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GIBRALTAR REGULATORY AUTHORITY

MARKET INVESTIGATION REFERENCES

DRAFT GUIDELINES

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FOREWORD

The purpose of this guidance is to indicate how the Gibraltar Competition and Markets Authority (the "GCMA") intends to apply the provisions of the Competition Act 2020 (the "Act") relating to the making of market investigation references.

Under section 191 of the Act, the GCMA may make a market investigation reference to its chair for the constitution of a group where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in Gibraltar for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar.

These guidelines are not binding, but will help businesses, its advisers and consumers to understand the grounds on which the GCMA may decide that a market investigation reference is justified. It is not intended to provide a prescriptive framework for analysis nor do the various issues discussed constitute an exhaustive list of factors that may prevent, restrict or distort (adversely affect) competition, not least because markets and thinking about competition continue to evolve.

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1. ACKNOWLEDGEMENTS

Where appropriate, the Gibraltar Competition and Markets Authority will seek to ensure that locally published guidance notes are consistent with those published by fellow Competition Authorities in other jurisdictions.

As well as reflecting the existing competition standards and practices in Gibraltar, parts of this document reflect and/or incorporate the guidance from the UK's Competition and Markets Authority.

The following document was used in the production of these guidelines:

(a) "OFT511: Market Investigation References", Office of Fair Trading (UK)[1]

(b) "CC3 (Revised): Guidelines for market investigations: Their role, procedures, assessment and remedies", Competition Commission (UK)[2]

(c) "CMA3 (Revised): Market Studies and Market Investigations: Supplemental guidance on the CMA's approach", CMA (UK)[3]

[1] OFT511: Market Investigation References", Office of Fair Trading (UK), March 2006 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284399/oft511.pdf>, accessed 12/10/23.

[2] CC3 (Revised): Guidelines for market investigations: Their role, procedures, assessment and remedies, Competition Commission (UK), April 2013 <https://assets.publishing.service.gov.uk/media/5a7c1b7340f0b645ba3c6bcc/cc3_revised.pdf>, accessed 12/10/23.

[3] CMA3 (Revised): Market Studies and Market Investigations: Supplemental guidance on the CMA's approach, CMA (UK), January 2014 (Revised July 2017) <https://assets.publishing.service.gov.uk/media/5a82015940f0b62305b91f95/cma3-markets-supplemental-guidance-updated-june-2017.pdf>, accessed 12/10/23.

2. INTRODUCTION

The Gibraltar Regulatory Authority (the "Authority") is designated as the competent authority for the promotion and enforcement of competition law in Gibraltar. Pursuant to such designation, the Authority must discharge all the functions, duties and obligations in accordance with the Competition Act 2020 (the "Act"), acting in its capacity as the **Gibraltar Competition and Markets Authority (the "GCMA").**

These guidelines are not binding, but will help businesses, their advisers and consumers to understand the grounds on which the GCMA may decide that a market investigation reference is justified. It is not intended to provide a prescriptive framework for analysis nor do the various issues discussed constitute an exhaustive list of factors that may prevent, restrict or distort (adversely affect) competition, not least because markets and developments within competition continue to evolve.

POWER TO MAKE REFERENCES

Under section 191 of the Act, the GCMA may make a market investigation reference to its chair for the constitution of a group[4] where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in Gibraltar for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar. However, a reference cannot be made by the GCMA where an undertaking has been accepted in lieu of a reference (section 228 of the Act) or where a ministerial reference (section 195 or 207(6) of the Act) of the same matter has been made but not finally determined by the GCMA.

Section 191(2) states that a feature of a market in Gibraltar for goods or services is to be construed as a reference to:

- the structure of the market concerned or any aspect of that structure;
- 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
- any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.

Section 191(3) of the Act adds that where the feature or each of the features concerned relates to conduct, a reference may be made in relation to more than one market in Gibraltar for goods or services. Section 191(4) explains that "conduct" includes any failure to act (whether intentional or not) and any other unintentional conduct.

It may not always be clear whether a feature of a market that affects competition is best described as structural or as an aspect of conduct; for example, a firm's supply contracts or distribution arrangements (a matter of conduct) may add to entry barriers in a market (a structural feature). Provided the relevant feature is clearly identified, categorising it as conduct or structure is a semantic issue. The separate references to structure and conduct in section 191 of the Act do not require the GCMA to state whether particular features of a market that

[4] Pursuant to Schedule 11 of the Competition Act 2020.

are the subject of a reference are to be considered structural features or some aspect of conduct.

A decision to make a market investigation reference is made by the GCMA Board and the exercise of this power cannot be delegated[5]. The GCMA has the discretion rather than a duty to make a market investigation reference where the statutory criteria appear to be met. Before making a reference, it must therefore consider:

- whether it has reasonable grounds to suspect that competition is prevented, restricted or distorted in some market in Gibraltar;

- whether it is a feature, or combination of features, of a market that gives rise to this adverse effect on competition ("AEC"); and

- whether a market investigation reference would be the most appropriate way of proceeding.

It is important to note that the system of market investigations does not entail sanctions for past behaviour; nor does it provide for the award of compensation for loss caused by a market failure.

Following a reference, the GCMA will decide whether competition is indeed prevented, restricted or distorted, and (if so) what, if any, action should be taken to remedy the AEC or any detrimental effect on customers resulting from it (in the form of higher prices, lower quality or less choice of goods or services, or less innovation in relation to goods or services in any market in Gibraltar).

It is important that the GCMA continually adapts its approach to market investigation references to ensure that it is fulfilling its statutory duty in light of a dynamic and evolving economy. It therefore reserves the right to amend these guidelines from time to time in line with regulatory experience gained and expertise acquired.

[5] For full details, see Schedule 11 of the Competition Act 2020.

3. WHEN TO MAKE A REFERENCE

The GCMA will only make references to its chair for the constitution of a group when the reference test set out in section 191 of the Act and, in its view, each of the following criteria have been met:

- it would not be more appropriate to deal with the competition issues identified by using other powers available to the GCMA or, where appropriate, to sectoral regulators;

- it would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference;

- the scale of the suspected problem, in terms of its AEC, is such that a reference would be an appropriate response to it;

- there is a reasonable chance that appropriate remedies will be available.

RELATIONSHIP WITH THE COMPETITION ACT 2020

The Act prohibits agreements, which have the object or effect of preventing, restricting or distorting competition, and abuses of a dominant position. Market investigations are concerned with something different from particular anti-competitive agreements or abuses of dominance. Their purpose is to determine whether the process of competition is working effectively in markets as a whole and will provide a framework for identifying, analysing and, where appropriate, remedying industry-wide or market-wide competition problems.

When dealing with a suspected competition problem it is the GCMA's policy always to consider first whether it may involve an infringement of the Chapter 1 and/or the Chapter 2 prohibitions and to investigate accordingly. It will only go on to consider a reference to its chair for the constitution of a group in one of two circumstances:

- when it has reasonable grounds to suspect that there are market features, which prevent, restrict or distort competition, but not to establish a breach of the Chapter 1 or Chapter 2 prohibitions;

- when action pursuant to the Chapter 1 or Chapter 2 prohibitions has been or is likely to be ineffective for dealing with the AEC identified.

Sectoral regulators may, in addition, wish to exercise their discretion and consider whether it would be more appropriate to deal with a competition problem under any sector specific legislation or rules.

Market investigation references are therefore likely to focus on competition problems arising from uncoordinated parallel conduct by several firms or industry-wide features of a market in cases where the GCMA does not have reasonable grounds to suspect the existence of anti-competitive agreements or dominance. Such problems may have a variety of sources such as competition-dampening common practices whose origins have long been forgotten and customers who are poorly informed relative to suppliers (information asymmetries), amongst others.

It is likely that in the great majority of references the GCMA makes will involve industry-wide market features or multi-firm conduct. Generally speaking, single-firm conduct will, where necessary and possible, be dealt with under the Chapter 1 or Chapter 2 prohibitions. It is not the present intention of the GCMA to make market references based on the conduct of a single firm, whether dominant or not, where there are no other features of a market that adversely affect competition.

