed divestiture package or where a business is subject to major asset risks and speed of divestiture is likely to be a critical requirement. In such circumstances, prior identification of a more extensive, more marketable package may be the most effective means of facilitating rapid disposal if the initial package cannot be sold to a suitable purchaser within a specified period.¹⁰⁰
15. The alternative divestiture package will include all the core assets necessary to remedy the AEC. The CC will wish to satisfy itself that the purchaser of such a package is committed to operate the core assets so as to compete effectively in the market(s) affected by the AEC and not primarily attracted by the additional assets. The CC will identify the alternative package in its report but the precise nature, and in some

⁹⁸So-called 'virtual power plant' remedies are examples of this type of remedy. See, for example, the Nuon/Reliant Energy case in the Netherlands, outlined in Appendix J of the ICN's Merger Remedies Review Project.

⁹⁹Such packages are sometimes referred to as 'Crown Jewel' packages; however, in view of the wide variety of usage of this term, the CC uses the more closely defined terminology of 'alternative divestiture packages'.

¹⁰⁰The *EWS Railway Holdings/Marcroft Engineering* (2006), *Stericycle International LLC/Sterile Technologies Group Limited* (2006) and *Capita/IBS* (2009) merger inquiries provide examples of the use of alternative divestiture packages.

cases the existence, of an alternative package may be excised from the published version of the report to prevent the existence of the alternative package undermining divestiture of the initial package.

Suitable purchasers

Criteria

16. The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The divesting party (or parties) will therefore need to obtain the CC's approval of the prospective purchaser(s). The CC will wish to satisfy itself that a prospective purchaser is independent of the divesting parties, has the necessary capability to compete, is committed to competing in the relevant market(s) and that divestiture to the purchaser will not create further competition concerns. The relative importance that the CC attributes to each of these criteria will depend on the circumstances of the inquiry. These criteria are considered in more detail below:

(a) Independence—The purchaser should have no significant connection to the divesting parties that may compromise the purchaser's incentives to compete with them or, where relevant, with other major suppliers in the relevant market(s). Significant connections may include, for example, an equity interest, shared directors, reciprocal trading relationships or continuing financial assistance. The CC will seek to understand the significance of such connections in the context of the overall relationship between the parties concerned, in order to form a view of their cumulative effect on incentives to compete.

(b) Capability—The purchaser must have access to appropriate financial resources, expertise and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly leveraged acquisition of the divestiture package that left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy

this criterion. Where the purchaser takes the form of a consortium, the CC will wish to satisfy itself that the structure and governance arrangements of the consortium will permit appropriate access to expertise and finance.¹⁰¹

(c) *Commitment to relevant market*—The CC will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s).¹⁰²

(d) *Absence of competitive or regulatory concerns*—Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns. Moreover, the CC's approval of a purchaser may be subject to clearance by the OFT or other regulatory authority.

17. Except in circumstances, as specified below, where a divestiture trustee is in place, the divesting parties are responsible for securing a prospective buyer which is able to demonstrate that it satisfies the CC's criteria for a suitable purchaser. However, the CC will keep the progress of the divestiture under close scrutiny.
18. Where divesting parties receive interest from more than one prospective buyer, the CC will generally wish to evaluate whether purchasers fulfil the criteria before any purchaser is granted exclusivity to undertake detailed due diligence. This is to avoid situations where a prospective purchaser undertakes lengthy due diligence on an exclusive basis but is then found not to satisfy the CC's criteria.
19. In certain cases, the CC may require a purchaser to provide it with undertakings that it will not sell on the divested entity within a limited period other than with the CC's

¹⁰¹The CC reviewed consortium arrangements in the divestiture of Gatwick Airport (*BAA airports*).

¹⁰²This approach was upheld by the CAT in the *Somerfield v Competition Commission* case [2006] where the CC excluded limited assortment discount retailers from acquiring Somerfield stores on the basis that these were insufficiently close competitors to conventional supermarkets, paragraph 183.

approval that the new purchaser satisfies the same purchaser criteria as applied in the initial divestiture.¹⁰³

Continuing links and purchaser protection

20. A purchaser should not have continuing links with the divesting party (or parties) after divestiture that may compromise the purchaser's incentives to compete with these parties, for example financial, ownership or management links. However, purchasers may require access to key inputs or services at appropriate terms from the divesting party (or parties), on an interim basis, in order to enable the divestiture to operate effectively. Such transitional service arrangements may be permitted by the CC for a limited period. The timescale over which transitional service arrangements will be permitted is likely to vary from case to case, depending on the time that it may reasonably be expected to take potential purchasers to develop their own independent access to the inputs or services in question.

21. The CC may also permit or require non-solicitation clauses or other measures to protect the purchaser from the divesting party (or parties) for a limited period to enable the purchaser to become established as an effective competitor in the relevant market(s). In order to ensure a timely remedy, the CC will seek to ensure that any period of purchaser protection is no longer than necessary and can be justified by reference to the steps necessary for the purchaser to become established as an effective competitor. In any event, given the desirability of achieving a timely remedy, the CC would not normally expect to permit or require such measures for more than two years.

¹⁰³This restriction was required in the BAA divestitures.

Effective divestiture process

Objective of process

22. An effective divestiture process will protect the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.

Protecting the divestiture package

23. Divesting parties may have significant incentives to run down or neglect the business or assets of a divestment package in order to reduce future competitive impact. The resulting asset risk may also be influenced by such factors as the length and complexity of the divestiture process and the pace at which customer goodwill and employee relations may erode.
24. To protect against asset risk, the CC will generally seek undertakings from the relevant parties which impose a general duty to maintain the divestiture package in good order and not to undermine the competitive position of the package. The CC may also require 'hold-separate' undertakings to mitigate asset risk. These will require the divestiture package to be held and managed separately from the retained business. Protection measures specified in final undertakings may sometimes continue existing measures specified in any interim undertakings that have been accepted by the CC (although interim undertakings can only be accepted in market investigations following publication of the final report). The appointment of a hold-separate manager or management team may also be required to manage the assets/business to be divested so as to maintain their competitiveness and establish separation from the retained assets. Establishing separation may be a more complex issue than in merger inquiries.

Use of monitoring trustees

25. Where divestiture undertakings are in place, the CC will normally require the appointment of an independent monitoring trustee to oversee the parties' compliance with the undertakings and, if applicable, the performance of the hold-separate manager. The trustee will have an overall duty to perform in accordance with their agreed mandate and the directions of the CC. The trustee will monitor the ongoing management of the divestiture package and the conduct of the divestiture process. The CC will have the right to propose and direct measures necessary to ensure compliance with the undertakings. The trustee will report to the CC at regular intervals.

