

Section one

Overview of UK markets regime

The markets “mission”



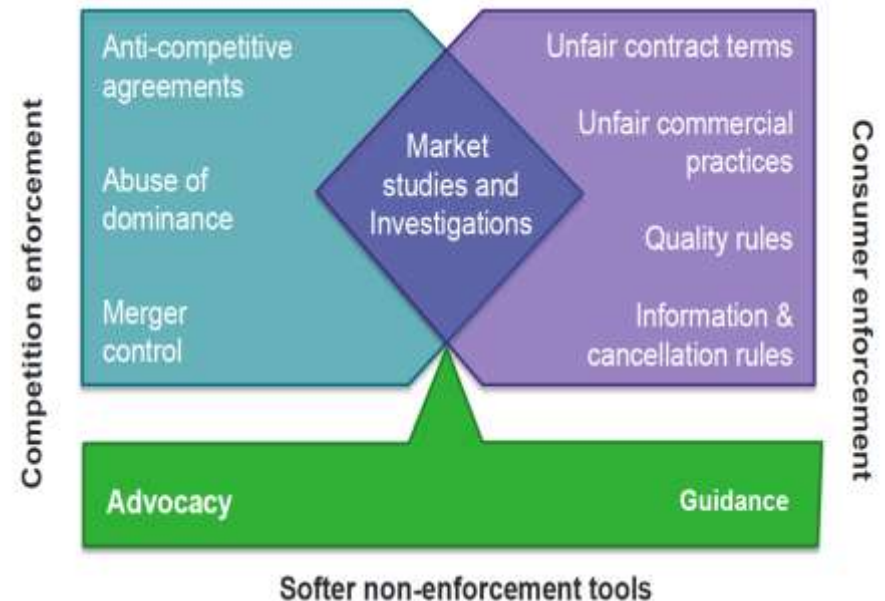
The Enterprise Act’s (EA02) purpose is to allow the CMA to examine, holistically and flexibly, markets that appear not to be working well for consumers even in situations in which it is not immediately obvious that either competition or consumer laws have been broken.

The mission is thus

....for the CMA markets work to deliver timely, well-reasoned results that make a **real difference to consumers.**

Markets in the competition toolkit

- Are discretionary tools which allow for remedying of competition problems and improving outcomes, rather than sanctions on firms
- Assess the functioning of the market as a whole, rather than on a single aspect of it or the conduct of particular firms
- Investigate “adverse effects on competition” which can be due to market structure, firm behaviour or demand-side issues, as well as due to government regulation, policy or procurement
- Allow for a range/set of remedies to be tailored to the problems identified



Legislative timeline

Complex monopoly regime
under Fair Trading Act 1973

Pre-2002

2002

2013

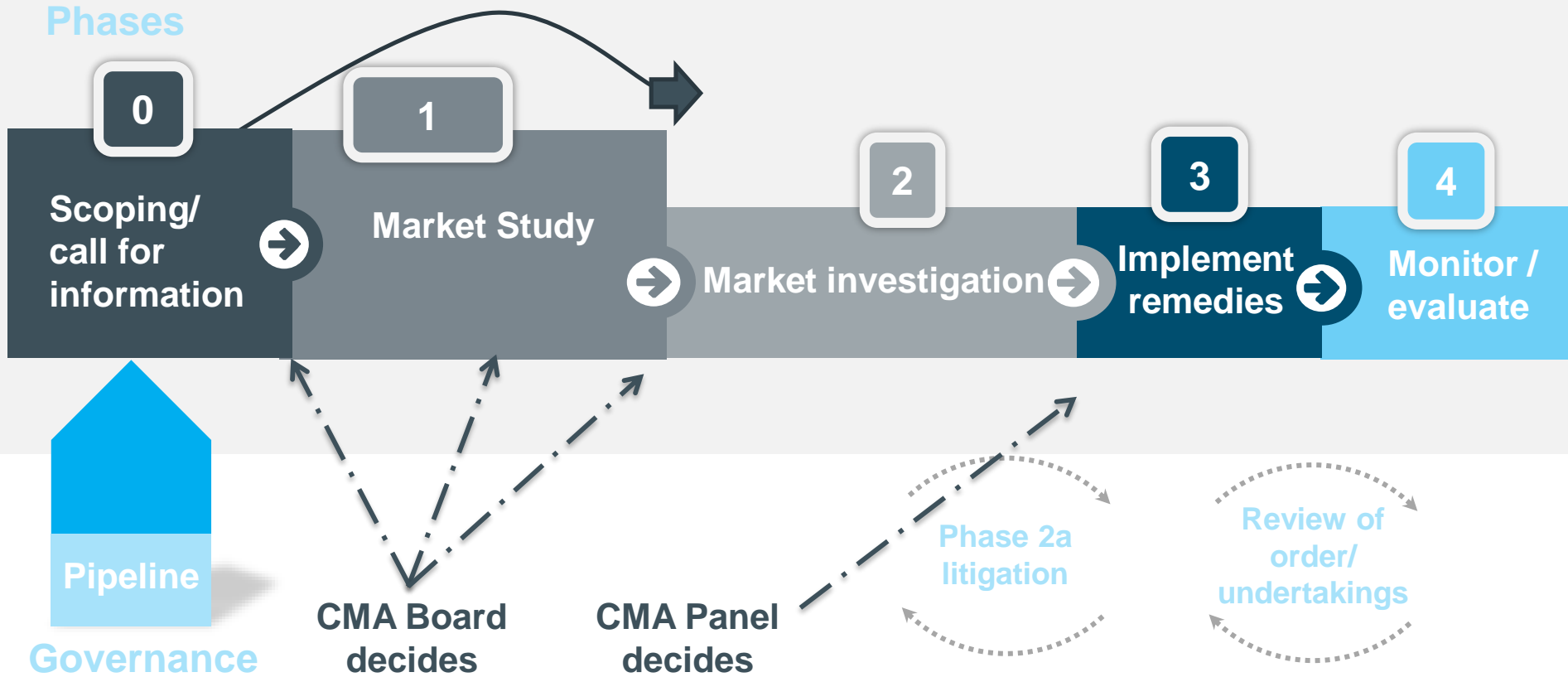
Enterprise and Regulatory
Reform Act 2013 amended
Enterprise Act (ERRA13)