SCALE OF THE PROBLEM

The GCMA will only make a reference when it has reasonable grounds to suspect that the adverse effects on competition of features of a market are significant. In making this assessment it will consider whether these suspected adverse effects are likely to have a significant detrimental effect on customers through higher prices, lower quality, less choice or less innovation. Where it seems likely that this effect is not significant, the GCMA will normally take the view that the burden on business, particularly in terms of management time, and the public expenditure costs of an investigation are likely to be disproportionate in relation to any benefits that may be obtained from remedying the adverse effects.

It is not possible to make a definitive statement about the circumstances in which adverse effects on competition, or the customer detriments arising from them, will be regarded as not significant. However, the following factors are relevant and will be taken into account by the GCMA:

The size of the market. Generally speaking, the cost of an investigation into a very small market would not be justified. However, problems in some relatively small specialised or local markets could have a significant detrimental impact on customers affected by them, in which case a reference may be justified.

The proportion of the market affected by the feature giving rise to adverse effects on competition. When this proportion is small, the adverse effects will unlikely lead to significant customer detriment. The GCMA does not think that it would be appropriate to specify a figure for the proportion of the market affected below which it would not make a reference, not least because the precise definition of the market (or markets) concerned and the extent of the market features having an AEC may not be clearly established until after it has conducted its investigation.

However, where possible, the GCMA will act in a way that is broadly consistent with its practice when applying its powers under the Act. In relation to the Chapter 1 prohibition (on anti-competitive agreements), such agreements generally have no appreciable effect on competition if the parties' combined annual turnover does not exceed £7 million[6], although there will be circumstances in which this is not the case particularly where agreements involve price fixing.

The persistence of the feature giving rise to adverse effects on competition. If the feature concerned seems likely to be short-lived (for example, because of an expected change in regulations) or clearly relates to a one-off incident, and there are no other market features giving cause for concern, then a reference is not likely to be justified.

[6] Competition (Small Agreements and Conduct of Minor Significance) Regulations 2021.

In some cases, the market features that adversely affect competition may also produce offsetting customer benefits. Such benefits might arise, for example, where customers gain when more of them use the same good or service (network effects) or where there are substantial economies of scale. Where the GCMA is confident that offsetting customer benefits exceed the likely detriment from the AEC, it will not make a reference.

UNDERTAKINGS IN LIEU

Section 228 of the Act gives the GCMA the power to accept undertakings instead of making a reference to its chair. In exercising this power, the GCMA must have regard to the need to achieve as comprehensive a solution, as is reasonable and practicable, to any adverse effects on competition identified (and any detrimental effects on customers so far as they result or may be expected to result from such adverse effects). It may also have regard, as appropriate, to the effect of the possible undertakings on any relevant customer benefits arising from a feature or features of the markets concerned.

In assessing customer benefits, the GCMA will take into account benefits such as lower prices, higher quality or greater choice of goods or services in any Gibraltar market, or greater innovation in relation to such goods or services.

Undertakings in lieu of a reference are unlikely to be common. In many cases the GCMA will not have done a sufficiently detailed investigation of a competition problem, prior to making a reference to its chair, to be able to judge with any certainty whether particular undertakings will achieve as comprehensive a solution as is reasonable and practicable. This is particularly likely to be the case when the adverse effects on competition arise from market features involving several firms or industry-wide practices. Moreover, trying to negotiate undertakings with several parties, in circumstances in which possible adverse effects on competition have not been comprehensively analysed, is likely to pose serious practical difficulties. By contrast, where an AEC arises from the conduct of a very few firms there may be more scope for accepting undertakings in lieu, provided that the GCMA is confident that they will achieve a comprehensive solution.

Before accepting any undertaking in lieu the GCMA must publish the proposed undertaking in a notice which, among other things, states the purpose and effect of the undertaking and identifies the AEC and any resulting detrimental effect on customers identified by the GCMA that the proposed undertaking is intended to remedy (the list of all the points to be included in such notices is given in section 229(2) of the Act). The GCMA must then consider any representations arising from the publication of the notice.

When an undertaking in lieu is accepted, the GCMA may not make a market investigation reference involving the same goods or services for a period of 12 months unless it considers the undertaking has been breached or it has been given false or misleading information by the person responsible for giving the undertaking.

4. POWERS AND PROCEDURES

THE GCMA'S POWERS OF INVESTIGATION

Section 168 of the Act gives the GCMA certain investigatory powers that it may use when it believes it has the power to make a reference, that is when it has reasonable grounds for suspecting that any feature of a market prevents, restricts or distorts competition. As the threshold for the use of these powers is the same as that for making a reference, there will be occasions when the GCMA will decide not to use its powers before making a reference. This is most likely to occur in situations where an investigation has already been carried out by the GCMA. However, there will be other occasions when the GCMA will decide that it needs to investigate a market further before making a reference, for example in order to be clearer about the appropriateness of a reference. Such further investigation will not necessarily involve the use of these investigatory powers but may do so.

Section 168 gives the GCMA three investigatory powers:

- to require the attendance of parties to give evidence;
- to require the production of specified documents; and
- to require the supply of specified information (including estimates and forecasts).

CONSULTATION AND PUBLICITY

Where the GCMA is proposing to make a reference, it must first consult, so far as practicable, any person on whose interests the reference is likely to have a substantial impact (section 243 of the Act).

In undertaking this consultation, the GCMA must, so far as practicable, give its reasons for the proposed reference. The content of any statement of reasons will vary from case to case but the GCMA expects that it would normally cover the following points:

- a description of the goods or services concerned;
- the identity of the main parties affected by the reference, whether as suppliers or as customers; or this may involve the identification of categories of persons rather than individuals;
- a view as to the possible definition of the market (or markets) affected;
- a summary of the evidence that has led the GCMA to have a reasonable suspicion that competition has been prevented, restricted or distorted, including the possible market features that may be relevant.

The length of the formal consultation period, following the issue by the GCMA of a statement of its reasons for a proposed reference, will depend upon the complexity of the issues and the extent to which discussions have already taken place with the parties affected. In general, the GCMA expects to have discussed the issues thoroughly with the parties concerned, where they have been identified, before the start of the formal consultation period. In such cases a

relatively short formal consultation may be appropriate. However, the GCMA will ensure that the length of total consultation period, formal and informal, is sufficient to enable parties to put their concerns and arguments to it.

At the end of this period, the GCMA will take account of representations received before making a final decision about whether to make a reference. Any reference that it makes must be published together with the reasons for it. It is likely that the published reasons for making a reference will cover the same ground as the reasons for a proposed reference, taking account of any relevant points that have arisen from the consultation on the proposal.

CONTENT AND VARIATION OF REFERENCES

Section 196 of the Act requires that a market investigation reference shall specify the enactment under which it is made, the date on which it is made, and the description of the goods or services to which the feature or combination of features concerned relates.

The GCMA may describe the goods or services in the reference in terms of the persons to whom they are supplied (or by whom they are acquired) or the places where they are supplied (or acquired).

A single reference may involve several different markets or several different features provided that they all relate to the specified goods or services. This will occur, for example, when the supply of goods involves a chain with several links (such as manufacturer to wholesaler, wholesaler to retailer, and retailer to consumer) and features giving rise to competition concerns which exist at each level.

The GCMA may also vary at any time, a market investigation reference[7].

TYPES OF MARKET INVESTIGATION REFERENCE

The following types of market investigation reference may be made by the GCMA:

- **ordinary references** (these are references which are not cross-market references)

- **cross-market references** (this is a type of reference in respect of specific features or combinations of features that exist in more than one market and can only be made in relation to features of a market relating to conduct[8]).

QUESTIONS TO BE DECIDED

The GCMA on an **ordinary reference**, will decide whether any feature, or combination of features, of a market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar.

[7] Section 199(1) of the Competition Act 2020.

[8] See section 191(2)(b) and (c) and 195(4) of the Competition Act 2020.

The GCMA shall, on a **cross-market reference**, decide in relation to each feature and each combination of the features specified in the reference, whether the feature or combination of features, as it relates to goods or services of one or more than one of the descriptions so specified, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar.