The divestiture period

26. The CC will state in its report the period in which the parties should achieve effective disposal of a divestiture package to a suitable purchaser (ie the 'initial divestiture period'). However, this period will normally be excised from the report if it is considered that disclosure to third parties may undermine the divestiture process. The length of this period will depend on the circumstances of the case but will normally have a maximum duration of six months in relatively straightforward divestiture cases. The CC, when determining the initial divestiture period, will seek to balance factors which favour a shorter duration, such as minimizing asset risk and giving rapid effect to the remedy, with factors that favour a longer duration such as canvassing a sufficient selection of potential suitable purchasers to facilitate effective disposal and adequate due diligence. In general, the CC would expect that the period permitted for divestiture in market investigations would be sufficient for the divesting company to realize an approximation-to-fair market value for the divestiture package. The initial divestiture period may be extended by the CC where this is necessary to achieve an effective disposal.

27. While the divesting parties are responsible for securing a suitable purchaser in the initial divestiture period, the CC will keep the progress of the divestiture process under close review through regular reporting and, where applicable, the scrutiny of a monitoring trustee.

Use of divestiture trustees

28. If the divesting parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then, unless this period is extended by the CC, an independent divestiture trustee may be mandated to dispose of the package within a specified period (the trustee's divestiture period) at the best available price in the circumstances, subject to prior approval by the CC of the purchaser and the divestiture arrangements. If the CC has reason to expect that parties will not procure divestiture to a suitable purchaser within the initial divestiture period, the CC may require that a divestiture trustee is appointed before the end of the initial divestiture period, or in unusual cases, at the outset of the divestiture process.¹⁰⁴ The role of a divestiture trustee is distinct from that of a monitoring trustee, but the two roles may be performed by the same person subject to consideration of any potential conflict of interest. The CC may require a divestiture trustee to be selected and made ready prior to the end of a divestiture period in order to prevent any delay in appointment following the end of the divestiture period.

Review of divestiture documentation

29. The CC will wish to ensure, before providing its final approval of the divestiture at the end of the divestiture process, that the divestiture agreement and relevant supporting documentation convey all assets required to be divested, and contain no provisions that are inconsistent with the remedial objectives of the divestiture. For example,

¹⁰⁴The *Tesco/Co-op* store acquisition inquiry (2008) is an instance where the CC has required the appointment of a divestiture trustee from the outset of the divestiture period.

continuing links between the purchaser and the parties, as outlined in paragraph 20, may undermine competitive incentives.

Intellectual property remedies

Introduction

30. The licensing or assignment of IP, including patents, licences and brands, may be viewed generally as a specialized form of asset divestiture. However, in certain cases, the terms of a licence may contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid. The key element is the extent to which any material link between licensor and licensee will exist following award of the licence. A remedy that requires an assignment or licence of an IP right that is exclusive, irrevocable and non-terminable with no performance-related royalties will effectively be treated by the CC as structural in form and subject to similar consideration and evaluation as an asset divestiture. A licence that requires a licensee to rely on the licensor for updates of the technology or continuing access to specialist inputs or know-how will be regarded as a behavioural commitment and is generally subject to greater risks of not being an effective remedy.
31. For licensing of IP alone to be effective as a remedy, it must be sufficient to enhance significantly the acquirer's ability to compete with other parties in the market and thus address the AEC.¹⁰⁵ Such a remedy may not be effective if the IP needs to be accompanied by other resources (for example, technical expertise and sales networks) to enable effective competition if these are unlikely to be available in potential acquirers of the IP.

¹⁰⁵In the *Thermo Electron Manufacturing/GV Instruments* merger inquiry (2007) the CC rejected a licensing remedy proposed by the parties on the basis that it would not adequately restore competition lost by the merger.

32. In view of the possible risks to effectiveness, as outlined in paragraph 30, that may result from using IP remedies, the CC will generally prefer to divest a business including IP rights, where this is feasible, rather than rely on licensing narrowly defined IP alone. This is because divestiture of a business including IP rights is more likely to include all that the acquirer needs to compete effectively with other parties in the market.

Design factors

33. The appropriate design of an IP remedy may be influenced by a number of case-specific factors such as:
- (a) *The form and jurisdiction of the relevant IP (eg patent, exclusive licence, trade mark etc).* The CC will wish to ensure that the IP to be divested is sufficient to enable a purchaser to compete effectively. This may sometimes include less easily transferable forms of IP (eg 'know-how').¹⁰⁶ Where there is uncertainty regarding the scope of a licence or its terms and conditions, the parties may be required to divest the underlying right and accept a licence back.
 - (b) *The relative specialization of the IP.* Highly specialized IP may impose particular constraints on selecting a suitable acquirer as there may be few parties competent to use the IP.¹⁰⁷
 - (c) *The rate of innovation expected in the relevant market.* A high rate of innovation may imply a shorter required duration for a licensing remedy than in a more stable market.
 - (d) *Forms of payment for IP.* As discussed in paragraph 30, the form of payment (eg one-off payment, royalties or profit shares) may have an effect on competitive incentives.

¹⁰⁶See, for example, the Shell/BASF case in which the EC found that difficulties in transferring 'know-how' and other types of IP could have significantly reduced the scope and effectiveness of a licensing commitment (as outlined in Appendix D of the ICN's Merger Remedies Review Project).

¹⁰⁷The *Nufarm/AH Marks* merger inquiry is an example of an IP-style remedy where the field of suitable acquirers was particularly constrained.

34. IP rights generally enable the remuneration of investment in innovation by granting time-limited exclusivity. In considering the design and scope of IP remedies, the CC will recognize the need for preserving incentives for innovation while addressing competitive concerns.
35. Remedies relating to the transfer of IP rights may have international repercussions due, for instance, to international filing and licensing of patent rights. International cooperation with other competition authorities is therefore often particularly necessary in these cases.

Section 2: Behavioural remedies

Introduction

36. Behavioural remedies are designed to regulate the ongoing conduct of parties so as to address an AEC and/or its adverse effects. In market investigations the CC may use behavioural measures as a main remedy or as an adjunct to other measures (eg structural measures or recommendations).

Design, monitoring and enforcement

37. Behavioural remedies seek to change aspects of business conduct from what may be expected based on businesses' incentives and resources. The design of behavioural remedies should seek to avoid four particular forms of risk to enable these measures to be as effective as possible:
 - (a) *Specification risks*—These risks arise if the form of conduct required to address the AEC or its detrimental effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. The intended operation of the measure needs to be clear to the persons to whom it is directed and other relevant parties, so that it is apparent what conduct constitutes compliance and what does not. For example, a commitment to permit access on FRND terms,

without further clarification of what this means in practice, may create significant specification risk as the provision may be insufficiently specific to allow effective enforcement. Markets that are subject to frequent change in products or supply arrangements may be particularly prone to specification risk if the definition of required conduct is vulnerable to such changes.

