

# **Session I: Planning a merger investigation and communication with participants in the merger review process**

**Sheldon Mills, Senior Director, Mergers**

**Competition and Markets Authority, United Kingdom**

**EU-China Competition Week, 20 – 24 October 2014, Chengdu, China**

# 1: Planning the investigation

# Forming the case team

The first task is to form the case team. A case team allocation request received from parties prior to submission of Merger Notice Form

- Allocate case team within 5 days of receipt, ensuring no conflicts of interest
- This ensures that a case team is ready to handle the case when the submission is received

# Format of Phase 1 case team



# Additional case support

At Phase 1 and 2, size and make-up of teams will depend on complexity and issues arising. Other advisers joining core team may include:

- Financial and business advisers (counterfactual issues)
- Econometrics or statisticians (where econometric or survey evidence submitted or carried out)
- Remedies team (remedies and hold-separates in completed cases)
- Legal advisors to advise on legal issues and risk

At Phase 2, generally all disciplines will be utilised.

# Scoping and initial work (1)

- We aim to scope theories of harm throughout the lifetime of a case:
  - At beginning of phase 1 case, economist prepares an Economic Preliminary Analysis (EPAN) note
  - EPAN sets out main theories of harm and how case team proposes to investigate them / main sources of evidence
- Case officer prepares a Legal Preliminary Analysis Note which sets out initial views on jurisdiction and legal risk
- Market questionnaires are considered early in pre-notification in readiness for sending to the parties and third parties
- Scope is continually assessed by case team and senior management/decision makers throughout lifetime of case across Phase 1 and 2

# Scoping and initial work (2)

- **Impact of UK voluntary regime.** Two factors of UK regime mean specific aspects of scoping and initial work: voluntary regime means that parties can complete without making a notification
- Mergers Intelligence team monitors markets and calls-in mergers where we consider they may potentially raise concerns
- This means part of important part of initial work is considering use of Initial Enforcement Order:
  - Purpose: to prevent pre-emptive action - parties from integrating businesses ('scrambling the eggs') in order to protect the remedy process
  - Possibility of derogations
- Other scoping/planning considerations.
- Is there a failing firm / exiting firm argument? Prepare for financial analysis considerations.

# Scoping and initial work (2)

- **Other scoping/planning considerations.**
- Is there a failing firm / exiting firm argument? Prepare for financial analysis considerations.
- Is there a local/retail dimension? Consider type of economic analysis to investigate this or the type of evidence agency or parties may collect (surveys, for example)
- Is this a complex case requiring economic analysis? Consider whether submission of technical economic evidence can be achieved within a statutory timeframe or what additional internal resources you might need to carry out such a review?
- Will seeing the sites or areas of production or operation be important? If so, factor in time for a site visit, if necessary.
- Is this a high profile case? Prepare and consider a media strategy.