The GCMA shall, if it has decided on a market investigation reference that there is an AEC, decide the following additional questions -

(a) whether action should be taken by it under section 202 of the Act for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC; and

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

In relation to a market investigation reference, there is a detrimental effect on customers or future customers in the form of -

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

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

In deciding the questions mentioned above the GCMA may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market or markets concerned.

A benefit is a relevant customer benefit of a feature or features of a market if –

(a) it is a benefit to customers or future customers in the form of –

(i) lower prices, higher quality or greater choice of goods or services in any market in Gibraltar (whether or not the market or markets to which the feature or features concerned relate); or

(ii) greater innovation in relation to such goods or services; and

(b) the GCMA or (as the case may be) the Minister believes that –

(i) 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 as a result (whether wholly or partly) of that feature or those features; and

(ii) the benefit was, or is, unlikely to accrue without the feature or features concerned.

MARKET INVESTIGATION PROCEDURES

The following section provides an overview of the procedures for a market investigation. In practice, some aspects of the procedures used in a particular case may vary from those set out below. This is inevitable because no two market investigations are alike in all respects and some references can encompass both upstream and downstream markets[9].

MANAGING INVESTIGATIONS

All providers of the goods or services in a market under investigation are potentially main parties to an investigation. However, the degree of each party's engagement with the GCMA may vary. The GCMA may need more information and evidence from some than from others, therefore differences in communication by the GCMA with different main parties may consequently reflect the different levels of party engagement.

In addition, there will be parties which are not providers of the goods or services in the market, but which may be materially affected by the investigation (including super-complainants, customers and consumer groups, upstream suppliers, and trade and professional bodies). Levels of engagement with these parties will also vary. For example, the GCMA may seek information from some of them, while others may volunteer information and views to the GCMA. While the detail of its processes might vary, the GCMA will ensure that its procedures are fair and give parties the opportunity to participate appropriately in an investigation.

TIMESCALES

The Act requires the GCMA to publish its report on a market investigation within 18 months of the reference[10]. There is scope to extend the investigation by up to a further six months if the GCMA considers there are special reasons for doing so[11]. Only one extension is possible and the decision to extend the timetable must be published.

The power to extend the timetable is most likely to be used in complex cases (for example, where there are multiple parties, issues and/or markets), in order to ensure a thorough and fair consideration of the issues raised and proper engagement with parties. The GCMA is also required to publish the reasons for any such extension[12].

The GCMA's report must contain the decisions on the questions which it is required to answer under section 198 of the Act, its reasons for those decisions, and such information as the GCMA considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions[13]. As an example, a final report may contain a summary of the GCMA's findings, the industry background and regulatory framework, the market definition,

[9] An upstream firm provides raw materials or manufactures inputs for processing and/or distribution by a downstream firm.

[10] Section 201(1) of the Competition Act 2020.

[11] Section 201(3) of the Competition Act 2020.

[12] Section 246(4) of the Competition Act 2020.

[13] Section 200(2) of the Competition Act 2020.

the features of the market/s that prevent, restrict, or distort competition, the detrimental effects on customers, the need for remedial action and the decision on remedies.

The following timetable shows the stages of a typical 18-month investigation. In practice, some of the stages may overlap and developments in the investigation, such as a need for additional consultations, may require adjustments to the timings and procedures. Some steps may not be needed and discarded altogether.

STAGE OF PROCESS	**TIMING**
Reference	Pre-reference analysis of information
'First day letter'/initial information requests Publication of initial Issues Statement (setting out theories of harm and inviting views on possible remedies) Initial submissions from main and third parties	Months 1-2
Site visits and hearings	Month 3
Further interaction with parties	Months 2-11
Publication of Draft Decision Report on the AEC and remedies (if needed)	**Month 12**
Consideration of responses to Draft Decision	Months 12-16
Publication of Final Report	**Month 18**

5. PREVENTION OF COMPETITION

The GCMA views competition as a process of rivalry between firms seeking to win customers' business. Competition will be effective and markets will work well when firms engaged in the market are subject to competitive constraints from other firms already in the market and/or from firms that could readily enter it, perhaps with new products, and from their customers.

The phrase "prevention, restriction or distortion of competition" should be interpreted broadly to encompass any reduction or dampening of actual or potential competition. Conduct that adversely affects the opportunity for others to compete is not the only thing that could prevent, restrict or distort competition. Where other features of a market create a situation in which suppliers do not need to compete to the extent that they would in a competitive market, those features may be found to restrict competition.

The GCMA's enquiries into a possible market investigation reference may affect several levels of a supply chain. It might be, for example, that competition appears to be prevented, restricted, and distorted in some way by the structure of the market or the conduct of firms at the manufacturing stage, yet further examination of the situation suggested that practices at the downstream level could also have an AEC. A market investigation reference could require that the effectiveness of competition at various levels of a supply chain should be assessed.

Although section 191 of the Act sets out the three types of market feature that could have an AEC, in practice there may not be a clear divide between structural features and those relating to conduct. For example, exclusionary conduct by firms in the market will affect structure to the extent that it raises entry barriers. In most cases, the GCMA's assessment that a reference would be appropriate is likely to be based on a combination of features and will include evidence about both structure and conduct. It may also include evidence about the performance of firms in the market.

Information on prices and profitability, in particular, can sometimes be a useful supplement to the GCMA's evidence on structural features of a market and on firms' market conduct. Indeed, evidence on prices and profitability might be the beginning of the GCMA's interest in a particular market. This is because complaints of anti-competitive conduct will often focus on excessive prices and high levels of profitability, perhaps making comparisons with prices or the profitability of firms in other similar markets or in other countries. Other performance indicators such as the level of costs or efficiency measures may, on occasions, also be a useful supplement to analyses of market features.

The GCMA is well aware of the limitations of such information for its purpose. Performance indicators in isolation yield little useful information about the state of competition in a market. At best they should be used as an indirect indicator that a competition problem may exist. For example, profits in dynamic markets, where technological advances are important, may not be entirely reliable and so a snapshot of profitability will not give a good indication of a firm's performance. Furthermore, identifying the concept of excessive prices and profits and the "normal" rate of return is extremely difficult. There is a need for care before any inferences about competition are drawn. Nevertheless, the GCMA will consider any available and reliable information on the dynamics of prices, profitability and other performance indicators in its assessment of the case for a market investigation reference.

In short, in any competition assessment, the GCMA will usually wish to consider a combination of features and their inter-relationships and will look at various types of information and sources of evidence. However, it is not required to reach firm conclusions before making references and it would be inappropriate for it to engage in extensive research.

MARKET DEFINITION

In making a market investigation reference, the GCMA must specify the goods or services for whose supply or acquisition competition is adversely affected. This will require some consideration of the definition of the relevant market. Market definition can be a useful step along the way to an analysis of market structure and an assessment of the extent to which firms may have market power, but it need not always be a necessary step. The effects on competition of some feature may be clear enough that firm conclusions on the definition of the relevant market by the GCMA are unnecessary.

The GCMA's approach to market definition in enquiries into a possible market investigation reference will conceptually be the same as in other competition cases. A market definition will usually comprise two dimensions, the product dimension and the geographic dimension. The product dimension comprises those products (or services) that are close enough substitutes for the price of one of the products to be constrained by the prices of the other products comprising the market. Products are close substitutes if a significant number of customers are able and prepared to switch their purchasing from one to the other on a change in their relative prices. This is referred to as demand-side substitutability.

A market may also be defined from the supply side, recognising the fact that a competitive constraint will apply wherever firms who do not currently supply a particular product could speedily, and at little cost, switch their facilities to the production of that product, should it become profitable to do so on a change in relative prices.

The geographical area that constitutes the relevant market will also be determined by reference to demand-side substitutability and, where it is appropriate, supply-side substitutability. For the purposes of market definition, the GCMA considers the geographical market as Gibraltar.

In all cases, the GCMA's purpose in defining markets will be to achieve a sufficient understanding of the competitive constraints that apply to firms supplying or acquiring the goods or services that would be the subject of a possible market investigation, so as to enable it to reach a view on whether any effects on the competitive process are of sufficient significance to justify a reference.