- (b) *Circumvention risks*—It is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted.¹⁰⁸ For example, if prices are controlled a firm may reduce product quality. To avoid or reduce these risks, behavioural measures will generally need to deal with all the likely substantial forms in which enhanced market power may be applied. In some cases this may not be feasible or may make the behavioural measures too complex to monitor and/or enforce.
- (c) *Distortion risks*—These are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs. Distortion risks may result from remedies overriding market signals or encouraging circumvention behaviour. For example, prohibiting the use of long-term contracts may result in a lack of incentives to compete for new business.
- (d) *Monitoring and enforcement risks*—Even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. This may be due to a variety of causes such as the volume and complexity of information required to monitor compliance, limitations in monitoring resources, asymmetry of information between the monitoring agency and the business concerned and the long timescale of enforcement relative to a rapidly moving market.

38. For behavioural remedies to have the desired impact it is important that there are effective and adequately resourced arrangements in place for monitoring and

¹⁰⁸This general phenomenon may be sometimes referred to as a 'waterbed effect'.

enforcement so that there is a powerful threat that non-compliance will be detected and that action will be taken to enforce compliance where this is necessary.

39. The OFT, or the relevant sectoral regulator where appropriate, is responsible for monitoring and enforcing compliance of remedies under the Act.¹⁰⁹ Customers and competitors of the firms subject to behavioural remedies may be in a strong position to report to the OFT, or the relevant sectoral regulator, on instances of non-compliance where they have appropriate resources and incentives to do so. However, such persons may be inhibited from fulfilling this reporting role by lack of resources and verifiable information, lack of understanding of the measures, fear of reprisals and other disincentives.
40. In view of constraints on the OFT's resources and the possible limitations in the reliance that can be placed on the reporting role of customers and competitors, it may be necessary for the CC to seek undertakings from the relevant parties to appoint and remunerate a third party monitor to enable the OFT, or the relevant sectoral regulator, to fulfil its monitoring responsibilities effectively.¹¹⁰ Alternatively monitoring may be facilitated by the CC making an order requiring the relevant parties to publish certain information¹¹¹ or to produce compliance reports that have been verified by an independent third party.¹¹² The likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime.
41. A behavioural remedy may seek to prevent certain conduct that may be prohibited under the CA98's Chapter II Prohibition or under Article 102 TFEU. Similarly, a

¹⁰⁹Section 162.

¹¹⁰For example, in *Northern Irish Personal Banking* the Lending Standards Board (LSB) played an important role in monitoring compliance with the CC's remedies.

¹¹¹The *Home credit* market investigation provides an example where parties were required to publish product and pricing information on a website.

¹¹²The *PPI* market investigation provides an example where the largest providers were required to produce compliance reports and to have these verified by an independent third party.

behavioural remedy may seek to prevent the making of agreements that may be prohibited under the CA98's Chapter I Prohibition or Article 101 TFEU. The CC recognizes the importance of ex post competition enforcement. However, the CC has an obligation to achieve as comprehensive a solution to the AEC and its detrimental effects as is reasonable and practicable. The CC will therefore normally prefer to specify its own remedial measures rather than rely on the general provisions of competition law, as this has the advantages that the CC measures can be designed to take account of the circumstances of the case and the provisions for monitoring and enforcement can be fully defined.

Duration

42. As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration. The CC may specify a limited duration if measures are designed to have a transitional effect. Where measures need to apply as long as an AEC persists and as this period can rarely be predicted during the course of an inquiry, the CC will generally rely on the relevant parties applying for variation or cancellation of the measures on the basis of a change of circumstances¹¹³ or possibly recommend that the OFT reviews the need for the measures after a given period. However, the CC may, in addition, specify a long-stop date in a 'sunset clause' beyond which the measures will definitely not apply. The period used for the long-stop date will depend on the circumstances of the case.

Types of behavioural remedy

43. This guidance discusses behavioural remedies under the headings of enabling measures and measures that control outcomes. The former address an AEC by

¹¹³Section 162. For example, in 2007, acting on the basis of advice from the OFT, the CC decided to release the UK's four largest clearing banks from most of the Transitional Undertakings given by them in 2002.

seeking to remove obstacles to competition or otherwise stimulating competition within a market, whereas the latter seek to prevent the exercise of market power and thereby control the detrimental effects arising from an AEC rather than remedy the AEC itself. A comprehensive and timely solution to an AEC may require both categories of remedy.

44. The variety of market features and possible behavioural measures that may be encountered on individual investigations is extensive. This guidance therefore seeks to outline the CC's general approach, making reference to the types of measure that have been implemented in investigations to date, rather than dealing with all possibilities.

Enabling measures

45. Enabling measures aim to remedy an AEC by removing obstacles to competition or otherwise stimulating competition. Most enabling measures that have been introduced by the CC to date may be classified as:¹¹⁴
- (a) market-opening measures;
 - (b) informational remedies; or
 - (c) measures to restrain the impact of vertical relationships.

Market-opening measures

46. Market-opening measures are aimed at removing impediments to effective competition, such as barriers to entry, expansion and/or switching. Such impediments may result from structural features of the market (eg barriers to entry) or from the behaviour of individual firms in that market (eg exclusionary conduct).

¹¹⁴This is not an exhaustive classification. For example, in a situation where the CC found an AEC resulting from tacit coordination, remedy options might include enabling measures designed to prevent or restrict the flow of information between market participants, alongside other measures (eg structural remedies or measures to facilitate new entry).

47. This is a diverse category of remedies. The specific aim of any market-opening measure and the particular mechanism that is used in any case, will depend on the market features that have been identified as preventing, restricting or distorting competition and the practical opportunities available for addressing those features. Market-opening measures can be further subdivided into the following two categories:
- (a) Firm-specific measures to restrain horizontal market power.
 - (b) Market-wide measures to reduce barriers to entry, expansion and switching.

Firm-specific measures to restrain horizontal market power

48. Where a firm enjoys market power it may be able to use the strength of this position in a number of ways to limit or restrain competition. These may include:
- (a) requiring customers to enter into long-term and/or exclusive contracts;
 - (b) creating switching costs for customers through, for example, volume discounts or contractual penalties;
 - (c) bundling or tying the sale of particular products; and
 - (d) selective discounting or exclusionary conduct.
49. Remedies may be introduced that prohibit, restrict or discourage types of behaviour, such as those listed above, where these have been found to prevent, restrict or distort competition. The selection and design of these measures will depend critically on the circumstances revealed by the inquiry and the need to manage specification, circumvention, monitoring and enforcement risks. Where circumstances point to the use of these measures, the CC will follow the general approach of considering the anticompetitive conduct that has been identified as having an adverse effect on competition. It will then consider the measures that may be taken to prevent or limit this conduct and the effectiveness and costs of these measures.

