

The UK Markets Regime

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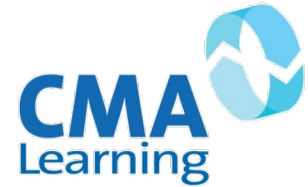


- **Part One: The UK Markets Regime**
 - Policy context and purpose
 - What is the markets regime?
 - “Essential features”
 - Legal instruments and how they work
 - » Market Studies
 - » Market investigations
 - Remedies
 - Some examples of cases
- **Part Two: Focus on Digital Markets**
 - CMA Markets work on digital markets
 - Ex ante regulation versus market investigation
 - Some final observations

Policy backdrop

- Current regime dates from 2002
 - rationale set out in 2001 Government White Paper “[A World Class Competition Regime](#)”
 - “....strong, proactive and independent competition authorities”
- Competition seen as a driver of economic growth
- Move towards “proactive” competition policy
- “Shining a light” into parts of the economy where there are potential competition problems
- Problems could be:
 - Structural – high concentration, barriers to entry
 - Demand-side – consumer inertia, confusion
 - Government policy and regulation

“Essential features” of markets regime



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

- **Not about breaking law**
 - Not punitive
 - We have other legal tools for this.

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

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

Market studies and market investigations

Important similarities:

- **Similar basis of assessment:**
 - Adverse effect on consumers (market study)
 - Adverse effect on competition (market investigation)
- Both also have **powers to compel provision of information** from firms
 - Criminal offence to withhold or provide misleading information

But there are important differences in....

....how they are instigated

Market studies

- only require a simple procedural step by CMA Board, no substantive test needed.

Market investigations

- substantive test must be met - reasonable grounds to suspect distortion of competition requires evidence that requires a reference decision to be made (intended to be a low threshold)
- instigated by the CMA Board, or by other regulators
- the Government also has the powers to make a references (though yet to be exercised)

....their governance...

- Market studies decided by CMA Board
- Market investigation decisions reserved to independent panel of members

....their timelines and procedural demands:

- Market studies must be carried out within 12 months
- Market investigations have statutory timeframe of 18 months (with possibility for 6 month extension)
- Market studies are relatively light in terms of procedural requirements, and also resourcing requirements
- Market investigations have significant procedural requirements so that parties rights are respected – involve hearings consultations.
- Market investigation assess whether there is an adverse effect o competition and, if so, to remedy

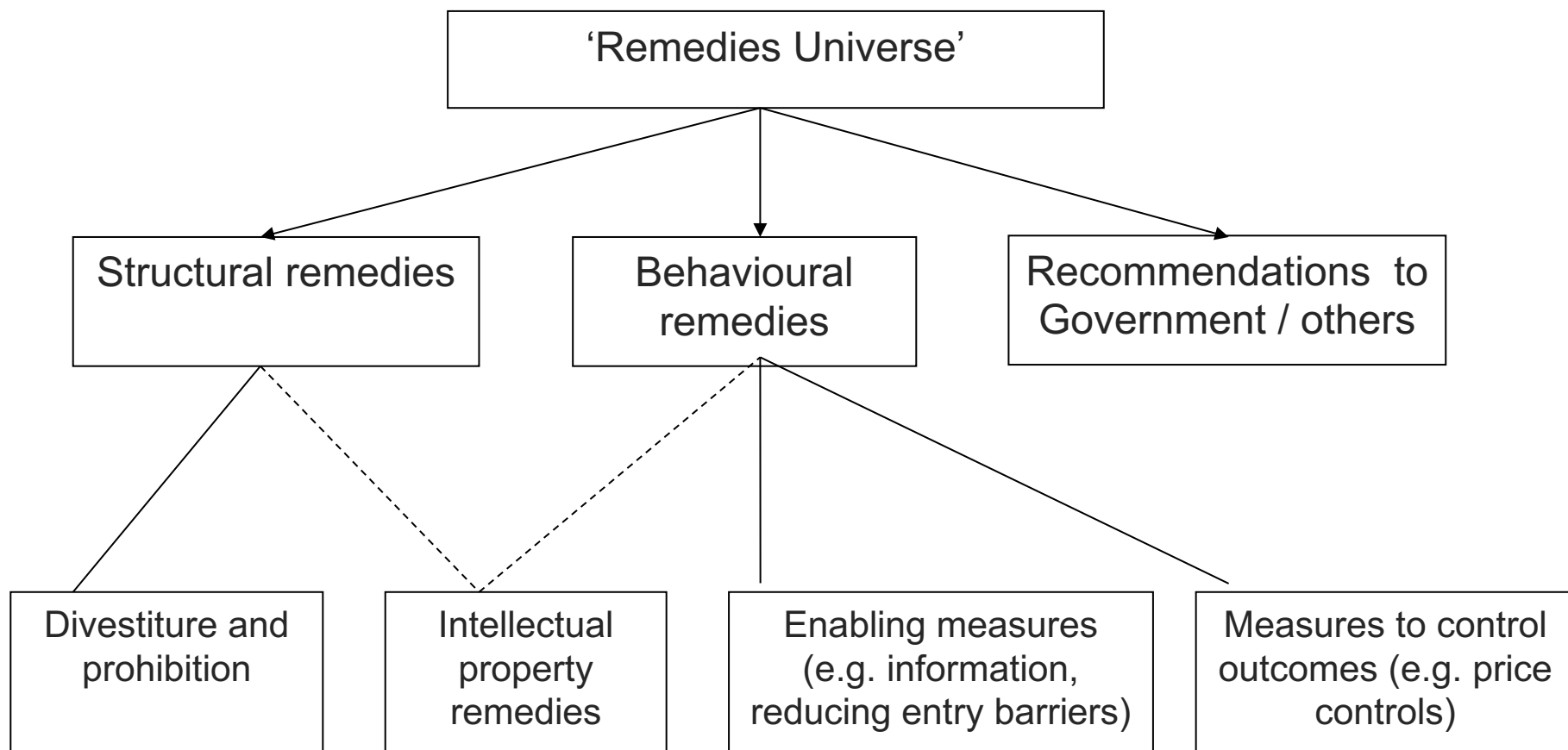
....and importantly in terms of their remedies powers.....