Enterprise Act 2002 (EA02)
introduced super-complaints and
established market investigations

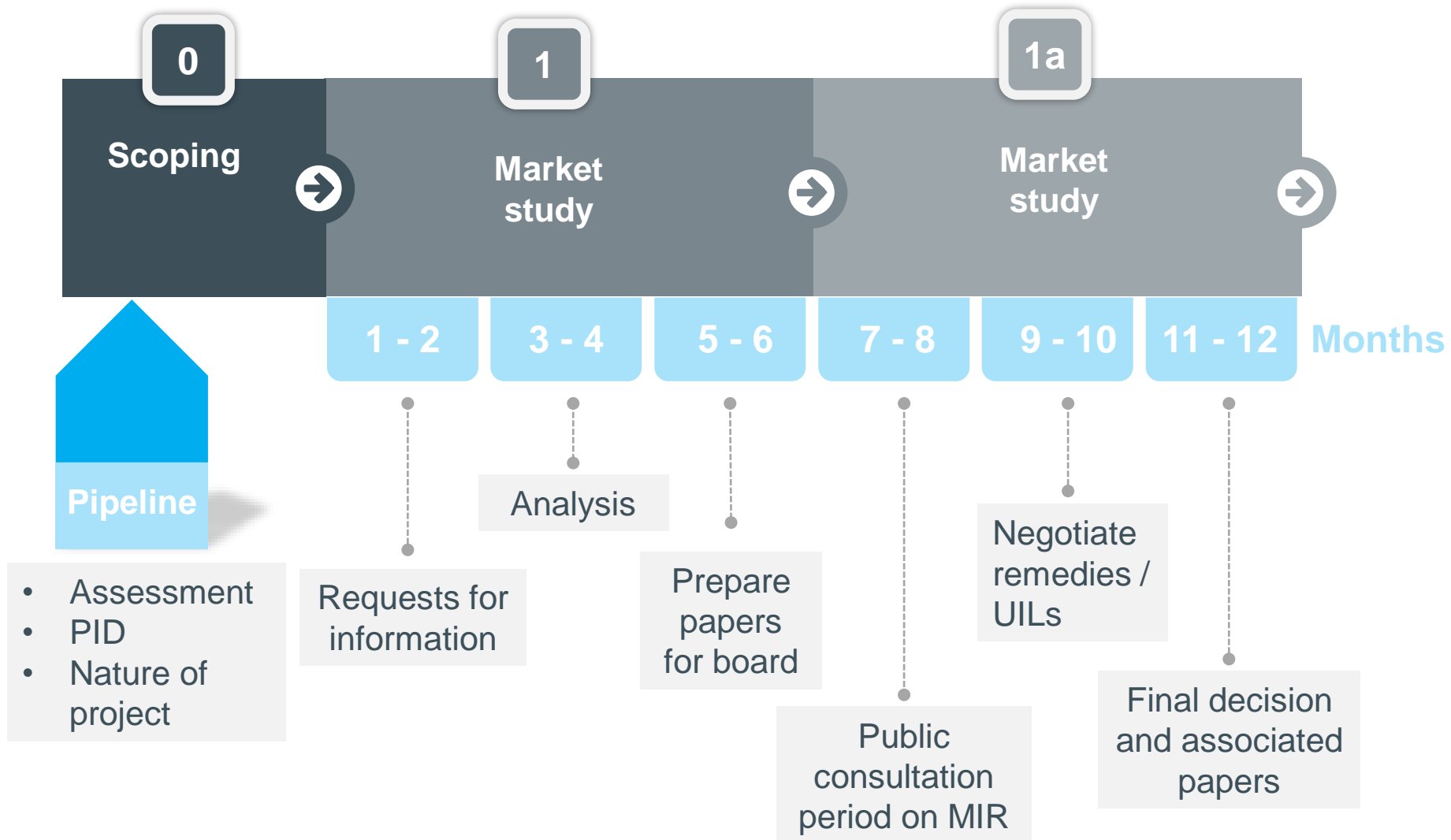
The overall markets process



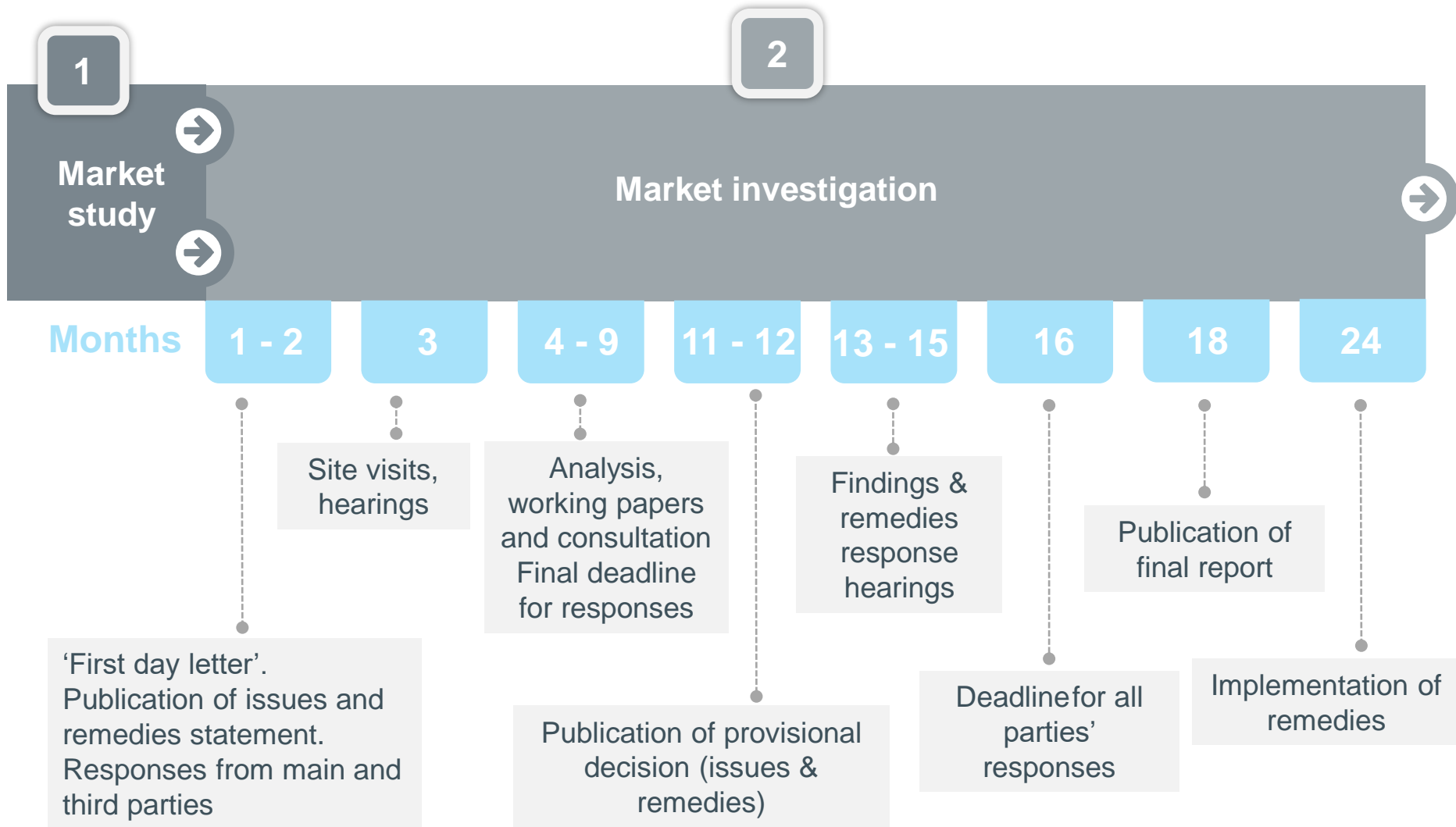
Phases



Phase 1: Market studies



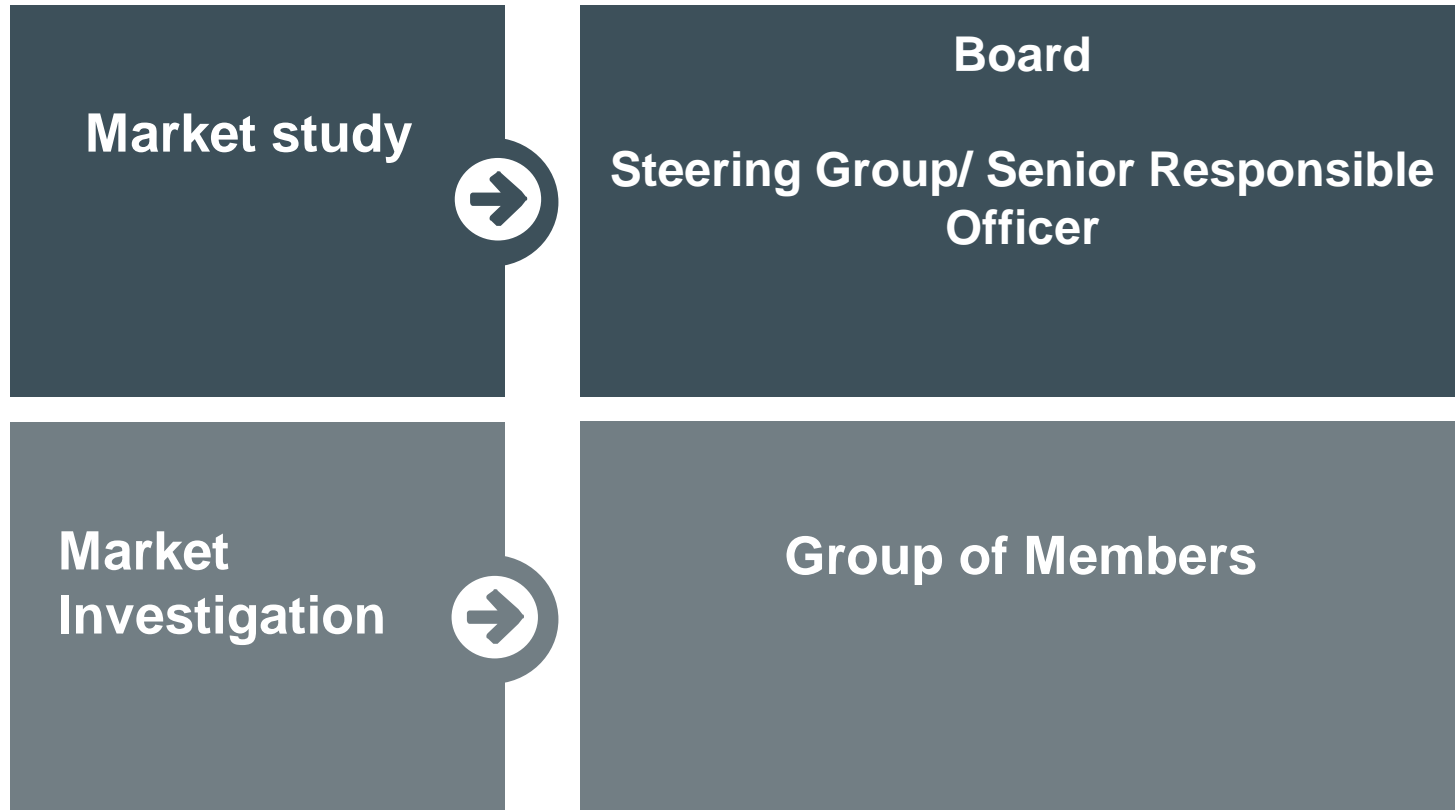
Phase 2: Market investigation



Legal basis for requesting information

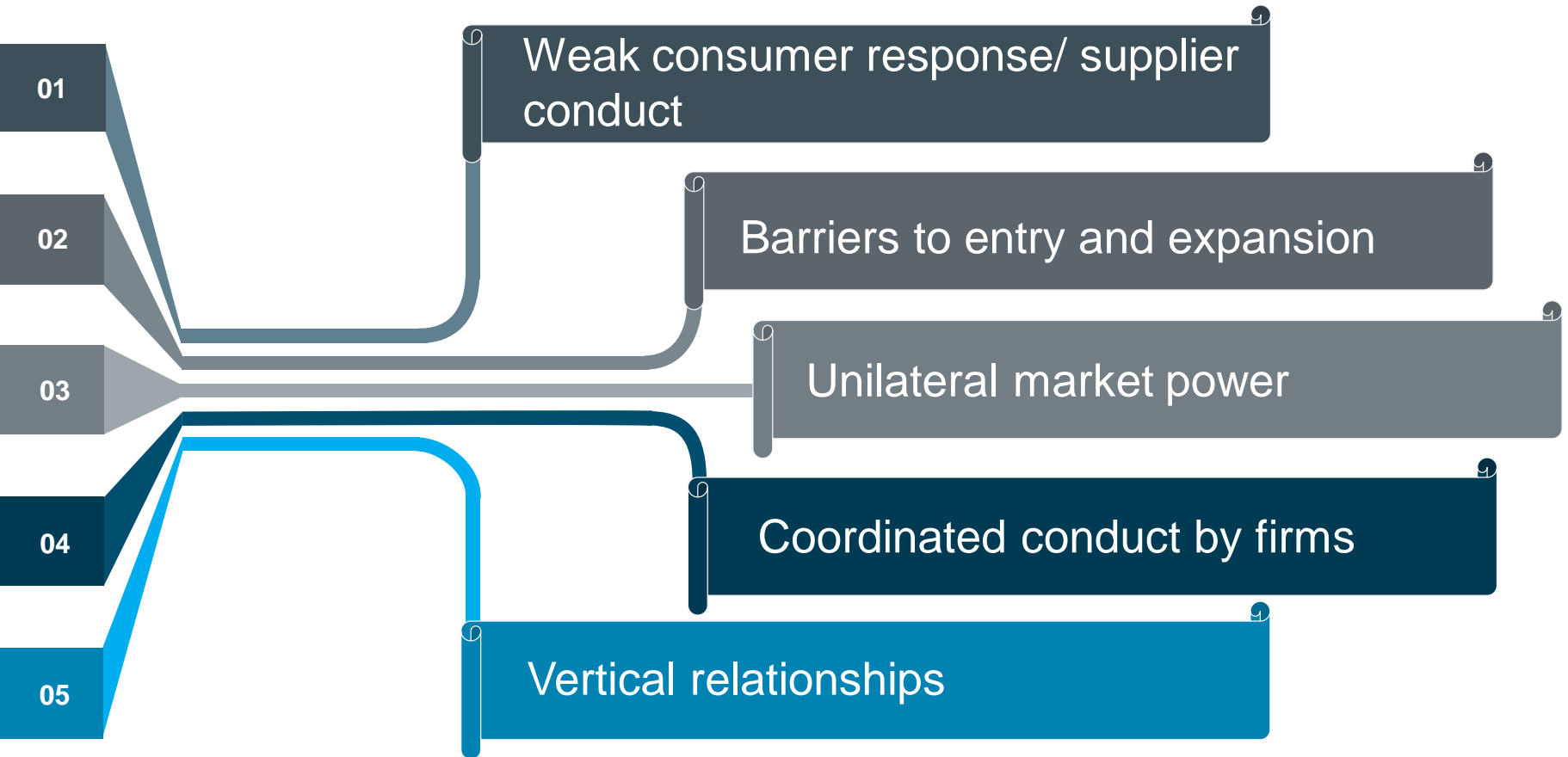
- *No compulsory information gathering powers pre-launch:*
- S. 5 of EA02 - general CMA function of obtaining, compiling and keeping under review information in relation to its functions
- *Compulsory information gathering powers available once market study notice has been issued:*
- S. 174 of EA02 – formal investigation powers to obtain documents (analogous to s. 109 in mergers)
- S. 174A of EA02 – where the CMA considers that a person has without reasonable excuse, failed to comply with the s. 174 notice, it may impose a penalty (analogous to s. 110 in mergers)
- S. 174D of EA02 – admin penalties can be fixed amount (£30,000 max) or daily rate (up to £15,000), or combination of both
 - Issuing a penalty notice requires a Board decision