50. As an example of the types of consideration relevant to this approach, the use of long-term and/or exclusive contracts by a firm with market power may create a significant barrier to entry or expansion. However, if, in the relevant market, firms need to invest heavily to acquire new customers (for example, by investing in new facilities or systems) then requiring a firm with market power to have contracts that are short term in nature may generate distortion risks as this could reduce incentives to compete for new contracts if firms do not have sufficient opportunity to recoup their initial investment. In implementing a constraint on the use of long-term contracts, the CC will therefore seek an appropriate balance between facilitating switching and permitting sufficient incentives to compete for new contracts.
51. Likewise, selective discounting or price discrimination by a firm with market power can also have the effect of creating barriers to entry or expansion when used systematically to reduce prices to particular customers that are more likely to switch to other suppliers.¹¹⁵ Measures to restrict selective discounting or price discrimination may therefore sometimes be necessary to address an AEC. However, measures restricting selective discounting or price discrimination may themselves generate significant distortion risk by adversely affecting the competitive dynamics of a market if maintained in the long term. They may therefore be most appropriate as a transitional measure until other sources of competition develop.
52. The CC will have particular regard to avoiding circumvention risk in implementing measures limiting the behaviour of firms with market power that has been found to prevent, distort or restrict competition. This is because firms with market power may readily evolve new forms of behaviour to replace prohibited or restricted conduct.

¹¹⁵The CC considered introducing measures designed to reduce the scope for selective discounting in the *LPG* market investigation.

Market-wide measures to reduce barriers to entry, expansion and switching

53. Market-opening measures may also be applied where incumbency advantages and other barriers to entry or switching have been found to prevent, restrict or distort competition. In this type of situation, market-opening measures to address these features may be applied to a market as a whole or, if this is not necessary and/or practicable, to the largest suppliers within the market.
54. The selection and design of these measures will depend critically on the specific features that have been identified as preventing, restricting or distorting competition. The types of measures that might be considered by the CC include:
- (a) measures to address barriers to switching; and
 - (b) measures to reduce incumbency advantages and other barriers to entry and expansion.
55. In some markets, customers may be put off switching suppliers by a perception that switching is costly, complex, time consuming and/or risky. This perception may be grounded in customers' own experience. Where barriers to switching have been identified as causing competition problems, measures may be introduced to make it easier for customers to switch.¹¹⁶ For example, the CC may introduce obligations on a customer's existing supplier to cooperate with the proposed new supplier to ensure that costs and disruption to consumers are minimized. Generally a new supplier will have significant incentives to make the switching process as easy as possible for the customer and will not normally require corresponding obligations.

¹¹⁶For example, in the *LPG* market investigation, the CC found that a major barrier to switching was the requirement to replace a customer's existing tank with one owned and operated by the new supplier. This was costly and disruptive to customers. To overcome this barrier to switching the CC developed and implemented a 'tank transfer' remedy requiring suppliers to transfer the ownership of the LPG tank from one supplier to another, when a customer switched. The tank transfer remedy was accompanied by other measures aimed at preventing contract terms that acted as a barrier to switching and informational remedies to raise customers' awareness of the options available to them.

56. Another factor that can deter customers from switching is if an important attribute of their current service is not transferable (or 'portable') from one provider to another and this leads them to remain loyal to their current supplier. For example, customers may wish to retain their existing telephone number if they change suppliers and may be deterred from doing so, if this were not possible. Interventions to increase the portability of product attributes are most likely to be beneficial when the attribute that customers value is easily identifiable and the ownership rights of the attribute are easily transferable to rival firms or consumers. In assessing remedies of this type, the CC is likely to evaluate the extent of any material benefits to consumers associated with non-portability such as, for example, being able to identify the network to which a call is being made.
57. Remedies may also be introduced to address competition problems in markets where some existing providers have significant incumbency advantages over other providers (eg potential entrants), which are found to act as a barrier to entry and/or expansion. In some cases, 'incumbency advantages' may result from good commercial decisions made in the past (eg to invest in and patent a successful new technology) and interventions to overcome these sources of competitive advantage may risk undermining dynamic incentives to invest and innovate. In other situations the source of incumbency advantages may result from firms having preferential access to key resources, information or customers and it may be possible to intervene to promote competition without adversely affecting dynamic incentives.¹¹⁷
58. A further potential source of incumbency advantage, which may sometimes require intervention, is the 'point-of-sale advantage'. This occurs when a particular supplier

¹¹⁷For example, in the *Home credit* market investigation, the CC found that an existing home credit lender had a critical incumbency advantage in lending to its existing customer base over all other potential lenders. This was its knowledge of its customers' repayment history in relation to loans taken out with them. This acted as a barrier to customer switching and as a barrier to entry and expansion. It also served to restrict competition from mainstream lenders. As part of a package of measures, the CC required the largest home credit lenders to share their repayment data with other lenders by entering into agreements with at least two credit reference agencies.

has systematically better access to customers than potential rivals. A range of possible approaches might be taken to remedying competition problems resulting from a point-of-sale advantage. For example:

- consumers may be encouraged to search for alternatives (eg through informational remedies) before they reach a particular point of sale;
- providers who enjoy a point-of-sale advantage may be prohibited from completing a sale until a customer has an opportunity to shop around;¹¹⁸ or
- providers who enjoy a point-of-sale advantage may be required to offer customers a choice of products at the point of sale.¹¹⁹

59. In considering such alternatives, the CC will consider the effectiveness and proportionality of different approaches, for example their impact on the behaviour of customers and suppliers as well as whether there are benefits to customers associated with purchasing a product at a particular point of sale.¹²⁰

Information remedies

60. Informational remedies can be used to address competition problems that are caused by shortfalls in the information that customers have to enable them to make informed purchasing or switching decisions. Informational remedies can lead to changes in customer behaviour, for example by reducing search costs, increasing customers' awareness of alternatives and making it easier for customers to make comparisons between products when making an initial purchase or when switching suppliers. Informational remedies can also lead to changes in suppliers' behaviour—for example, suppliers may improve their offering, in order that their products appear attractive in terms of the information that customers receive. Information remedies

¹¹⁸For example, the point-of-sale prohibition in the *PPI* market investigation.

¹¹⁹For example, the so-called 'guest beer' provision in the 'Beer Orders'.