Possible outcomes and remedies

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

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

Markets work can lead to a diverse range of outcomes



What determines which we use?

Tend to use....

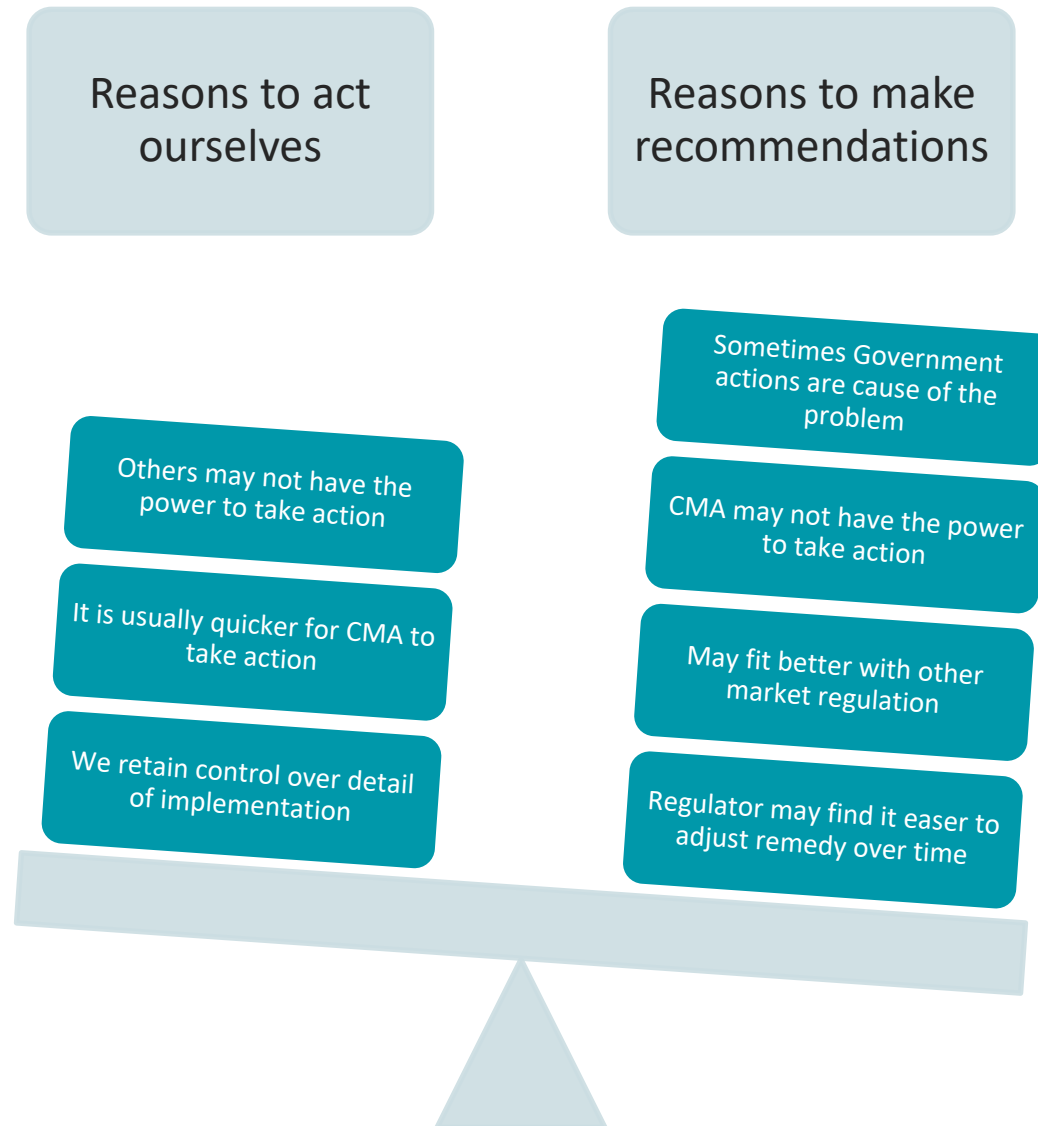
....Market investigation when...