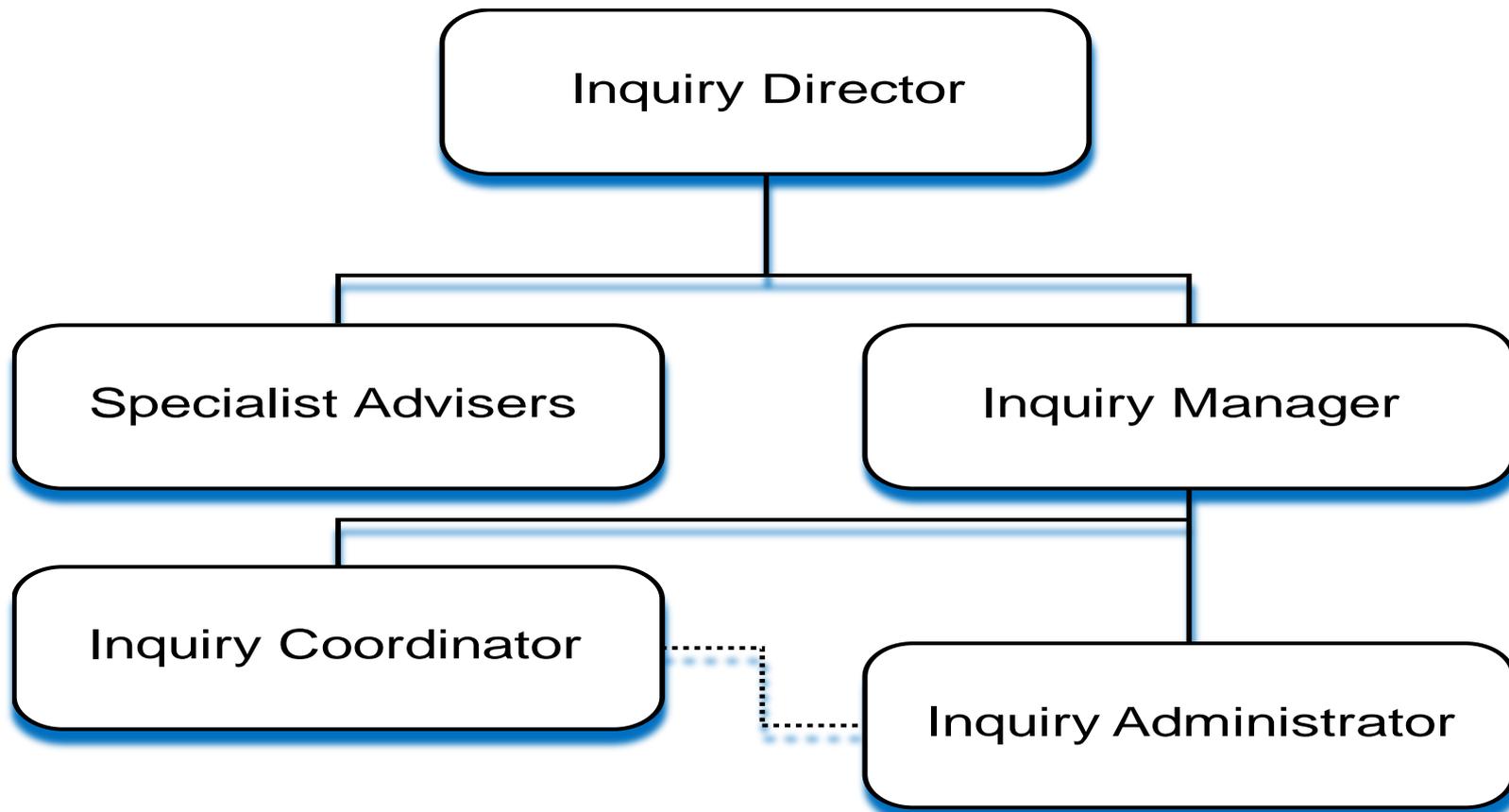
# Briefing decision makers

- Planning the case to ensure that briefing and updating decision makers is undertaken on a regular basis is important.
- At the CMA, significant autonomy is given to case teams and their managers to scope and investigate a merger.
- However, ultimately, the final decision-maker will require briefing to enable them to take an informed and robust decision which takes account of key evidence and risks
- In the UK, there are separate decision-makers at phase 1 and 2. This enables a 'fresh pair of eyes' to take a decision at Phase 2.
- At Phase 1, the CMA Board delegates authority to Executive Director and Senior Director, Mergers to take decisions on whether to refer a case for phase 2 investigation

# Planning the Phase 2 case

- Planning of a Phase 2 project requires significant scoping and consideration of the work plan.
- A new set of decision makers is appointed to form an Inquiry Group. These come from our Panel which is made up of leaders in law, economics, business who work as Deputy Chairs or part-time panel members.
- A new case team with some staff from the Phase 1 team but the majority staff who have not worked on the case previously.
- Liaison between Phase 1 and Phase 2 team is key to ensure effective and efficient handover of the file including theories of harm, responses to market questionnaires, decision documents.