Governance



Main theories of harm

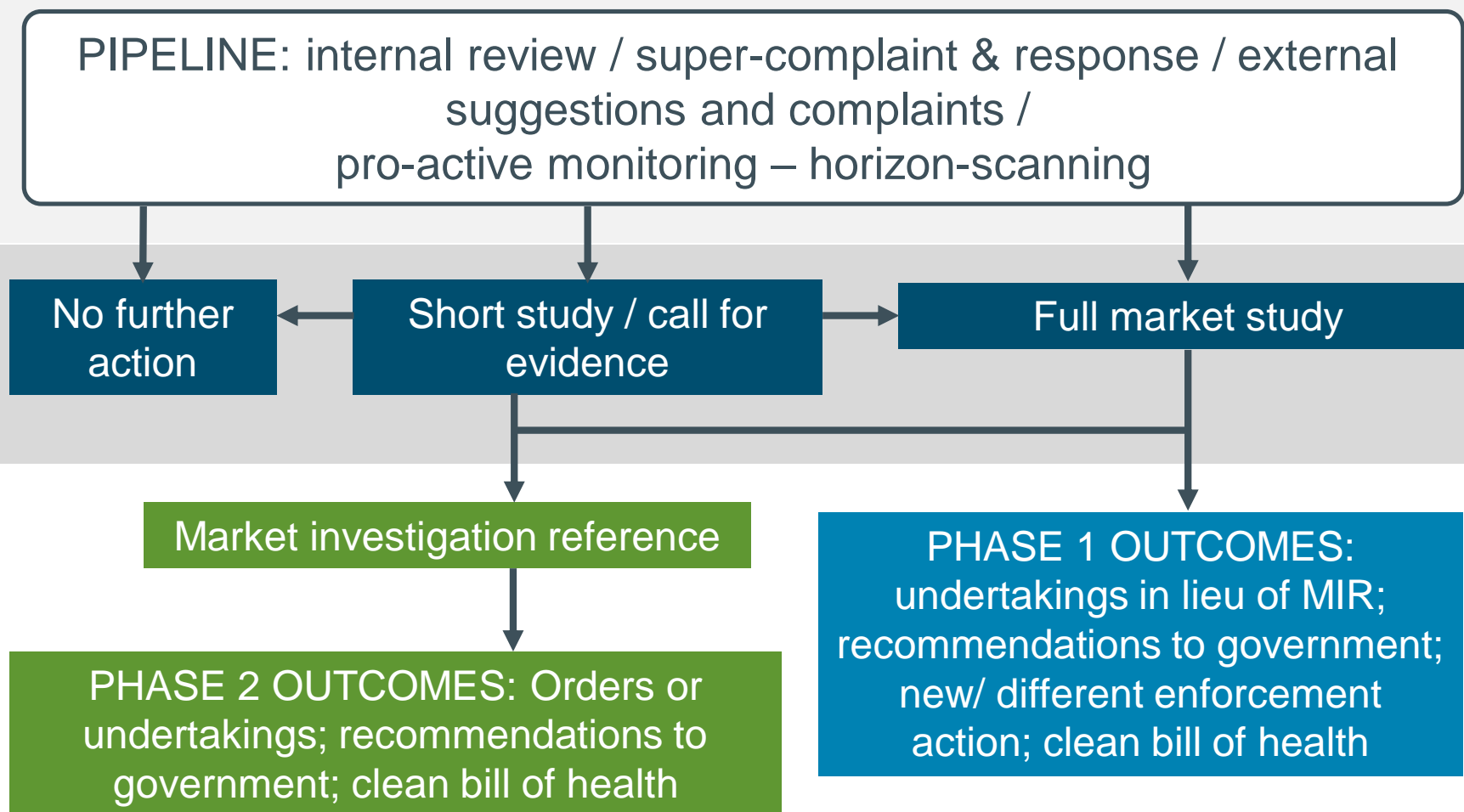
There are five common potential sources of competitive harm:



Section 5

Remedies and the outcomes of markets work

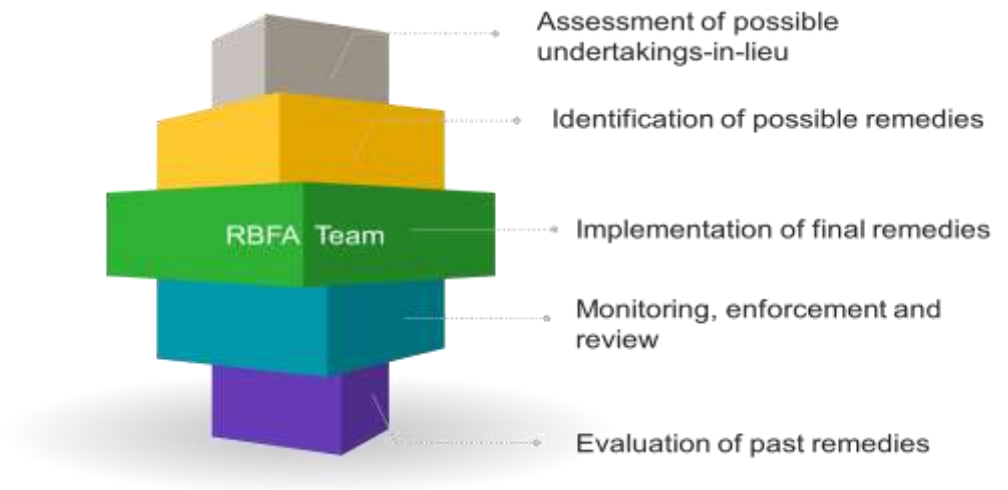
Markets work: possible outcomes



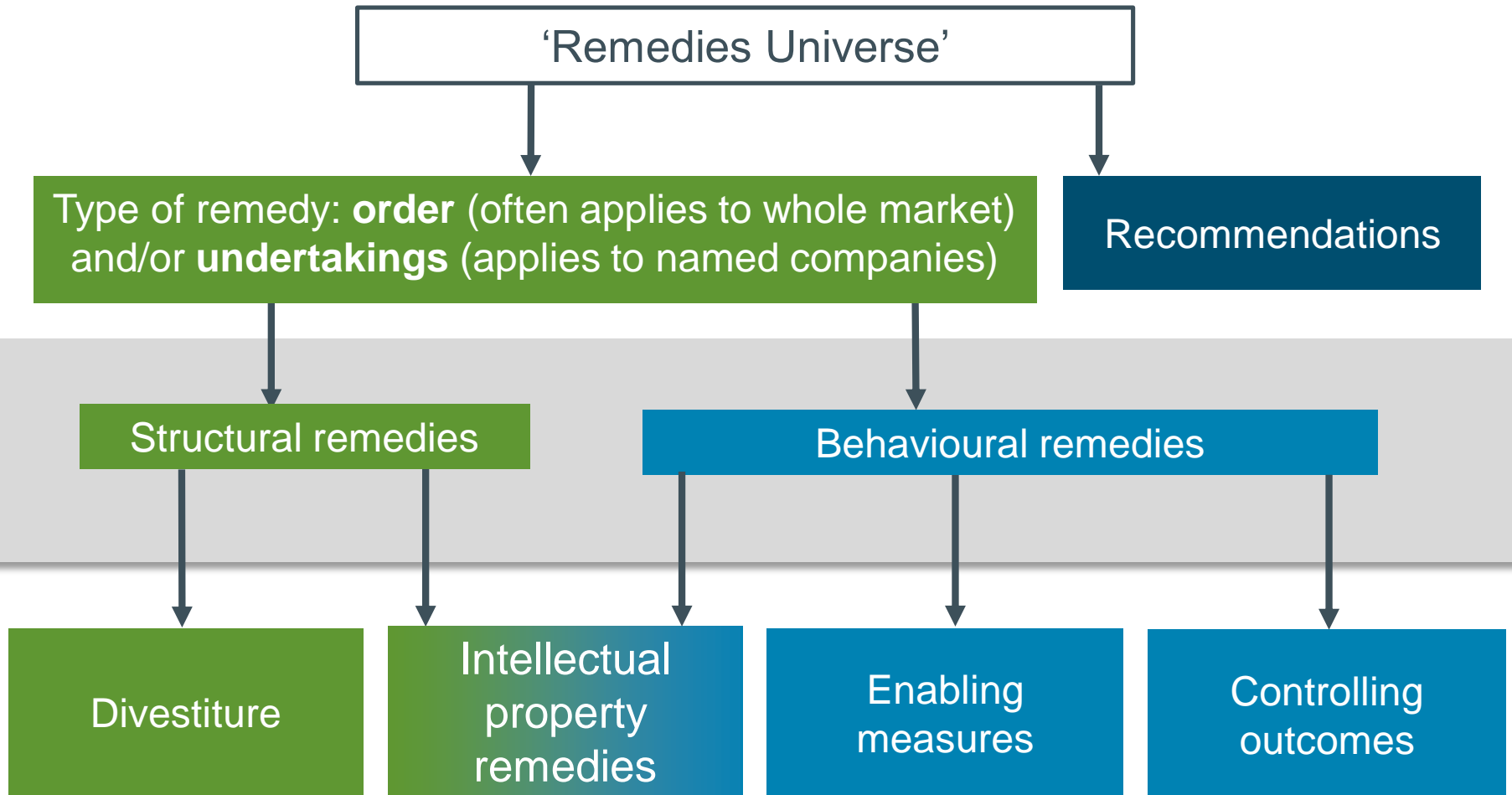
The rationale for remedial action

- The extent to which markets work is effective in making markets work well for consumers depends on the *quality of the remedies*
- In a market study, the CMA must assess the extent to which steps can and should be taken to remedy, mitigate or prevent any adverse effects identified
- The CMA has a statutory duty to **consider remedial action** when in the case of a market investigation, there is or may be one or more adverse effects on competition (**AEC**).

It is important to consider the outcomes of a market investigation throughout the case



Types of remedy



Principles

The CMA needs to achieve as “comprehensive a solution as is reasonable and practicable”.

1

Effectiveness

Does the remedy have the desired impact?

- (i) Practicability
- (ii) Timeliness
- (iii) Consider other legislation
- (iv) Interaction between measures
- (v) When making recommendations will they be acted on

2

Proportionality

Is this a reasonable thing to do?

- (i) Effective in achieving its aim
- (ii) No more onerous than needed to achieve its aim
- (iii) Least onerous if choice
- (iv) Does not produce disadvantages that are disproportionate to its aim