6. STRUCTURAL FEATURES OF A MARKET

Structure describes the environment within which firms operate in a particular market. The GCMA interprets it broadly to include such matters as government regulations and any information asymmetries that are inherent in the nature of the market. Any assessment of the working of competition in a market will begin with an analysis of market structure and the implications of this structure for the conduct of the firms engaged in the market. A wider range of structural features can give rise to concern under the market investigation reference provisions of the Act than would normally arise in considering whether a firm or firms had infringed the Chapter 1 and/or Chapter 2 prohibitions.

CONCENTRATION

Market concentration is about the number and size distribution of firms in a particular market. It is generally accepted that, other things being equal, the larger the market share of a firm, the greater its market power is likely to be, particularly if its high market share has persisted over a period of time and is relatively stable. This applies to both sellers and buyers. Market shares are not conclusive indicators of a firm's market power of course. Other factors can be relevant. Notable among these are entry barriers. Markets in which firms have high market shares are often, though not necessarily, markets with high entry barriers. In assessing the degree of concentration, it is important for the market to be correctly defined as too narrow a definition will overstate concentration (and vice versa).

A firm may have market power, and the capacity to act in ways that may prevent, restrict or distort competition, with a market share below that usually regarded as necessary to suggest dominance. Much will depend upon the effectiveness of the constraints exerted by its competitors or its customers. Generally speaking, a firm with a stable market share will be more likely to have market power than one whose share fluctuates from year to year.

In markets comprising a small number of firms (oligopolies), each firm might find it relatively easy to predict the reaction of its competitors to any action it might take. This could provide an opportunity for firms to coordinate their behaviour for mutual advantage or it could simply lessen the incentive to compete, leading to a situation in which rivalry to attract new customers becomes muted. By no means all oligopolistic market structures produce these results. Among the more important of the market features that may assist the coordination of behaviour are:

- the existence of substantial barriers to entry;
- the homogeneity of the firms' products;
- the similarity (symmetry) of the firms with respect to their market shares, their cost structures, the time horizons of their decisions and their strategies;
- the stability of market conditions on both the demand and the cost side;
- the degree of excess capacity;
- the extent to which prices, outputs and market shares are transparent so that competitors can be well-informed about each other's behaviour;

- the awareness by firms that their competitors have the ability to respond quickly and effectively to any price reductions they make;

- the structure of the buying side of the market (if the issue is possible co-ordination among sellers); and

- the extent of any multi-market contacts.

This list is not exhaustive nor are any of the items on it necessary conditions for competition dampening to take place. It also is quite possible for a market displaying many of these factors to be competitive. Nevertheless, the more symmetrical the firms in the oligopoly, the more homogeneous their products, and the more stable the market conditions, the more likely it is that an understanding on, say, a particular price can be reached and sustained. It can be difficult to sustain a coordinated price where buyers are large and may encourage sellers to offer special and secret deals.

A view on the likelihood of coordination or the existence of muted rivalry can only be reached after a close study of the market concerned, not least because the influence of some of the features listed directly above can be ambiguous. Therefore, product homogeneity makes it easier for oligopolists to reach a tacit understanding, but it also makes it easier for customers to compare the offerings of different firms.

VERTICAL INTEGRATION

A structural market feature that can have a bearing on market conduct and the effectiveness of competition is the degree (if any) of vertical integration of firms engaged in the market. Although vertical integration may often be efficient or pro-competitive, a vertically integrated firm can have adverse effects on competition if it can foreclose non-integrated competitors from a significant part of their market either by refusing to supply or to deal with them or by discriminating against them in its pricing. Vertical integration may also add to entry barriers if a potential competitor would have to enter at both stages in order to be able to compete effectively with incumbent firms.

For vertical integration to have any of these effects, the vertically integrated firm(s) will need to have a sizeable share of either of the vertically linked markets. Where only a single firm is vertically integrated, adverse effects on competition will usually arise only if it is dominant.

CONDITIONS OF ENTRY, EXIT AND EXPANSION

Entry conditions are always a crucial part of any competition assessment. If there are no significant barriers or impediments to entry into the market under consideration, so that there is a realistic possibility that a new entrant could establish itself in the market on a viable basis within a reasonably short period of time, the established suppliers will have no lasting market power. However, while there can be such contestable markets, more often than not, in markets in which the GCMA is interested, there will be some significant entry barriers facing any potential entrant.

One definition of entry barriers is any feature of the market that gives incumbent suppliers a cost or other advantage over efficient potential entrants. The strength of entry barriers may

then be measured by the extent of the cost (or other) disadvantage that the entrant must bear.

There are various sources of entry barriers and they can be classified in a number of ways, but it is helpful to distinguish between three types:

- **absolute advantages** such as access to a scarce input, intellectual property rights, and regulatory barriers that limit the number of market participants;

- **strategic or "first-mover" advantages of incumbents** - An entrant will be concerned to make a return on the commitment it makes in entering the market. This will depend on the response to entry of the incumbents and the size of the commitment the entrant has to make. First-mover advantages can be particularly potent in an industry where economies of scale are important or in a market where incumbents have built up brand loyalty through advertising and promotion;

- **exclusionary behaviour by incumbents** - for example, predatory price cuts directed at an entrant, or restrictive distribution arrangements which raise entrants' distribution costs.

Strategic entry barriers will tend to be more important the greater the sunk costs of entry (costs that will be incurred on entry but cannot be recovered on exit from the market) and therefore the commitment that any potential entrant would have to make. Sunk costs can include the set-up costs in entering the market (market research, finding a location and getting planning permission, attracting and training staff etc), investment in specific assets and advertising and promotion costs.

Some entry barriers are "natural" in that they arise from the technology of the industry such as economies of scale, from statutory provisions such as exclusive rights under intellectual property law or from government regulations. Other entry barriers can more readily be loosened by action under the competition legislation. These are entry barriers created by the conduct of incumbent firms. Sometimes such barriers involve actions by a dominant firm, such as a refusal to supply essential inputs to a downstream competitor or to grant access to an essential facility and can be dealt with under the Act. On other occasions they may involve several incumbent firms, for example where there are networks of restrictive distribution agreements or the exploitation of information advantages to deter the entry of new competitors, and these may be more suited to investigation by means of a market investigation reference.

Barriers to expansion determine how easy it is for an entrant to grow once they have entered a market, thereby gaining customers and market share from the incumbents. This could be closely related to the degree of switching by consumers and the information asymmetry inherent in the market: the sunk costs for entry may be small but if customers are unwilling to switch (due to brand loyalty for example) then price competition may not provide a basis for expansion.

Barriers to exit relate to the cost of exit from the market if the business does not go according to plan. This is closely related to the degree of sunk costs incurred on entry and the extent to which investment can be recovered on exit. Where the barriers to exit are high, firms will not consider exiting the market easily. This could lead to situations where tacit collusion becomes the optimal strategy rather than intense price competition.

REGULATIONS AND GOVERNMENT POLICIES

Government regulations can have a direct effect upon competition when they limit the number of firms that can operate in a market. This might be achieved by a licensing system or by specified entry criteria, for example a minimum capital funds requirement as in much of the financial sector. However, it does not follow that such entry barriers will necessarily have significantly adverse effects upon competition. That will depend upon how seriously the regulations limit the number of firms in the market, for example, whether the restrictions are quantitative or qualitative, and how active the competition is between those that are in the market.

Regulations can also affect firms' conduct. Often, they will be innocuous in competition terms, such as regulations on product labelling, emissions of pollutants and hiring and firing of employees, although they will raise firms' costs and can bear more heavily on small firms than on their larger competitors. Sometimes the effects on competition will be more significant, for example the imposition of demanding product standards, restrictions on trading hours or the restrictions on advertising tobacco products or marketing drugs.

Government policies can affect markets in other ways, for example by influencing the way in which public sector bodies act as providers or purchasers of services. Where such policies have a significant effect on competition, they will be among the market features that the GCMA takes into account when considering a reference.

Competition can also be affected by the rules emanating from systems of self-regulation, for example, those applicable to financial services and to a number of occupations and professions. In many cases this can be adequately addressed using the Act or sector-specific legislation.