# The inquiry staff team



# CMA Group

- A group must consist of at least three members of the CMA panel
- The group chair has a casting vote on any question to be decided
- Independent and Impartial
- Panel members from varied career backgrounds – lawyers, economists, financial advisers, consumer rights

# Phase 2 planning observations

- Some key planning points include:
  - Scoping. Needs to take account of phase 1 work and consider new lines of enquiry/investigation and analysis.
  - Consider timing of investigation. If under statutory timetables, then important to consider whether sufficient time to undertake detailed economic work
  - Format, design of further questionnaires.
  - Site visits and attendance (standard in phase 2 cases in UK)
  - Planning in evidently complex cases for remedy negotiations or options – we try to do this early in some cases

# Post Final Report – if SLC - planning

- In both phase 1 and 2, if remedies are required, important to plan for implementation
  - In completed cases in UK, we need to consider continuation of Interim Measures and the continued operation of a monitoring trustee
  - In Phase 1 and 2, we need to carefully plan for undertakings or orders (phase 2) and their drafting and consultation mechanisms in order to meet certain statutory deadlines
  - We have a remedies team which specialises in this area.

## **2: Communication with participants**

# Liaising with parties

- General approach is aim toward transparency where possible and appropriate.
- **Phase 1** – formal and informal elements:
  - Formal : State of Play call at Day 15-20 – update on theories of harm. If case raises potential concerns, then:
    - Issues Letter – sets out CMA’s concerns in some detail
    - Issues Meeting – parties meet with case team and decision-maker to discuss the case
    - Decision is published with full reasons
    - Informal: case team names and direct telephone/email published on website; parties’ advisers can contact Directors with concerns; ad hoc meetings in pre-notification or throughout the case, if considered appropriate

# Liaising with parties

- Phase 2 -
- Increased level of transparency and disclosure subject to need to protect information which is confidential to the parties and third parties
- Formal questionnaires sent
- Site visit where Group members and staff attend
- Hearings are held with the parties on draft provisional findings
- Working papers are put to parties for verification and disclosed for their views
- Annotated issues statement is sent which highlights key findings before main party hearings
- Public transparency – terms of reference, issues statement, provisional findings, summaries of third

# Liaising with third parties

- Use third parties as a source of evidence; send out questionnaires to customers, competitors and sometimes suppliers at commencement of Phase 1 investigation
- At phase 2, use mixture of hearings and questionnaires
- Often will iterate with third parties
- Hold third party information confidential subject to limited exceptions; in decisions and public documents, redact information or refer only in general aggregated terms to avoid harm through disclosure of commercially sensitive information

# Liaising with other authorities

- Our process is independent and final decision-making rests with the CMA
- However, we consider it important to use information and expertise of sectoral regulators or Government departments when assessing cases. We approach them in a similar way to third parties and send formal questionnaires and expect written replies for the file:
- Specific aspects include: formal procedure for liaising with other government authorities in public interest cases and memorandums of understanding with sectoral regulators, for example, Office of Communications, Office for Gas and Electricity Markets, Financial Conduct Authority etc to cover cases which raise sector specific issues
- Liaise with other NGAs, through the ECN or the ICN system with the use of waivers