¹²⁰For example, in the *PPI* market investigation and the subsequent remittal, the CC considered the implications of any loss of convenience for the assessment of the proportionality of including the point-of-sale prohibition in the remedy package.

may also facilitate new entry, if a lack of awareness by consumers of alternatives was a factor that was restricting entry.¹²¹

61. The CC has introduced informational remedies in six of the nine market investigations completed to date under the Act,¹²² as well as in complex monopoly investigations under the Fair Trading Act 1973, such as *Extended warranties*.¹²³ Informational remedies put in place by the CC include:

- (a) obliging firms to submit information about their products for publication on price comparisons sites (eg *Home credit, PPI*);
 - (b) standardization of pricing structures¹²⁴ (eg *PPI* single-premium prohibition);
 - (c) mandatory disclosure of price and other key messages at the point of sale and in marketing materials (eg *Extended warranties, Northern Irish personal banking*);
 - (d) requirement to offer written quotations that remain valid for a fixed period (eg *Extended warranties, PPI*);
 - (e) requirement to provide information to existing customers in regular statements (eg *Store cards, Northern Irish personal banking, PPI*);
 - (f) requirements to provide information to customers about their rights to switch and the switching process (*LPG, Northern Irish personal banking, PPI*);
 - (g) requirements to provide or extend 'cooling-off' periods (eg *Extended warranties*);
- and
- (h) requirements to provide financial information underpinning the pricing of products and services to potential franchise operators (eg *ROSCOs*).

62. The CC's starting point for the selection of appropriate informational remedies will generally be the identification of the particular barrier to search or other information

¹²¹A survey of the economic literature on different types of informational remedies may be found in Garrod et al, [Assessing the effectiveness of potential remedies in consumer markets](#), OFT research paper 994, April 2008.

¹²²*Store cards, LPG, Home credit, Northern Irish personal banking, PPI, ROSCOs*.

¹²³*Extended warranties on domestic electrical goods* (2003).

¹²⁴This type of remedy is more prescriptive than most informational remedies as it can constrain the type of product that can be offered. It therefore has some characteristics of a measure that controls outcomes.

shortfall which is causing the AEC. This will help identify the information or message that needs to be communicated to customers: for example, if switching is suppressed because many customers have a mistaken belief that they are unable to switch suppliers, then an informational remedy could focus on correcting this misperception.

63. The CC will also consider how information may best be communicated to customers (eg via a website, through companies' marketing material, or by periodic statements to consumers). The choice between these options may depend on a number of factors, including:

(a) *The ways in which customers currently obtain information about the product.* It may be more practicable to introduce informational remedies that build on existing sources of information used by customers.¹²⁵

(b) *Customers' ability to access particular information channels.* For example, the level of Internet access among a customer base is likely to be relevant to consideration of whether to require firms to disclose prices on a price comparisons website.

(c) *The nature of the information to be provided to customers.* For example, the CC will generally consider whether information needs to be tailored to individual customers (eg via a customer statement) or whether a common message needs to be communicated to all consumers (eg in marketing materials).¹²⁶

64. Any obligation to provide information to consumers will usually fall on the providers of the product under investigation.¹²⁷ If information is to be provided using a medium

¹²⁵For example, in the *Home credit* market investigation, some of the informational remedies required information to be included on customers' payment books as this was a document that customers were likely to retain and look at regularly.

¹²⁶For example, in *Store cards*, information on the option to pay by direct debit and any APR that was over 25 per cent was provided to customers on statements; and in *Northern Irish personal banking*, information on charges relating to overdrafts was required to be communicated in marketing materials. Similarly, in *PPI* the CC is requiring PPI providers to provide existing customers with a personalized annual review and to include a small number of 'key messages' (which are not customer-specific) in their marketing material.

¹²⁷In some circumstances (eg an obligation to publish information on an existing website) a third party may control the final presentation of information to customers. In such cases the CC would need to be satisfied that the way in which information was provided by a third party would be effective in addressing the competition problem identified. This may give rise to a recommendation to the third party concerned.

over which providers have control, the CC may find it necessary to specify in some detail what information is to be provided and how. This is particularly likely to be the case if:

- (a) the disclosure is intended to help customers make comparisons between providers and a standard format for disclosure will help achieve this objective;¹²⁸ or
- (b) providers have incentives to conceal or marginalize information that presents them in an unfavourable light or which encourages their customers to switch or shop around.

65. The CC will also have regard to the potential benefits of taking a less prescriptive approach. The cost to firms of complying with informational remedies will generally be lower if they have some flexibility as to how they meet their requirements. It may also be necessary to allow some flexibility, in order to 'future proof' the remedy, so that it is still effective in relation to new or unusual situations or products.

66. In considering the design of informational remedies, the CC will generally be mindful of how the remedy is likely to interact with existing obligations on firms relating to information provision. For example, the content of advertisements may already be regulated (as was the case in *Home credit*) or firms may already be required to give various disclosures to customers at the point of sale (as was the case in *PPI*). The CC will look, where possible, to exploit positive synergies between existing regulations and CC proposed remedies.¹²⁹ It may sometimes be possible to implement informational remedies by building on existing mechanisms for communication with

¹²⁸See, for example, *Consumers and mortgage disclosure documentation*, September 2006, FSA, p9 and *Insight Research PPI forms consumer testing*, April 2009, CC, p4.

¹²⁹For example, the recent review on the Northern Ireland Personal Current Account Banking Order took into account the information obligations banks face under two European Directives (the Payment Services Directive and the Consumer Credit Directive) and under other UK regulations (eg the FSA's Banking Conduct of Business Sourcebook).

customers. Where this is the case, this may be a lower cost option than requiring the establishment of a new form of communication.¹³⁰

67. In specifying information remedies, the CC will look to ensure that information is provided at a time that the recipient can make use of it. For example, informational remedies that are intended to help customers search the market and compare products will tend to be most effective when consumers see this information *before* they have made their main purchase decision. So, for example, providing price and product information in writing after a sale has been concluded—while sometimes required for consumer protection—may only have a limited impact on search behaviour.¹³¹
68. Informational remedies that are intended to facilitate switching will tend to be most effective if they are targeted at those consumers who are able to switch, at a time when they are likely to be interested in switching (eg on invoices or statements setting out how much they have paid over a period).¹³²
69. The CC may consider whether introducing an information remedy might have the unintended consequence of facilitating coordination between suppliers. As not all markets are conducive to coordination and as suppliers will generally have better information than customers about the prices charged by their competitors, this is most likely to be a material risk if the conditions for coordination are met and if prices

¹³⁰For example, in *PPI*, the CC is obliging firms to provide information to the Money Advice Service for publication in its comparative tables, rather than developing a new site.