INFORMATION ASYMMETRIES

Where customers are well informed, they can make efficient choices and their purchases will provide useful information to sellers about customers' preferences. Sellers then have the incentive to provide the goods and services that customers most value. Without such information, the incentives to compete on price, quality and other terms are likely to be diminished. In short, adequate information available to customers is one of the pre-requisites for markets to work well. If customers have inadequate information or are unwilling or unable to search for the best deal, firms may be able to exercise a degree of market power, even if there are many firms supplying the market.

In many markets, suppliers will have more information than their customers about the quality and other attributes of their products. This will not necessarily adversely affect competition, particularly if suppliers have an incentive to provide their customers with relevant information. However, where the quality of products is difficult for customers to assess, either because of their complexity or the infrequency with which they are purchased, information asymmetries can have a significant impact on the nature and degree of competition in the market for the product or service. Information asymmetries can restrict competition by adding to customers' switching costs.

SWITCHING COSTS

For competition to work effectively, it is often necessary that customers are readily able to switch if a competing supplier is found to offer better value for money. Where customers face difficulties in switching between suppliers, whether because of the monetary costs, administrative hurdles or inconvenience, competition can be affected. If firms find it difficult to persuade customers to switch, their incentive to compete with each other may be reduced and rivalry between them diminished.

Switching costs allow firms to potentially charge high prices to customers. Firms face conflicting incentives. They want to offer low prices to attract new customers but to charge high prices to their existing customers. Even if the firm is unable to discriminate between the two types of customers, it is still possible that the existence of switching costs will permit firms to charge higher prices than they would set in the absence of these costs.

Firms may engage in practices that increase switching costs, for example, by not releasing information needed for a switch to be feasible or by not doing so in a timely fashion. In some markets, the problem may be that the customer is unaware of the existence of competing products. For example, a consumer may not be aware of a generic pharmaceutical product having the same medicinal properties as a more expensive branded product.

COUNTERVAILING POWER

The structure of the buying side of the market can also be relevant to the assessment of the effectiveness of competition between suppliers. It may suggest that any market power of suppliers would be countervailed by the bargaining power of customers, or that any attempt of suppliers not to compete on price would be eroded by the temptation to negotiate special terms with large buyers.

The effectiveness of buyer power as a constraint on suppliers will depend upon a number of factors, particularly upon the relative dependence of seller and buyer on the business of the other and the credibility of any threat by the buyer to switch its business to an alternative supplier.

SUMMARY

There are many dimensions of market structure. In its assessment of a possible market investigation reference, the GCMA will examine any structural feature that, on its own, or more likely in combination with other market features, could enable suppliers (or buyers) to behave in ways that significantly prevent, restrict, or distort competition, or that exploit the absence of effective competition in a market. Where there is no abuse of a dominant position, but structural features of the market nevertheless appear to affect the competitive process adversely, then a market investigation reference will be a possibility.

7. FIRMS' CONDUCT

The conduct of firms refers to their behaviour and practices in the broadest sense including what decisions they take, how they make them and the resulting action or lack of it. Section 191(4) of the Act states that conduct includes failure to act and unintentional conduct. A significant part of the evidence on which the GCMA will base its case for a market investigation reference will normally concern the conduct of firms (as sellers or buyers) who, because of structural or other features of the market, are in a position to exercise a degree of market power.

The conduct of the firms in a market may affect competition in that market (horizontal effects), competition in the (upstream) market of its suppliers or in the (downstream) market of its customers (vertical effects). It is also possible for conduct adversely to affect competition in a market for some related good or service.

As stated above, market investigation references are likely to involve markets where the conduct of a number of firms (whether sellers or buyers) appears to have the effect of preventing, restricting or distorting competition (without an agreement or concerted practice that would be unlawful under the Chapter 1 prohibition). This part of the guidance gives several examples of such conduct. However, these should not be regarded in any way as exhaustive or exclusive.

CONDUCT OF OLIGOPOLIES

Many of the markets in which the GCMA is likely to be interested will be oligopolistic. These are markets comprising very few firms (or few firms of any significance) where those firms are aware of the mutual interdependence of their actions. Each firm's strategy is therefore determined at least partly by its beliefs about its rivals' likely reactions. These strategies can take various forms, ranging from competitive rivalry to conduct that is tantamount to collusion, even without an explicit agreement not to compete. With either of these extremes, the outcome can be parallel behaviour. The task will then be to determine whether the oligopolists' conduct reflects a restriction of effective competition and would be an appropriate ground for an GCMA investigation.

It is a common feature of oligopolistic markets that competition takes forms other than competition in price. These include competitive advertising and promotional activity, rebates and discounts linked to purchases, and more explicit customer loyalty-inducing schemes. These forms of conduct are often pro-competitive but they may have effects, that, especially when combined with other market features, lessen the competitive process, for example by adding to entry barriers.

Where firms in an oligopolistic market reach a tacit understanding to pursue their joint interests by coordinating their behaviour (tacit collusion), the adverse effects on competition are likely to be severe. The GCMA will not need to establish conclusively that any observed parallel conduct reflects coordinated rather than competitive behaviour by oligopolists. However, it will need to establish that the market features that make tacit collusion a feasible strategy are present and will need to have a reasonable suspicion that the oligopolists are not competing effectively with consequences that are likely to be detrimental to their customers.

Among the evidence that the GCMA might examine in this regard are:

- the pattern of price changes over time, with a view to establishing the degree of parallelism in the face of any changes in demand or cost conditions, and whether the pattern seems more consistent with collusive than competitive behaviour;

- price inertia, such as when sustained exchange rate advantages are not exploited by importers;

- any evidence that, notwithstanding evidence of parallelism in, say, published prices, the oligopolists compete in discounts or other concessions off the published price; and

- the oligopolists' rates of return compared to returns in comparable markets or to the cost of capital (since the expected outcome of tacit collusion is that the level of prices will be higher than could be sustained in a competitive market). However, where there is persistent excess capacity, excessive prices may not be reflected in high rates of return.

Even if the conditions necessary for tacit collusion are not met, other market features such as switching costs and informational inadequacies may limit the effectiveness of competition, especially price competition. Competition can be muted in oligopolistic markets without any coordination of firms' decisions.

The GCMA will therefore be concerned to consider, in contemplating a reference, whether there are any steps that could be taken to facilitate entry into an oligopolistic market and whether there is any conduct that serves to reinforce the market features that are conducive to tacit collusion and that could, if appropriate, be struck down. One such possibility is facilitating practices.

FACILITATING PRACTICES

Facilitating practices are the conduct of firms that make it easier for oligopolists to arrive tacitly at a coordinated outcome and to maintain it in the face of the temptation of all the firms involved to cheat on the other participants. Examples would be a practice of announcing price increases well in advance of the date of implementation, most favoured-customer clauses in contracts, uniform systems for reflecting transport charges in prices, and information exchanges, for example, on costs.

There can be objective justifications for such practices and they do not necessarily have the effect of restricting competition. However, where other market features appear conducive to tacit collusion, practices of firms that appear to facilitate such conduct will be closely scrutinised by the GCMA. They could even be the focus of a market investigation in their own right.

CUSTOM AND PRACTICE

Practices that may restrict competition can be adopted widely in a market as a custom of the trade and with no apparent agreement or understanding between firms.

Another example could be the practice of manufacturers' recommended retail prices. While the practice can be innocuous, its widespread use in a market can have the effect of restricting competition in the downstream (retail) market by dampening price competition, should

retailers generally choose to follow the recommended price; or of restricting competition in the upstream market, by making it easier for a manufacturer to monitor competitors' prices and thereby to detect, and hence to deter, competitive price cutting.

Any common practices in a market, that appear to reflect a restriction of competition and to have no objective justification, could be the subject of a market investigation reference.