3

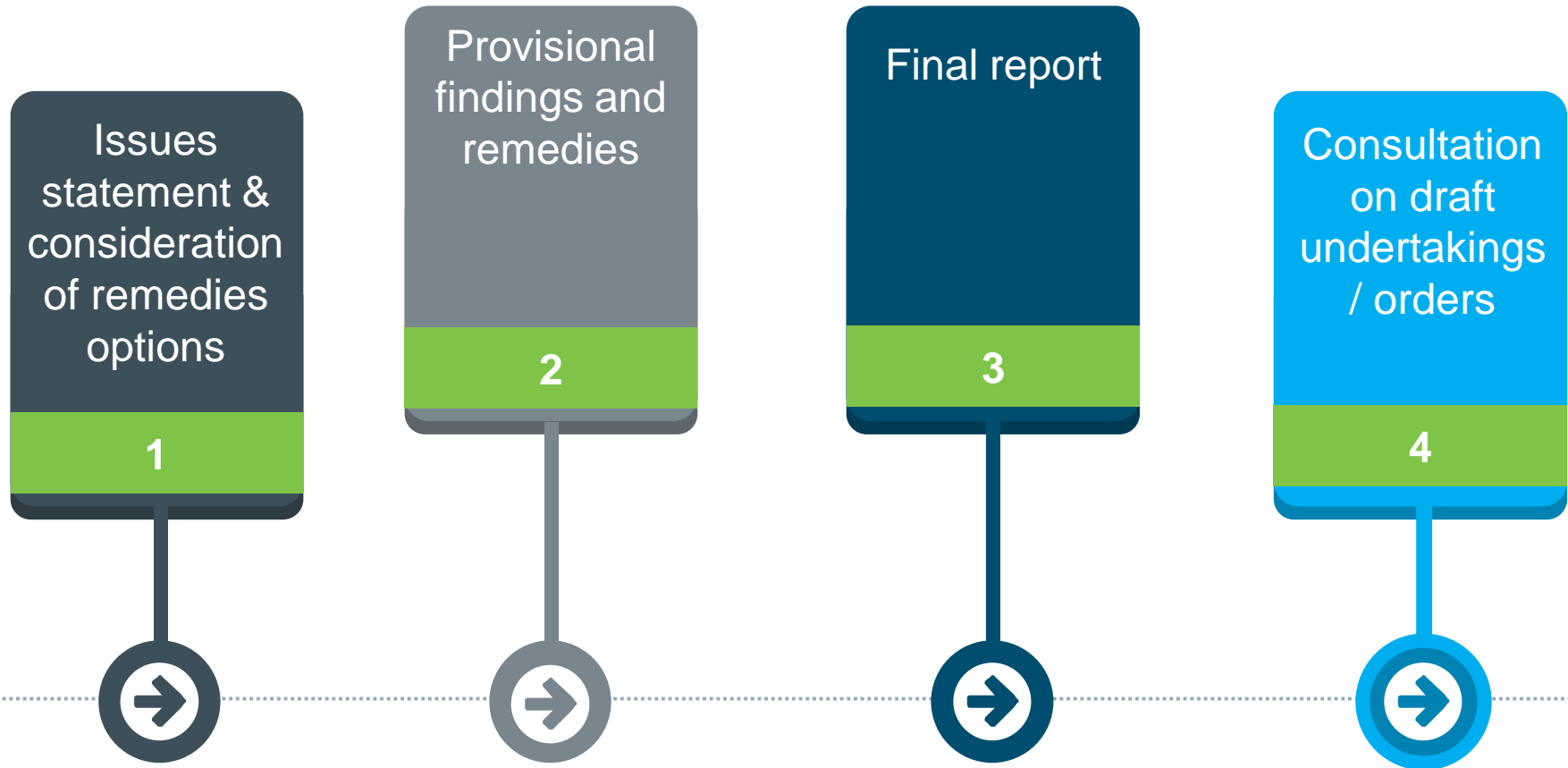
Relevant customer benefits

Lower prices, higher quality, more choice, greater innovation.

Would these be harmed by putting in place a particular remedy?

Remedy design during a Phase 2 inquiry

There are a series of publication stages which allow stakeholders to comment and be involved in remedy design:



Remedies implementation

Undertakings: Drafted by the CMA, agreed with parties, signed undertakings published by CMA

Orders: CMA drafts orders, consults with parties (informally/formally) and then publishes the final order

} CMA has 6 months to publish finalised orders / undertakings

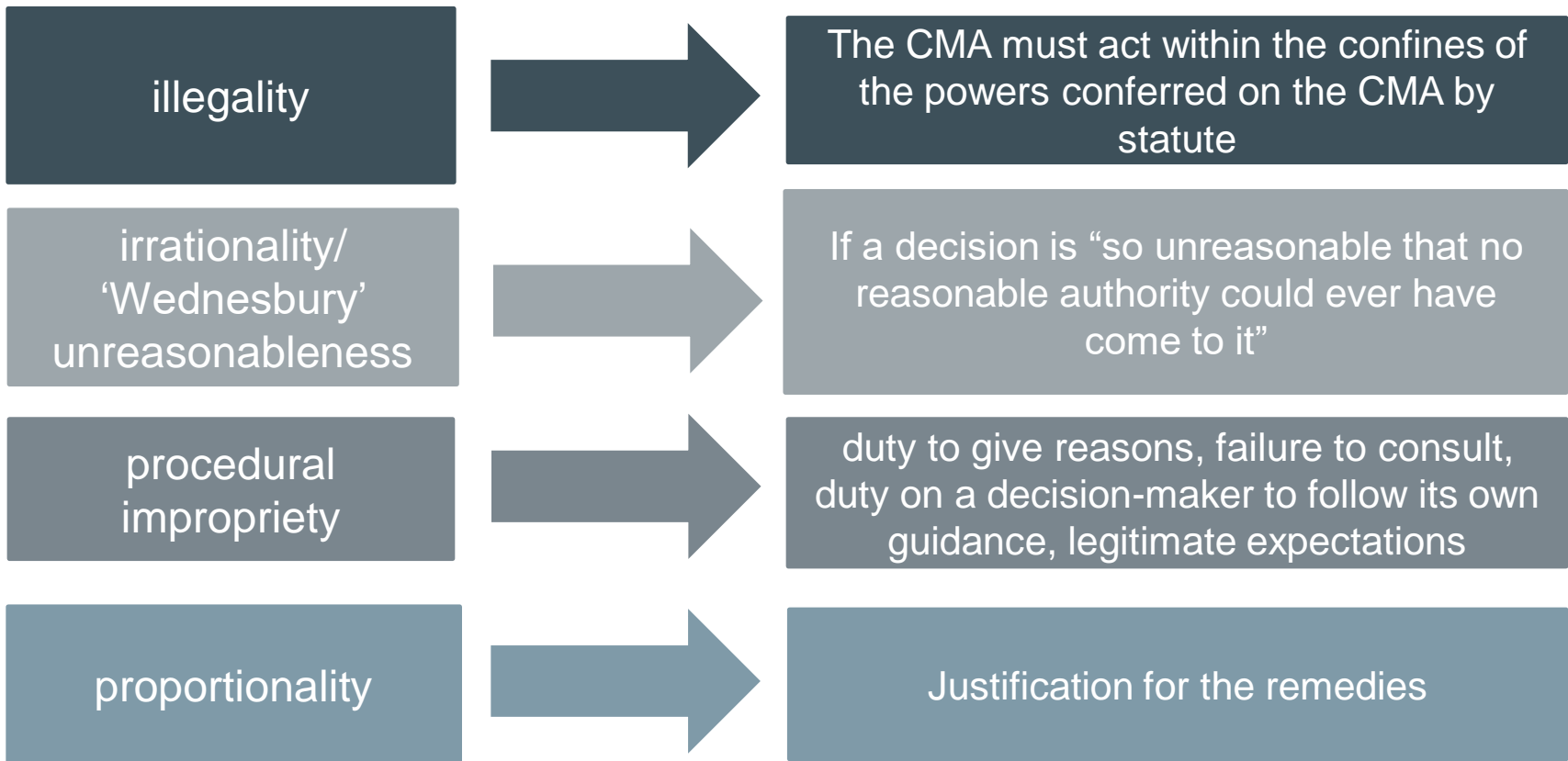
Recommendations: Government has made a commitment to respond to all formal recommendations within 90 days