¹³¹There is evidence from the academic literature that consumers can display a 'status quo' bias, which makes them more reluctant to change decisions that they have already made than to consider alternatives when making an initial choice. See, for example, FSA, *Financial Capability: A Behavioural Economics Perspective*, July 2008.

¹³²For example, in *Northern Irish personal banking*, a switching leaflet was required to be provided alongside customers' annual summaries.

are opaque to competitors in the absence of the remedy (eg because prices are subject to individually negotiated discounts).¹³³

70. The CC will consider carrying out specific customer research into informational remedies (or ‘road-testing’) before they are put in place.¹³⁴ Road-testing may be carried out during a market investigation to inform choices between alternative remedy options and the design of individual options. The CC has also carried out road-testing after publication of the CC’s final report, to fine-tune the detail of particular remedies prior to final implementation.¹³⁵

Restraining the impact of vertical relationships

71. Competition problems can sometimes arise where individual firms are active at different levels of the supply chain of particular goods or services (vertical integration). Similar problems can arise from contractual arrangements between firms active at different levels of the supply chain (vertical restraints). Where a party has significant market power at one or more levels of the supply chain, vertical integration and/or vertical restraints (collectively, vertical relationships) may contribute to an AEC, typically through the firm’s incentive and ability to disadvantage competitors by foreclosing access to key inputs, facilities or customers and/or exploiting access to confidential information.
72. For example, if, as illustrated below, the manufacturer (Compco) of most of a key industry component also owned a major user of this component (Prodco1) then the ability of other users (Prodco2 and Prodco3) to compete could be disadvantaged by the combined entity through restricting supply of this component to Prodco2 and

¹³³For an example of how such a risk might materialize, see ‘Government-Assisted Oligopoly Coordination? A Concrete Case’, S Albæk, P Møllgaard and PB Overgaard, 1997, *Journal of Industrial Economics*, 45(4), pp429–443. The CC considered the possibility that informational remedies could facilitate coordination in the *LPG* and *Home credit* market investigations.

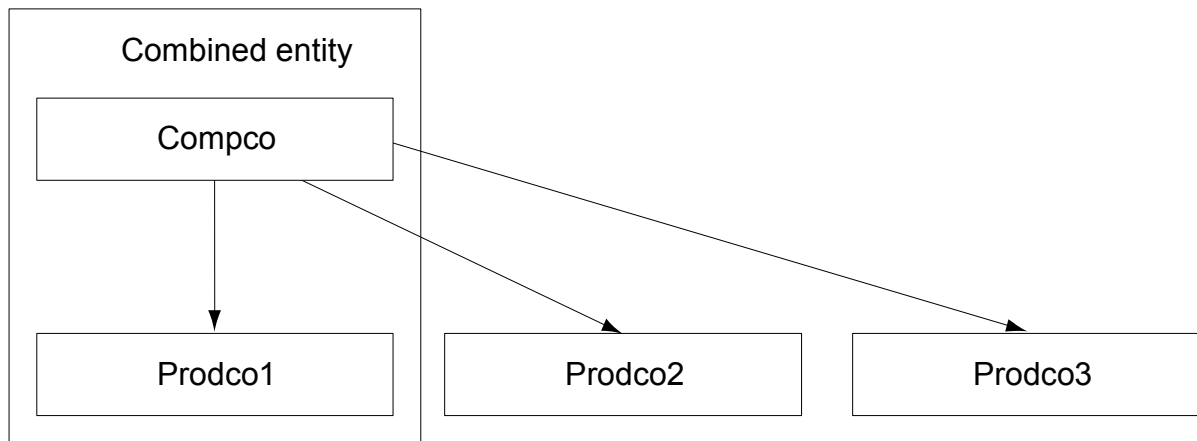
¹³⁴See *Road Testing of Consumer Remedies*, London Economics, July 2009.

¹³⁵For example, in *PPI*, the CC appointed market researchers after the final report to conduct focus groups with PPI customers, to see how customers reacted to different specifications of personal PPI quote and annual review forms. The findings of this research informed the development of the two forms, which were used as the basis for schedules to the resulting Order.

Prodco3 or making use of information concerning component orders by Prodco2 and Prodco3.

FIGURE 1

Illustration of vertical configuration



73. An AEC resulting from vertical relationships might be remedied by structural measures. Such measures might involve vertical separation (eg requiring divestiture of ProdCo1),¹³⁶ but could also involve reducing the market power that the combined entity has at the critical stage of the supply chain (eg partial divestiture of Compco).
74. If vertical relationships produce substantial RCBs that would be largely reduced by structural measures, or if divestiture is otherwise not appropriate or feasible, then behavioural measures may be selected by the CC that enable continued access to necessary products or facilities on appropriate terms and/or measures that prevent the combined entity exploiting privileged access to information.

Access remedies

75. Access remedies seek to address competition problems resulting from vertical relationships by enabling competitors to have access on appropriate terms to the

¹³⁶Or in the case of vertical restraints, prohibiting the commercial arrangements between Compco and Prodco1.

products and facilities of a combined entity that they require to be an effective competitor.

76. An access remedy will normally need to specify an access commitment by the firm concerned to third parties in sufficient detail so that third parties and monitoring agencies can enforce the commitment effectively. This will include details of the product or facility to be provided, including quality and technical parameters, and the terms of supply of the product or facility, including service levels and the basis of pricing. The latter may be particularly complex and may be subject to some of the same issues that are encountered with price caps, as discussed in paragraphs 89 to 92. If the access commitment is not specified or monitored in sufficient detail then the measure may be vulnerable to specification risk and the combined entity may be able to avoid its obligations readily. In such circumstances the CC may need to consider alternative forms of remedy (eg divestiture) that are likely to be more effective.
77. To overcome specification risk, the CC will also generally require that an access remedy should make explicit provision for accommodating future changes, for example, in product specifications or supply arrangements. Where a market is likely to be subject to frequent technological change or other wide-ranging market developments, there is likely to be a significant risk that an access remedy will become ineffective if the terms of the access commitment do not accommodate these changes. However, significant technological change might also reduce the market power that results in the AEC (eg if—see Figure 1—effective substitutes are developed for the component supplied by Compco).
78. In some supply arrangements, certain factors that are not easily specified may be particularly important for competitive access, for example quality of product support, priority for system upgrades, quality of management assigned to a customer's

account. Such factors may result in 'soft biases' in access to supply that may generate significant circumvention risk and may significantly undermine the purpose and suitability of an access remedy.¹³⁷