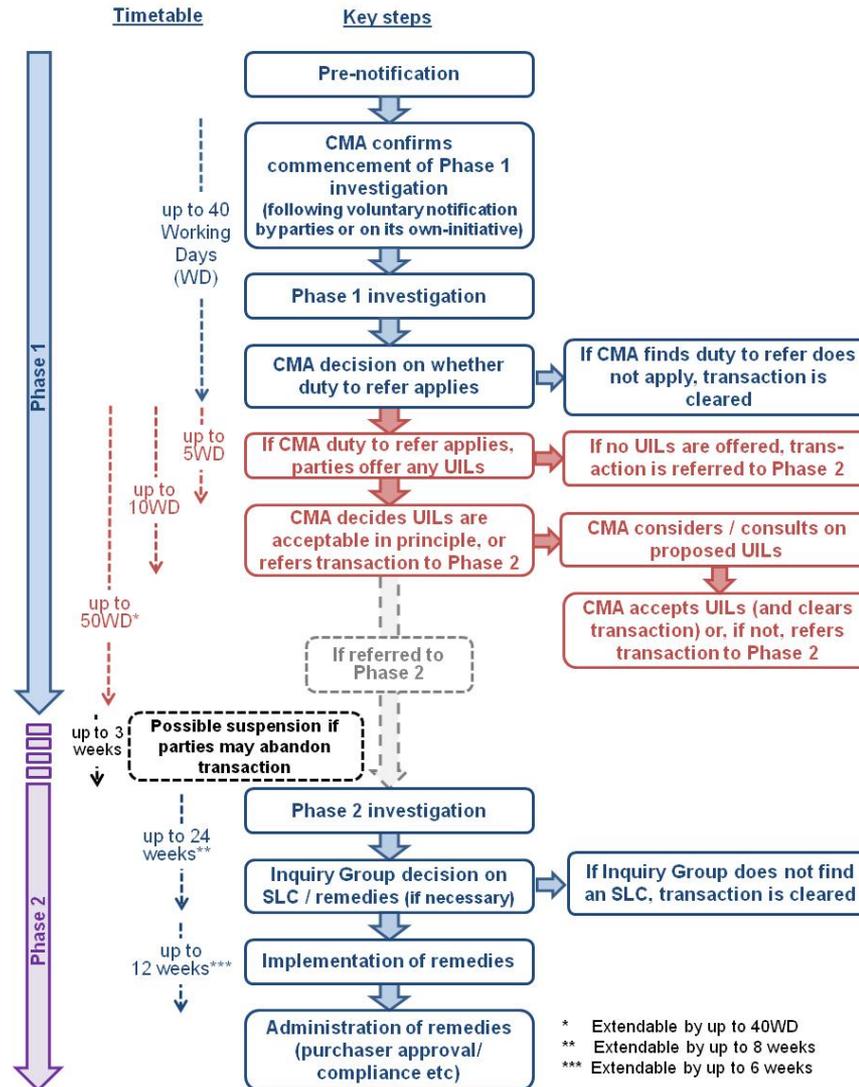
# **Session III: Timing in merger investigations**

**Sheldon Mills, Senior Director, Mergers**

**Competition and Markets Authority, United Kingdom**

**EU-China Competition Week, 20 – 24 October 2014, Chengdu, China**

# Overview of CMA process



# Timing: phase 1

# Statutory constraints

- 4 month statutory deadline for investigating completed mergers, calculated from the date of completion unless this was not made public
- Once satisfactory notice received/enough information to commence investigation, 40 working day statutory period to complete a Phase 1 investigation
- Statutory period commences the working day after CMA confirms it has received a complete Merger Notice
- Limited ability to pause the timetables once they have commenced