- We are clear that it is likely that order-making powers will be needed

....Market study when

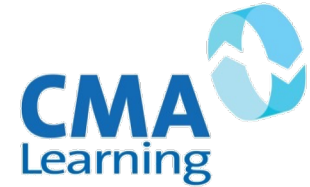
- We need to do some fact-finding
- Most likely to lead to recommendations to government

Various factors affect whether we act ourselves or recommend action by others



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

Market investigations - some examples



Former state-owned sectors

BAA (2009)

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

Energy market investigation (2016)

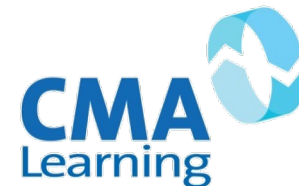
- Background of significant price rises in deregulated retail energy sector
- Referred by energy regulator to “clear the air”
- Market investigation found consumer detriment of c£1.4bn a year
- CMA imposed price cap on pre-payment sector of the market and put in place measures to drive switching and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

Also Local Buses (2011); Milk Marque (1999); British Gas (1988)

Retail Banking

- Lack of consumer switching leading to poor outcomes for consumers of bigger, longer-standing banks
- Remedies to improve switching and comparison and in particular to introduce “open-banking” - enforcing banking data to be held in API standard

Thoughts/Observations on markets regime



- Impact of markets work assessed to be £1.9bn in 3 year period to 2020. (About 73% of overall CMA impact)
- Key to credibility of markets work is evidence-based and robust objective analysis taken by independent authority
- Accountabilities are also important - decisions appealable to independent tribunal on judicial review principles
- Can take time to implement change also resource-intensive
- We have made proposals to government for reform including:
 - Ability to take action more quickly;
 - Powers to implement some remedies earlier
 - Some streamlining of processes
 - Making it easier to revisit past remedies
 - Stronger enforcement powers against breaches of remedies

Part Two: Focus on Digital Markets



Digital Markets Work (1)

Online Platforms and Digital Advertising Market Study (2020)

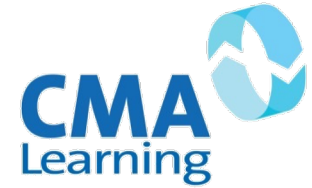
- Entrenched market power by Google and Facebook
- Requires pro-competitive ***ex ante*** regime with the following elements
- Set out a range of interventions that could potentially address the harms
- Made recommendation to government to establish a new regime
- Decided against proceeding to a market reference

Digital Market Taskforce Advice to Government (2020)

Argued that existing tools are not well-placed to address challenges of platforms:

- Slow, remedies backward looking and case specific, and are largely static one-time interventions focused on on addressing poor conduct than shaping future action.
- An *ex ante* approach in the form of a ***Digital Markets Unit*** (DMU) is needed to proactively shape the behaviour of powerful digital firms and prevent harm arising

Digital Markets Work (2)



Mobile Eco Systems Market Study (2022)

- Android and iOS - Mobile devices, browsers, Operating systems, and App Stores
- Large interconnected ecosystems that make it difficult for rivals to challenge
- iOS restrictions effectively large range of services (web apps, cloud gaming, other browsers) through requirement to use Apple Browser engine
- Android – fewer explicit restrictions, but pre-installation and use of defaults
- Set out a range of interventions that could potentially address harms
- Argued (again) for pro-competitive regulatory regime to provide full solution

Market Investigation Reference Consultation on Mobile Browsers and Cloud Gaming (2022 ongoing)

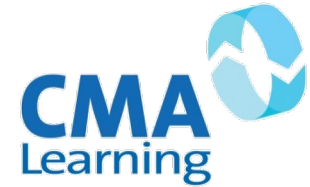
- Case for an Market Investigation into two elements of mobile eco systems
- Case based on: potential for one-off solutions through an MI to address these issues.
- CMA's digital strategy to use existing tools as far as possible until new regulatory regime with DMU is put in place

Ex ante versus Ex post regimes

Choice of ex ante and ex post regime depends on balance of risk between:

- (i) concerns about excessive intervention limiting healthy competition and innovation point to ex post regime.
 - Ex post competition measures pre-suppose markets self-correct after harm addressed.
 - Focus is on diagnosis more than remedy
- (ii) when there is entrenched incumbency position firms are predisposed to exploit market power.
 - Ex ante regime needed to shape competition and limit harms up-front.
 - Ex ante regimes allow for a lot of focus on remedies.

Market investigation or ex ante regime



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

But:

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

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

- Can effect change – especially when one-off interventions are good options.
 - Structural remedies.
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- **We have therefore argued that a new regulatory regime is needed for a comprehensive solution**
 - The DMU regime being proposed is effects-based and proportionate – not rules-driven



Thank You