79. In certain circumstances it may be possible to simplify the specification of an access remedy by obliging the combined entity to supply a particular product on FRND terms where supplies to external customers are provided on the same or similar terms as apply to its own businesses. For this to be effective, the nature of FRND terms must deal adequately with the circumstances of external customers and must be transparent to customers and monitoring agencies in sufficient detail to enable effective enforcement.
80. The use of FRND terms may still leave competitors vulnerable to a margin squeeze by the combined entity as it may have an incentive to charge all downstream businesses, including its own, a uniformly high price since reduced profitability in its downstream business can be offset by higher profitability in its upstream business. The CC may therefore require that use of FRND terms is accompanied by provisions to protect against a margin squeeze (eg submission of regular reports demonstrating full cost recovery in the downstream business).
81. Where it is necessary to preserve access to a key facility owned or controlled by a vertically integrated company and the usage and capacity of the facility is readily assessed, the CC may determine that the most practical and effective means of providing access to competitors is to cap usage of the facility by the combined entity

¹³⁷In the *London Stock Exchange plc* merger inquiry (2005), the CC rejected a solely behavioural access commitment to clearing and settlement services due, in part, to the likely difficulty of 'soft biases'.

and require it to auction remaining capacity to third parties.¹³⁸ This would be effectively a form of ‘virtual divestiture’ as considered in paragraph 13.

‘Firewall’ measures

82. ‘Firewall’ measures¹³⁹ seek to prevent a vertically integrated company from accessing and using privileged information generated by competitors’ use of the company’s facilities or products. For example, in Figure 1, in the absence of firewall provisions, Prodco1 may be able to exploit privileged information regarding the orders and deliveries of key components from Compco to Prodco2 and Prodco3.
83. Firewall measures prevent access to privileged information by effectively insulating the firm or division generating the information from other group companies. This is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff.¹⁴⁰
84. To ensure effective compliance with firewall provisions, the relevant firm will normally need to commit significant resources to educating staff about the requirements of the measures and supporting the measures with disciplinary procedures and independent monitoring.

Controlling outcomes

85. Remedies that control or restrict the outcomes of business processes, such as price caps, supply commitments and service level agreements, seek to prevent firms from

¹³⁸In the *Centrica/Dynegy Storage* merger inquiry (2003), the CC required Centrica to restrict its usage of the Rough Gas Storage Facility to a percentage of total capacity to prevent foreclosure of access.

¹³⁹These may be referred to alternatively as ‘Chinese wall’ measures.

¹⁴⁰The *Centrica/Dynegy Storage* merger inquiry provides an example of the measures that may be required by the CC to make firewalls effective.

exercising market power. As such, these remedies seek to restrict the consumer detriment arising from an AEC, rather than addressing its cause.

86. In order to overcome specification risk, remedies that control outcomes normally need to specify in significant detail the products or services that are subject to control and the basis of the control, for example, the application of price indices to a price cap. The remedy will generally also need to specify how the control will deal with changes, such as the introduction of new products.
87. Measures to control outcomes are often used in regulated sectors, where it may not be feasible to introduce effective competition. The introduction of such measures is also a potential outcome of market investigations, particularly where it is not possible to identify effective ways of addressing the causes of the AEC or where competition-enhancing measures are likely to take a long time to remove the consumer detriment that results from the AEC. However, such measures are vulnerable to the main risks associated with behavioural remedies (see paragraph 37) and this can have a negative impact on their effectiveness and cost. Specifically:
- (a) Defining appropriate parameters for the control measure—for example, the level of a price cap—may be complex and, in some cases impractical, and the measure may therefore be vulnerable to specification risks. This is especially likely where any of the following conditions apply:
- (i) Pricing in the relevant market is naturally volatile, for example because of variability in input costs.
 - (ii) Products or services are differentiated rather than homogeneous; this may increase the complexity of any control in order to capture adequately the diversity of products offer.
 - (iii) Prices are individually negotiated, which may also increase the complexity of any control measure.

- (iv) Supply arrangements and products are subject to significant ongoing change, which require the control measure to change to reflect new developments.
- (b) This class of remedy directly overrides market signals with the result that it may generate distortion risks over time that increase the effective cost of the remedy or reduce its effectiveness. For example, a supply commitment for a particular product may discourage product innovation. While it may sometimes be possible to design measures to minimize distortion risk (sometimes referred to as ‘incentive regulation’) this may be at the expense of increasing the complexity of the control.
- (c) The control may be vulnerable to circumvention risks. For example, a price cap may be circumvented by a firm reducing the quality of controlled products or restricting the supply of controlled products. It may be sometimes possible to add preventative provisions to reduce the risk of circumvention, though this may be at the expense of increasing the complexity of the control.
- (d) Monitoring and enforcement may be costly and intrusive and, in the absence of an industry-specific adjudicator or regulator,¹⁴¹ may lack effectiveness, especially where the form of remedy is complex.
88. In view of these risks the CC will not generally use remedies that control outcomes unless other, more effective, remedies are not feasible or appropriate.¹⁴² In addition, where this class of remedy is employed, it is most likely to be used on a temporary basis unless there is no alternative to a continuing regulatory solution.

¹⁴¹Monitoring and enforcement of measures to control outcomes may be facilitated by the existence or appointment of a sufficiently resourced monitoring or adjudication body and/or a specialist industry regulator. For example, in the *Macquarie UK Broadcast Ventures/National Grid Wireless Group* merger inquiry, an independent adjudicator was appointed to resolve disputes arising in relation to the commitments that formed the package of behavioural remedies in this case. The adjudicator is paid for by the parties but is accountable to the OFT and under the guidance of Ofcom. In reaching its decision in this case, the CC had regard to the fact that Ofcom already had regulatory responsibilities for the relevant market.

¹⁴²Measures to control outcomes have been considered but rejected in a number of market investigations to report to date, including, for example, *ROSCOs* and *Store cards*.

Price caps

89. Price caps are likely to be the most common form of measure for controlling outcomes and illustrate many of the issues outlined above.
90. Different approaches may be adopted to defining the products and prices to be controlled depending on the circumstances of the case:
- (a) Prices of all affected products may be individually capped. This may be impractical where a large number of products are involved and may be inflexible in dealing with product changes.¹⁴³
 - (b) The average price of a basket of products may be capped. This allows greater flexibility in taking account of shifts in demand between products but the weighting of the constituents of the basket may be problematic and subject to distortion, for example, if revenue-weighting is used and the firm introduces a number of low-cost product variants.¹⁴⁴
 - (c) The price cap may apply to key benchmark products. This approach could greatly simplify monitoring and compliance but is only likely to be effective if a few key products are likely to continue to account for a large proportion of sales and the pricing of other products is expected to remain closely related to the benchmark products.
 - (d) The price cap may be to particular product terms (eg 'hidden charges'). Again, this approach could simplify monitoring and compliance and may increase the

¹⁴³For example, in the *Classified Directories* market investigation, consideration was given to how new, local and rescoped directories should be taken into account in order to avoid circumvention of the price control. The final remedies package included a provision within the price cap which set maximum prices that Yell could charge in new directories created as a result of rescoping.