# Stopping the 4 month clock (1) CMA

Competition & Markets Authority

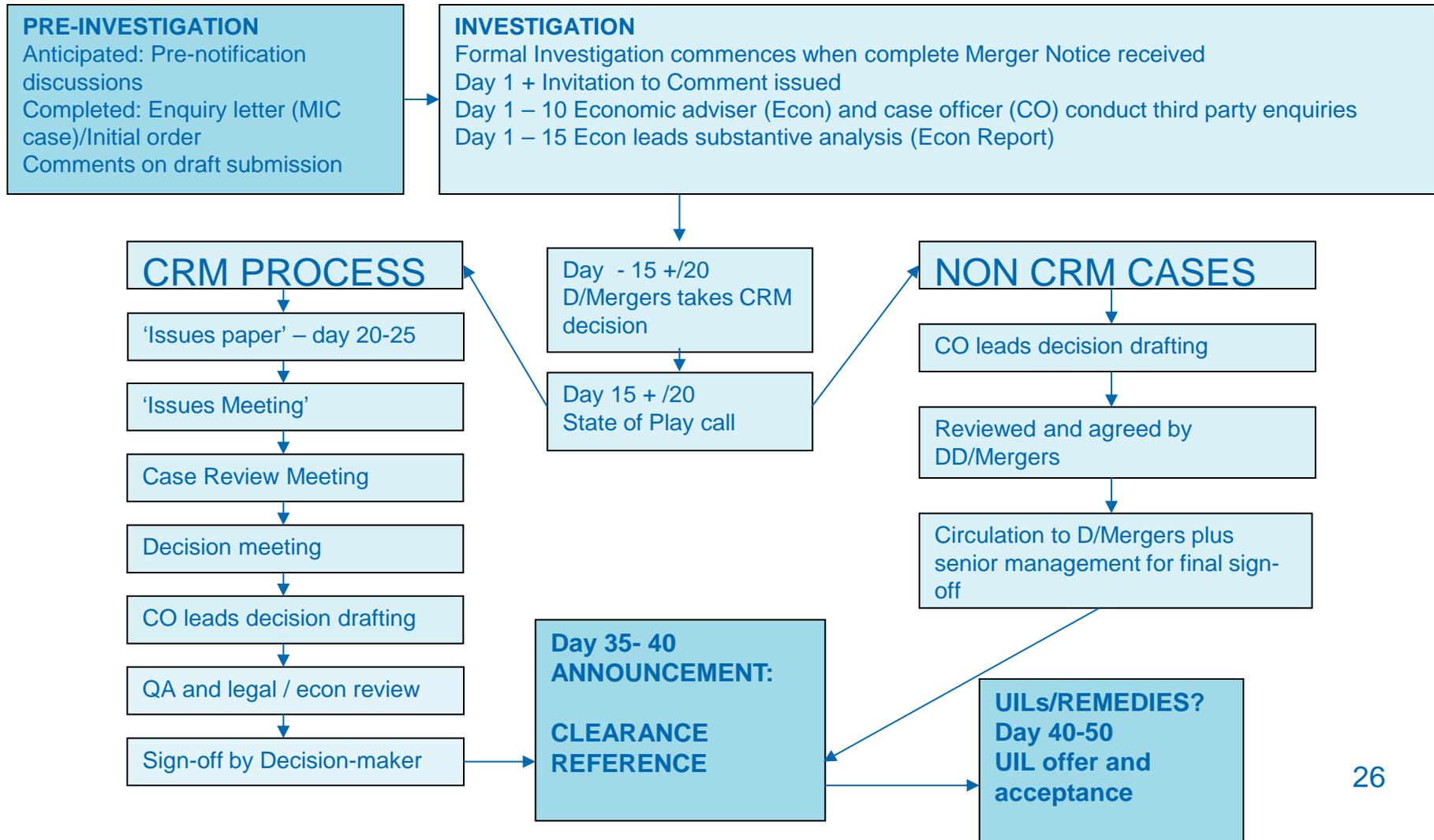
- In some cases, there is a risk we may run out of time to complete our phase 1 investigation.
- The governing law provides a limited ability to extend the statutory 4-month clock in two circumstances: failure to provide information, or by agreement with the parties.
- **Failure to provide information:** This is possible where CMA issues a mandatory information request under section 109 Enterprise Act 2002 (EA02) to the merged firm. The clock can be stopped where the firm fails to comply by responding, in whole or in part, to the information request.
- In order to officially stop the clock, a notice must be sent under section 25(2) EA02 to the parties. The clock stops on the date the s25(2) notice is sent.
- We may also cancel the extension of the four-month clock, for example when we accept that the merged firm is unable to respond fully.