NETWORKS OF VERTICAL AGREEMENTS

Vertical agreements of one kind or another are commonplace in industry and are frequently pro-competitive or neutral. Agreements between manufacturers and distributors (wholesalers or retailers) will often include terms that restrict the freedom of action of one or other party, as will agreements between a manufacturer and suppliers of its inputs. Such restrictions could in some circumstances adversely affect competition. Where several firms in a market have agreements with their distributors or suppliers that contain restrictions which, taken together, have an AEC in the market of one or other party, for example, by foreclosing the market to competitors or adding to entry barriers, a market investigation reference could be justified. It is not necessary for there to be any horizontal agreement to engage in particular vertical arrangements (indeed, if there was such an agreement it would have to be considered under the Chapter 1 prohibition). Such networks of vertical agreements can result from the independent decisions of the firms concerned, or even from long custom in a trade.

Types of vertical agreement that may be suitable for market investigation references include exclusive purchasing (i.e. where the retailer or other downstream party is tied to a single supplier), exclusive or selective distribution (where a supplier only sells to certain downstream outlets), and tie-in sales and product bundling.

The effect on competition of vertical agreements will depend not just on the foreclosure and entry barrier-enhancing effects but also on the effectiveness of competition between suppliers and the willingness of consumers to shop around among competing suppliers' products. Where inter-brand competition is strong, the effects may not be significant. On the other hand, inter-brand competition can be weakened if consumers find that particular retailers are effectively tied to particular suppliers (or vice versa) and they are unwilling for one reason or another to shop around and switch to another retailer (brand) if it is found to offer better value for their money.

Vertical agreements are frequently efficiency enhancing so that even where the GCMA suspects that they adversely affect competition it will need to consider the trade-off. A reference will only be appropriate where there are reasonable grounds to suspect that the net effect of the agreement is detrimental to the interests of customers.

SUMMARY

The conduct of firms can affect competition in various ways. For the GCMA to have any concern, it is the process of competition that needs to be affected not the fortunes of individual competitors. Adverse effects are less likely to be a concern where there are no structural features of the market that give rise to market power, either for an individual firm or a number of firms in a market. Single firm conduct will usually not be the cause of a market investigation reference in the absence of such features. Conduct that embraces a number of firms engaged

in a market and appears to prevent, restrict, or distort competition is more likely to lead to a market investigation reference.

8. CONDUCT OF CUSTOMERS

Section 191(2)(c) of the Act identifies the conduct of customers as a market feature that could give rise to adverse effects on competition and be the subject of a market investigation reference. The customers concerned may be businesses or final consumers. It may seem rather unlikely that the conduct of consumers could affect the competitive process until it is recalled that "conduct" includes failures to act. One feature of consumers' conduct that can then affect competition is the search process.

SEARCH COSTS

Competition requires customer choice. In order to make informed choices customers need to spend at least some time and effort finding out what alternative products are available to them. Where such search costs are perceived to be high searching is likely to be curtailed. Customer sensitivity about a product may also limit the amount of search that will be contemplated. Depending on other features of the market, reduced searching may dampen sellers' incentives to compete.

Even if a proportion of customers do engage in search activity there may remain enough uninformed customers with high search costs, who purchase from the first firm they encounter, for the seller to be able to charge prices without regard to competition. In this situation, the profit foregone by losing informed consumers who buy elsewhere is more than offset by the increase in profits accruing from uninformed consumers who do not shop around. Markets serving both tourists (with high search costs) and local residents (with low search costs) may be an example.

Firms may engage in practices that increase search costs (or fail to engage in practices that would reduce search costs). For example, firms may choose not to display prices prominently. An example of price display reducing search costs is the prominent display of petrol prices at filling stations. Restrictions on advertising in the rules of many professional bodies in the past also served to increase the difficulties of search.

Firms may fail to make available all the product information needed by consumers to make an informed choice. Customers may be ignorant of all the product attributes that they should consider in choosing between competing products. This may be the case with some financial products and certain professional services. Where one-off purchases are involved, with no repeat sales, there will be little incentive for a firm to provide consumers with the information that they need. Indeed, there may be an incentive for the firm deliberately to provide consumers with partial and potentially misleading information.

Search costs are therefore a market feature that could be a factor pointing to a market investigation reference, especially when associated with sellers' conduct that is likely to have adverse effects on competition in its own right. Structural features of the market would also be relevant, but it is noteworthy that the effect of high search costs on prices will be greater the more firms that there are in the industry.

The effects of search costs on the competitive process are likely to be compounded when they are combined with high switching costs. A good example of such a combination of market features is durable goods where the consumer needs information on the availability and costs of aftermarket services, such as spare parts and maintenance, if an informed choice is to be

made between competing products. A competition problem can arise where consumers are unable to factor into their purchase decisions all the aftermarket costs of the products or where the aftermarket is not competitive. For some durable products such as new motor cars there are adequate sources of information on lifetime aftermarket costs for any customer willing to take a little trouble. For other products such information is inherently difficult to obtain. Suppliers are well placed to take advantage of customers who are short of relevant aftermarket information with little risk of losing sales to competitors.

High search and/or switching costs will therefore be features of markets that could justify a market investigation reference. They can feed into other market features by facilitating anti-competitive or exploitative conduct by suppliers and by adding to market entry barriers. The GCMA will need to be convinced that market behaviour is affected. It is not necessary for all customers to be well informed and quick to switch suppliers in response to price differences for markets to work well.

Indicators that market behaviour may be little affected by search or switching costs with little risk of detriment to customers at large include:

- prices clustering together (in the absence of resale price maintenance or recommended retail prices);
- advertising of prices by all or most suppliers;
- customary and inexpensive comparison shopping;
- inability of suppliers to discriminate between informed and uninformed customers.

SUMMARY

Customers' conduct on its own is unlikely to be sufficient to justify a market investigation reference. However, when combined with other features of the market, a failure or the inability of customers to engage in meaningful search activity can add to firms' opportunities for anti-competitive conduct.

9. MINISTERIAL INVOLVEMENT

Ministers have the power to make a reference[14] to the chair of the GCMA for the constitution of a group under Schedule 11 of the Act if he/she has reasonable grounds for suspecting that any feature, or combination of features, of a market in Gibraltar for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar. Section 195 of the Act allows the Minister to make a reference when he or she is not satisfied with a GCMA decision not to make a reference and in the case in which the GCMA has published a market study notice, the period permitted for the preparation and publication by the GCMA of the market study report has expired.

Additionally, the Minister can make a reference where he/she has brought to the attention of the GCMA information relevant to the question of whether the GCMA should make a reference and is not satisfied that the GCMA will decide, within such period as the Minister considers to be reasonable, whether to publish a market study notice in relation to the matter concerned. The Minister can also vary any reference made after consulting with the GCMA[15].

INTERVENTION NOTICES

The Minister also has the power to intervene in certain markets cases which raise defined public interest issues[16]. The interests of the security of Gibraltar is currently the only specified public interest consideration in relation to the markets regime[17]. The Minister may by order introduce new public interest considerations[18]. Furthermore, the GCMA has a function of informing the Minister of cases that might raise public interest considerations[19].

The Minister may give an intervention notice to the GCMA if he/she believes that it is or may be the case that one or more than one specified public interest consideration is relevant to the matter being investigated by the GCMA[20].

The intervention notice must be issued:

(a) when a market study has been published, within the period commencing on the publication by the GCMA of a market study notice and ending with -

- the acceptance by the GCMA of an Undertaking in Lieu (instead of making a reference);
- the publication of the GCMA's decision not to make a reference;

[14] Section 195 of the Competition Act 2020. These can be ordinary or cross-market references.

[15] Section 199(2) of the Competition Act 2020.

[16] Section 207(6) of the Competition Act 2020.

[17] Section 227(1) of the Competition Act 2020.

[18] Section 227(2) of the Competition Act 2020.

[19] Section 226(1) of the Competition Act 2020.

[20] Section 205(2) of the Competition Act 2020.

- the making of a reference; or

- on expiry of the time limit for publishing a market study report has expired if the GCMA has not published such a report[21].

(b) if no market study has been published, within the period commencing with the GCMA's consultation under section 243 of the Act on whether to make a market investigation reference and ending with –

- the acceptance by the GCMA of an Undertaking in Lieu (instead of making a reference);

- the publication of the GCMA's decision not to make a reference; or

- the making of a reference[22].

Intervention notices must contain certain prescribed information. The information is set out in section 206 of the Act. Intervention notices must also be published by the Minister[23].