¹⁴⁴For example, in the *Classified Directories* market investigation it was noted that although a basket may be preferable for regulated monopolies, its use on an incumbent facing emerging competition may not be beneficial. In this instance it was considered that the greater flexibility that a basket mechanism would give to Yell would enable it to target price-sensitive customers of its competitors and so undermine emerging competition. It would also enable it to target less price-sensitive Yell customers with price increases. Finally, it was also noted that a basket control introduced greater complexity, making it more difficult for customers and the OFT to monitor compliance.

overall level of price transparency for consumers, though it may result in a 'waterbed effect' whereby other charges increase.¹⁴⁵

91. The CC will seek a basis for the price cap which will restrict the extent to which a firm's market power is reflected in prices. The basis of a price cap may take a variety of forms:

- (a) Prices may be benchmarked to the prices of products in analogous markets that are determined by competition. In practice, this may only be feasible in limited circumstances due to the lack of an analogous market.
- (b) Prices may be determined on the basis of input cost data and an approved return on capital. This resembles the approach adopted by many sectoral regulators but generally requires a highly resource-intensive regulatory process backed by extensive information gathering and enforcement powers to be effective.
- (c) A hybrid approach may be taken whereby an initial price reduction is determined on the basis of input cost data and an approved return on capital, with subsequent changes to the level of the price cap being updated by reference to an index that is representative of input cost changes after incorporating current productivity gains.¹⁴⁶ The CC will wish to use an index which has robust data sources which cannot be influenced by the parties subject to the price control. Use of such an index may provide a broad approximation to a competitive price outcome in the short term but is at risk of departing significantly from such an outcome in the medium to long term.

92. The CC will generally require that price caps are accompanied by measures to prevent circumvention risk that may arise, for example, through the merged entity

¹⁴⁵For example, in the *Home credit* market investigation, the CC increased the value of the rebates paid to customers when they settled a loan early.

¹⁴⁶For example, variation to the original FirstBus/SBH Undertakings was made to allow revenue to rise by a hybrid index calculated using costs from the Confederation of Passenger Transport UK (CPT) Scotland index, rather than the original 1997 fare cap which was based on increases to RPI. This was because there was concern that the previous method was distorting competition by restricting fare increases below increases in bus industry costs.

restricting the supply or service levels of price-controlled products or reducing product quality.

Section 3: Recommendations

93. The CC can decide to make recommendations to others, either on their own or in combination with other measures as part of a solution to an AEC. The most common instances where the CC is likely to use recommendations are where it does not have jurisdiction to implement undertakings or orders directly, for instance where the area concerned is governed by a regulator or government department. Recommendations may also be included as a 'fallback' remedy, if it is uncertain whether the CC will be able to achieve its preferred remedy itself—for example, if this depends on parties being prepared to offer satisfactory undertakings.¹⁴⁷
94. Recommendations will be directed to the party that is best able to implement the necessary action. It will, of course, be for the person to whom a recommendation is addressed to decide whether to act on the recommendation. The Government has made a commitment to give a public response to any recommendation made to it within 90 days of the publication of a CC report. In its response, the Government will set out where it does or does not propose to make changes in light of the report, or where it proposes to consult on options. The Government will take into account all public policy and welfare considerations, including considerations of Better Regulation, in making its assessment.
95. The CC has made recommendations in five of the nine market investigations to report to date (*Home credit, ROSCOs, PPI, Groceries, BAA airports*).

¹⁴⁷For example, in *Groceries*, a recommendation was made to BIS that if the CC did not receive satisfactory undertakings from the parties in relation to the establishment of an Ombudsman then BIS should take action to establish the Ombudsman.

Recommendations have been used to address a diverse range of market features and have had structural and behavioural elements, for example:

- (a) Improvements to the information provided to customers. For example, in *Home credit*, the CC made a recommendation to BIS to require additional information on the Annual Statement that already had to be produced by lenders subject to the Consumer Credit Act.
- (b) Changes to the policy and regulatory framework applying to a market. In *BAA airports*, the CC made recommendations to the Department for Transport (DfT) and CAA about future airport regulation and airports policy.
- (c) Changes to the operation of rail franchising. In *ROSCOs*, the CC made recommendations to the DfT and to Transport Scotland about the operation of the rail franchise system, for example the introduction of longer rail franchise periods.
- (d) Changes to the operation of the planning regime. In *Groceries*, one element of the remedies package was a recommendation to the Department for Communities and Local Government (CLG) that a competition test for grocery store developments should be introduced into the planning system.

96. The fact that recommendations are not binding on the party to which they are addressed represents an intrinsic risk to their effectiveness as a remedy. A recommendation may not be accepted, may not be implemented in a way that is consistent with the CC's intentions, or may become redundant following a change of policy. There may be a risk to the effectiveness of a wider package of remedies, if the success of other measures in the package is dependent on a recommendation being followed.

97. In evaluating the effectiveness of a recommendation as a potential remedy, the CC will form a view on the likelihood that the recommendation will be acted on and the timescale over which this might be expected to occur. In reaching this view, the CC

will have regard both to the stated policy of the body to which the recommendation is to be directed and to the possibility that that stated policy may change, either in light of the CC's recommendation or subsequent events.

98. Before making a recommendation, the CC will consult with the body to which the recommendation may be directed as well as parties likely to be affected by it. This will enable the CC to understand the benefits and risks of implementing the recommendation, to inform decisions about the specification of any recommendation, as well as informing the CC's judgement about the likelihood of the recommendation being accepted.
99. When considering the specification of a recommendation, the CC will normally consider a range of factors including:
- (a) what change is required to remove or reduce the obstacle to competition that has been identified;
 - (b) who is best placed to take the action necessary to effect the necessary change;
 - (c) how that change might be best achieved by the party to which the recommendation is addressed; and
 - (d) the likelihood of a recommendation being implemented, the timescale within this would happen under different assumptions and the likelihood that change, if implemented, would be sustained.
100. In relation to these factors, the CC will have regard to the degree of complexity and the number of institutions involved in making the change. Recommendations that are relatively straightforward to specify and to introduce are generally more likely to be implemented than recommendations which are more complex or which require closely coordinated action by a large number of bodies.

101. There may sometimes be a trade-off between these factors. For example, the ideal outcome from a competition perspective might be very difficult to achieve in a reasonable timescale, whereas it may be possible to achieve a material improvement in competition by means of a recommendation that can be implemented more quickly. In such circumstances, the CC will weigh up the relative merits of increased certainty of implementation against the possibility of achieving a better outcome, but with less certainty or over a longer timescale.