CMA role tends to be limited to advocacy

Once orders / undertakings are in place, the CMA has an on-going role in monitoring compliance

Grounds for judicial review at the Competition Appeal Tribunal

The grounds for judicial review are as follows:



Examples of recent MIRs in the UK

Recently closed MIRs and key remedies

Private healthcare market investigation

Closed: 28 April 2017

The CMA has completed its remittal into the private healthcare market and has brought article 22 of the 2014 Order into force.

Press release

Better information for private patients moves closer

Better information for private patients on healthcare performance and fees has moved a step closer after the CMA appointed the organisation to provide it.

Retail banking market investigation

Closed: 2 February 2017

The CMA investigated the supply of personal current accounts (PCAs) and of banking services to small and medium-sized enterprises (SMEs).

Press release

Open Banking revolution moves closer

A technological revolution will give people greater control over their money following today's publication of the CMA's banking final order.

Energy market investigation

Closed: 20 December 2016

The CMA investigated the supply and acquisition of energy in Great Britain and has published its final orders and undertakings.

Press release

CMA finalises help for customers and microbusinesses on expensive deals

In order to help people who have been on a default tariff for more than 3 years – who are currently paying some of the highest prices in the UK for their energy – suppliers will be required to provide Ofgem with relevant information to help these customers (both households and microbusinesses) switch to a better deal.

Last week, the CMA finalised its [price cap for the 4 million households with prepayment meters](#).

Ongoing MIRs

Launched: 12 March 2024

Vet prices: Investigation over concerns pet owners are being overcharged

The Competition and Markets Authority (CMA) says it has identified "multiple concerns" in the UK vet market, including over pricing information and the buying up of practices by big chains.



Launched: 5 October 2023

CMA to investigate UK cloud computing market amid Microsoft and Amazon concerns

Media watchdog refers £7.5bn sector to competition regulator after being 'particularly concerned' about position of market leaders



Launched: 24 January 2024

CMA to restart cloud gaming probe in January

UK Court of Appeal to allow further investigation into Apple and Google's dominance in the emerging sector

The UK's Competition and Markets Authority will resume its investigation into the mobile browser and cloud gaming sectors on January 24.

The regulator's probe was held back in May due to complaints from Apple and Google, alongside a disagreement with the UK's Competition Appeal Tribunal.



Changes to the MIR powers coming into force with the DMCC

Digital Markets, Competition and Consumers Bill

[AS INTRODUCED]

CONTENTS

PART 1

DIGITAL MARKETS

CHAPTER 1

OVERVIEW

1 Overview

CHAPTER 2

STRATEGIC MARKET STATUS

Power to designate undertaking as having SMS

2 Designation of undertaking

3 Digital activities

4 Link to the United Kingdom

5 Substantial and entrenched market power

6 Position of strategic significance

7 The turnover condition

8 Turnover of an undertaking

Procedure

9 Initial SMS investigations

10 Further SMS investigations

11 Procedure relating to SMS investigations

12 Closing an initial SMS investigation without a decision

13 Consultation on proposed decision

14 Outcome of SMS investigations

15 Notice requirements: decisions to designate

16 Notice requirements: decisions to revoke a designation

17 Existing obligations

18 Designation period

- **More flexibility** for the CMA to make MIRs after a market study¹
- Power to impose **tougher penalties** for breaching market investigation orders/undertakings (penalties of up to 5% of global turnover for failure to comply with orders imposed)
- More opportunities for binding commitments to be accepted during market investigations
- Greater flexibility for the CMA to **define the scope** of market investigations
- CMA can **conduct trials** to determine the final format of certain remedies
- Power for the CMA to vary undertakings accepted or orders imposed which are subsequently identified to be ineffective for **up to 10 years after the finding** of an adverse effect on competition

1. "The amendments allow the CMA to make a reference: (i) two years or more after the publication of the market study report; or (ii) if there has been a material change in circumstance." [UK Digital Markets, Competition and Consumers Bill: One step closer to becoming law \(ashurst.com\)](#)