For further information on intervention notices, please see section 207 of the Act.

PUBLIC INTEREST CASES

Following an intervention notice, the GCMA will either provide the Minister with the unpublished market study report or in the case of the GCMA consulting on a decision to make a market investigation reference, information on the reasons for its decision. In circumstances where the Minister decides that there is no relevant public interest consideration, he or she shall make an ordinary or cross-market reference to the chair of the GCMA for the constitution of a group under Schedule 11 of the Act.

Where the Minister decides that there is one or more relevant public interest consideration/s, he or she shall make a restricted public interest reference or a full public interest reference:

- **restricted public interest references** (where the Minister retains the ability to consider the defined public interest issues him/herself whilst requesting the GCMA to investigate the competition issues) and;

- **full public interest references** (where the Minister requests the GCMA to investigate the defined public interest issues alongside the competition issues)[24].

Following a **restricted public interest** reference, the GCMA is required to decide:

- whether any feature/s, of the market/s, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar and;

[21] Section 205(3) of the Competition Act 2020.

[22] Section 205(4) of the Competition Act 2020. See also section 205(5) to (14) for further details.

[23] Section 246(3)(c) of the Competition Act 2020.

[24] Public interest references may be made on an ordinary or cross-market basis.

if the GCMA finds that there is an AEC, the GCMA must decide on two sets of questions concerning the taking of remedial action –

- First, the GCMA must decide what action (if any) should be taken by the Minister, or it should recommend others take for the purpose of remedying the AEC or any detrimental effect on customers resulting from the AEC[25].

- Secondly, the GCMA must decide what action (if any) should be taken by it, or it should recommend others to take for the same purpose[26].

When answering both sets of remedial questions, the GCMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC concerned and any detrimental effects on customers resulting from the AEC. Relevant customer benefits shall also be considered.

Following a **full public interest** reference, the GCMA is required to decide:

- whether any feature/s, of the market/s, prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar and;

- if there is an AEC, whether, taking into account only any AEC and the admissible public interest consideration(s)[27], any feature or combination of features which gave rise to an AEC operate(s) or may be expected to operate against the public interest[28], and

- if the GCMA finds that there is an adverse effect on the public interest, it must decide on what (if any) action should be taken by the Minister, or it should recommend others take for the purpose of remedying the adverse effect on the public interest[29]or

- if the GCMA does not find any adverse effect on public interest but finds an AEC, it must decide what (if any) action should be taken by it or it should recommend others take for the purposes of remedying the AEC or any resulting detrimental effects on customers[30].

When answering the remedial questions, the GCMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the public interest consideration or the AEC (as appropriate) and any resulting detrimental effects on customers. Relevant customer benefits shall also be considered.

In full public interest references, the Minister may appoint one or more "public interest experts" to advise the GCMA. Therefore, when deciding whether there is an adverse effect on

[25] Section 209(4) of the Competition Act 2020.

[26] Section 209(5) of the Competition Act 2020.

[27] Defined in section 210(11) of the Competition Act 2020.

[28] Section 210(4) of the Competition Act 2020.

[29] Section 210(5) of the Competition Act 2020.

[30] Section 210(5) of the Competition Act 2020.

the public interest and if so, what action should be taken to remedy it, the GCMA shall take into account the views of the expert/s[31].

REPORTING PROCEDURE

Following its investigation, the GCMA prepares a market investigation report containing its conclusions. If, in the case of a full public interest reference, the Minister has appointed a public interest expert to assist the GCMA, the GCMA must include a summary of the expert's views in the report[32].

Where the GCMA decides that action should be taken by the Minister, it is required to provide the report to the Minister[33]. The report must be provided to the Minister within the 18-month reporting period[34].

Having received the report, the Minister is required to decide:

- on a **restricted public interest reference**, whether any eligible public interest consideration is relevant; or any eligible public interest considerations are relevant to any remedial action mentioned in the report and which the GCMA should take for the purpose of remedying, mitigating or preventing any AEC or any detrimental effect on customers[35], and

- on a **full public interest reference**, whether to make an adverse public interest finding and, if so, how the adverse effects should be remedied, taking into account the recommendations included in the GCMA's report on the matter[36]. The Minister must accept the GCMA's findings and remedies in relation to competition issues[37].

The Minister's decision must be made and published within 90 days of receipt of the GCMA's market investigation report[38].

[31] Section 210(7) of the Competition Act 2020.

[32] Section 212(2)(d) of the Competition Act 2020.

[33] Section 214(3) of the Competition Act 2020. In other circumstances, the GCMA publishes the report.

[34] Section 215(1) of the Competition Act 2020. The reporting period my be extended by no more than 6 months. The starting date for the 18-month period may be later in cases where the Minister has proposed to appoint a public interest expert. (section 215(2)(b))

[35] Section 217(2) of the Competition Act 2020.

[36] Section 218(1) and (2) of the Competition Act 2020.

[37] Section 218(5) of the Competition Act 2020.

[38] Sections 213(4), 214(4), 217(3) and 218(6) of the Competition Act 2020. The Minister must also publish the GCMA's market investigation report (given to the Minister under section 213(3) or section 214(3) of the Competition Act 2020 no later than publication of the Minister's decision under sections 217(2) or 218(2) of the Competition Act 2020 in relation to the case.)

If the GCMA reaches any decision on the reference which does not require action to be taken by the Minister, it publishes the market investigation report itself[39]. In those circumstances, the remedies implementation process (if necessary) follows the usual procedure with no further involvement of the Minister.

[39] Section 213(2) and 214(2) of the Competition Act 2020.

10. REMEDIES

If, following any type of market investigation, the GCMA finds an AEC, it is required to consider whether remedies are appropriate. In ordinary and cross-market references it must decide the following questions:

- whether action should be taken by it for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC;

- whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on consumers so far as it has resulted from, or may be expected to result from, the AEC, and;

- in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented[40].

If the GCMA has decided to take action itself to remedy, mitigate or prevent an AEC, it has the choice of accepting undertakings from the relevant parties and/or of making an order.

The period following publication of the final report during which the GCMA puts in place its remedies is known as the remedies implementation stage. The following applies during the remedies implementation stage following a market investigation report finding an AEC.

TIME LIMITS AND PROCEDURE

The Act sets statutory time limits for the implementation of remedies by the GCMA to address findings from a market investigation. The GCMA must accept final undertakings or make a final order within six months of the date of publication of the market investigation report[41]. This six-month period includes a period of consultation[42].

The GCMA may extend the six-month period by up to a further four months if it considers that there are special reasons why final undertakings cannot be accepted or a final order made within the statutory deadline[43].

The power to extend the timetable is most likely to be used where the remedies themselves are more complex, for example where consumer testing of the detailed implementation of remedies is necessary, where proposed remedies give rise to complex practical issues, or

[40] Section 198(6) of the Competition Act 2020. In full public interest references, the GCMA is additionally required to decide whether (and, if so, what) action should be taken by the Minister to remedy, mitigate or prevent any adverse public interest effects that have been identified. In cases where the Minister makes an adverse public interest finding, he/she may take action to remedy, mitigate or prevent any of the adverse effects identified.

[41] Section 203(1) of the Competition Act 2020. These time limits do not apply to any further implementation required after final undertakings have been accepted or a final order made.

[42] Section 229 of the Competition Act 2020.

[43] Section 203(2) and (4) of the Competition Act 2020.

where an additional consultation is required to address material changes arising from comments made in earlier consultations.

During the period covered by the statutory timetable for remedies implementation, the GCMA has investigatory powers[44]. In addition to the ability to impose penalties in some circumstances, the GCMA has the ability to 'stop the clock' if it considers that any person has failed (whether with or without reasonable excuse) to comply with any requirement of a notice issued by the GCMA using its statutory investigatory powers (for example, a notice requiring the production of specified documents)[45].

In this case, the time limits set out above are extended. In effect, the timetable is suspended either until the documents or information requested is provided to the satisfaction of the GCMA, or until the GCMA publishes a notice to cancel the extension. The extension periods described in this paragraph and in paragraph above (extension of the six-month period by up to a further four months) can be used together if necessary, in which case the extension periods are added together[46].

SCOPE OF THE GCMA'S ORDER-MAKING POWERS

The GCMA's decision as to whether to implement remedies by means of accepting undertakings or making an order is determined on a case-by-case basis. It is informed both by the scope of the GCMA's order-making powers under Schedule 8 to the Act and by practical issues such as the number of parties concerned and their willingness to negotiate and agree undertakings.

INTERIM MEASURES

After the GCMA has published its final report but before the reference has been finally determined (by final undertakings being accepted or a final order made), the GCMA has the power to prevent pre-emptive action that might impede the taking of final action in relation to the investigation[47]. It may do so by accepting from the parties concerned interim undertakings to take such action as the GCMA thinks is appropriate or by making an interim order[48].

The GCMA can take steps to require parties to reverse any action that has already occurred before any interim measures have been put in place. This will enable the GCMA, once a report has been published, to prevent the effectiveness of any ultimate remedy being jeopardised through pre-emptive action by the parties.

[44] Section 248(b) of the Competition Act 2020.

[45] Sections 203(3) to (5) of the Competition Act 2020.

[46] Section 204 of the Competition Act 2020.

[47] In the case of a restricted public interest reference or a full public interest reference, this power is exercisable by the Minister (section 231(9) of the Competition Act 2020).

[48] Sections 231 and 232 of the Competition Act 2020.

SUNSET CLAUSES AND REVIEWS OF REMEDIES

As a single competition authority, the GCMA is responsible for the entire remedies lifecycle. As a result, it has developed its guidance to commit more clearly to considering the use of sunset clauses and to reviewing the ongoing need for remedies, with a view to ensuring that remedies do not remain in force where they are no longer necessary to achieve the purposes for which they were imposed.

EFFECTIVENESS

The GCMA will assess the extent to which different remedy options are likely to be effective in achieving their aims, including their practicability.

The effect of any remedy is always uncertain to some degree. In evaluating the effectiveness of potential remedies, the GCMA 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 of a remedy may involve consideration of several dimensions discussed further below.

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 any other body that has responsibility for monitoring compliance. The effectiveness of any remedy may be reduced if elaborate monitoring and compliance programmes are required[49]. Remedies regulating behaviour generally have the disadvantage of requiring ongoing monitoring of compliance and may also constrain beneficial aspects of competitive rivalry.

Secondly, the timescale over which a remedy is likely to have effect will be considered. The GCMA 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 GCMA will also tend to favour remedies that can be expected to show results within a relatively short time. Some remedy options may have an almost immediate impact, while the effects of others will be delayed. In such instances the GCMA may select a remedy package combining both types of measure, taking into account both when each measure would take effect and how long it would endure. Where an AEC is expected to be short-lived (for example, because a specific future event is expected to bring it to an end) and the timescale for implementation of a particular remedy option would extend significantly into this period, the GCMA will consider whether an alternative measure would be more appropriate.

When designing remedies, the GCMA will consider whether to specify a finite duration – for example, by means of a long-stop date in a 'sunset clause' – as part of the design of individual measures[50]. A sunset clause will generally specify when individual measures cease to have

[49] The GCMA will also consider the costs of compliance as part of its assessment of the impact of remedies and their proportionality.

[50] While consideration may be given to the individual duration of elements of a remedy package; the GCMA may also give consideration to applying a sunset clause across a package of measures.

effect, whether by reference to a specific date or a clearly defined future event (for example the expiry of an intellectual property right or concession). A measure which is the subject of a sunset clause will cease to have effect on the specific date or defined event and will not be enforceable or reviewable beyond that specific date or defined event. Some measures, for example, an obligation to implement a divestiture within a specified period of time, take effect when they are completed and therefore a sunset clause may not be necessary for these measures[51].

A number of considerations may be relevant to the GCMA's decision whether to specify a finite duration for a measure and the duration of any such 'sunset clause'[52], including:

(a) **The length of time over which the AEC is expected to persist.** For example – if the GCMA considered that an AEC and/or its detrimental effects would not endure beyond a particular date or event, then there would not need to be ongoing remedial action beyond that point, and the GCMA may adopt a sunset clause linked to that date or event.

(b) **The role that the measure is expected to play in tackling the AEC and/or resulting customer detriment.** For example, some measures are intended to be a temporary arrangement to deliver improvements in the short term, while other longer-term measures take effect. Such a transitional measure might be suitable for a relatively short sunset clause – for example, of less than five years – which might be linked to the length of time it was expected to take for the longer-term measures to take effect. Other measures may be intended to work as a catalyst to introduce greater competition into a market – for example, by promoting new entry, or removing obstacles to competition – such that, once this change has become established there is no longer a need for ongoing intervention. For such a measure, the GCMA might consider adopting a sunset clause that might be linked to achievement of the desired change or the timescale within which it expects such a change to occur. Where remedies are intended to create enduring characteristics of how the market operates, the GCMA might adopt a relatively long sunset period or not have a sunset period at all.

(c) **The extent to which the measure is expected to become obsolete over time.** This might sometimes be anticipated if prospective changes in technology, the policy and regulatory framework applying to the sector, consumer behaviour or other aspects of the competitive environment (for example, the way in which information is provided to consumers) mean that a measure is unlikely to serve its original purpose after a period of time. While the GCMA will generally seek to 'future-proof' its remedies to prolong their effectiveness, all markets are subject to evolution and some more than others. The GCMA might therefore adopt a sunset clause in some cases to reflect this, taking into account the characteristics of the market and remedy concerned.

Whether to include a sunset clause and the period used for any sunset date will therefore depend on the circumstances of the case and will be matters for the GCMA to decide on a case-by-case basis. The duration of an AEC in the absence of an effective intervention by the GCMA cannot always be predicted and there will similarly be some uncertainty about the precise timescale over which remedies will take effect. However, the GCMA may nonetheless

[51] Some ancillary measures accompanying divestitures – e.g. not to reacquire the divestiture package – may themselves involve ongoing obligations on parties, and these ancillary measures may themselves be subject to a sunset clause.

[52] Some of these considerations may also be relevant to decisions about whether to initiate a review of a remedy.

be able to identify a date or event beyond which it considers it would not be necessary to retain a remedy in force and, in these circumstances, the GCMA would typically expect to adopt a sunset clause as part of the design of the remedy.

In addition to the upfront consideration that the GCMA gives to duration in designing its remedies, the GCMA is obliged to keep remedies under review[53] and may remove or revise those that are no longer appropriate. Such reviews might take place as a result of parties applying for variation or revocation of remedies on the basis of a change of circumstances.

Alternatively, the GCMA might identify a change of circumstances following a review conducted on its own initiative. Consistent with the GCMA's objective to avoid retaining remedies in force when they are no longer needed, when introducing a remedy without a sunset clause (or if the sunset clause substantially exceeds ten years), the GCMA would normally expect to initiate an assessment of whether the remedy remains appropriate within ten years of the remedy coming into force. In some cases, the GCMA may recommend consideration of the continued need for particular measures within a shorter timescale and/or specify the types of future circumstances which might be expected to trigger such a review – for example significant new entry.

Thirdly, where more than one measure is being introduced as part of a remedy package, the GCMA will consider the way in which the measures are expected to interact with each other. As a general rule, measures that 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 accompanied by information remedies that help customers choose the best product available to them.

DURATION [OF BEHAVIOURAL REMEDIES]

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 GCMA may specify a finite duration, for example, if measures are designed to have a transitional effect or are otherwise expected to become obsolete within a specified period. In such circumstances, the GCMA might consider setting a finite duration or 'sunset clause' beyond which the measures will definitely not apply. The period the GCMA adopts for the sunset clause date will depend on the circumstances of the case. Where no sunset date or event has been set, or if the period is for substantially longer than ten years, the GCMA would normally expect to assess the continued need for the remedy within ten years. Relevant parties remain able to apply for variation or revocation of the remedies on the basis of a change of circumstances rather than awaiting an own-initiative review or the expiry of a sunset clause[54].

[53] A statutory duty under section 149(1), (2) and (3) and section 236(1), (2) and (3) of the Competition Act 2020.

[54] Section 236 of the Competition Act 2020.

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