# Stopping the 4 month clock (2) CMA

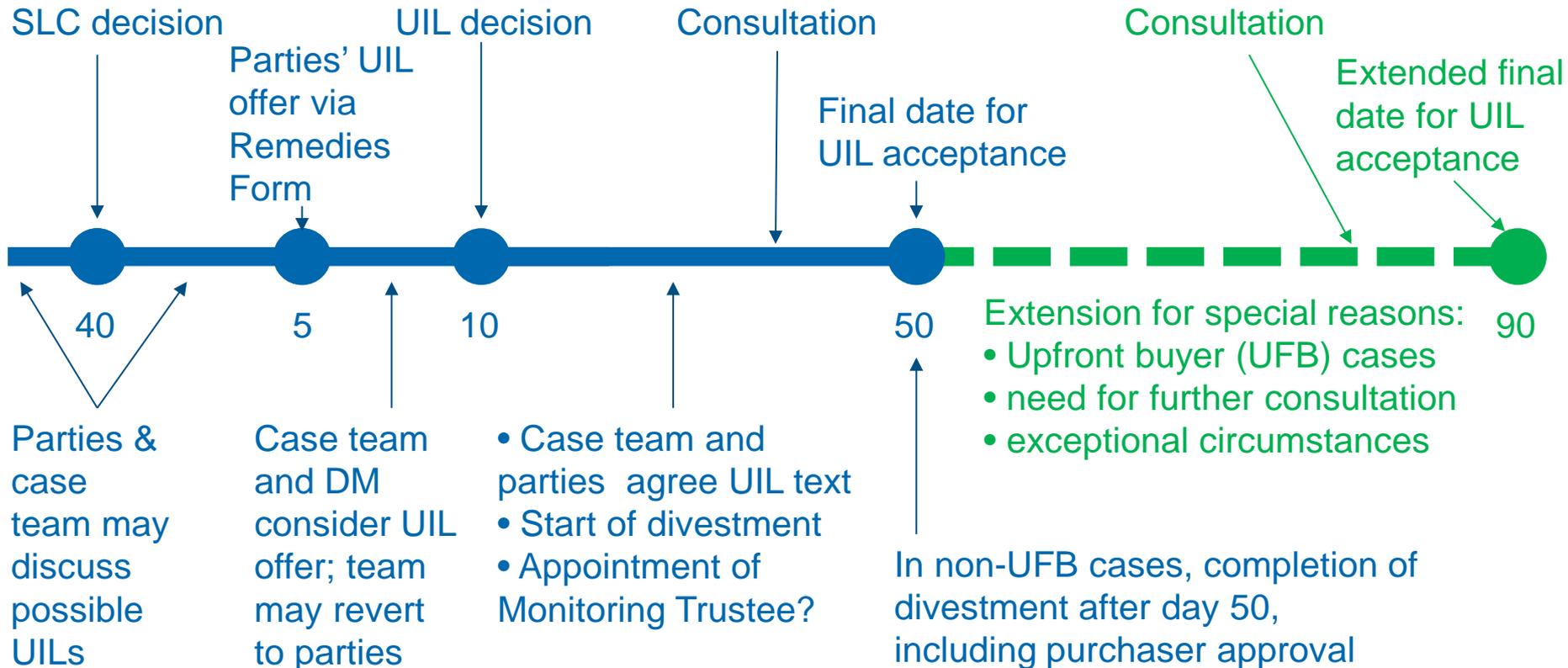
Competition & Markets Authority

- Clock re-starts only once we have had a reasonable opportunity to consider whether the request has been complied with, not immediately upon receipt of the information. The determination of what is a reasonable time for reviewing the information is a fact and risk based assessment.
- **By agreement with the parties:** Under s25(1) we can agree with the parties to extend the four month clock by 20 working days. We would only ask parties for this if it is clear that without an extension we would have less than 40 WDs for the formal investigation. In that situation the parties are often willing to agree to the extension because it gives us a better opportunity to investigate and hence a reduced risk of reference to Phase 2.
- Under s25(4) we can extend the four-month clock if we are seeking UILs.

# 40 WD Internal timeline



# UILs procedure



# Stopping the 40 day clock (1)

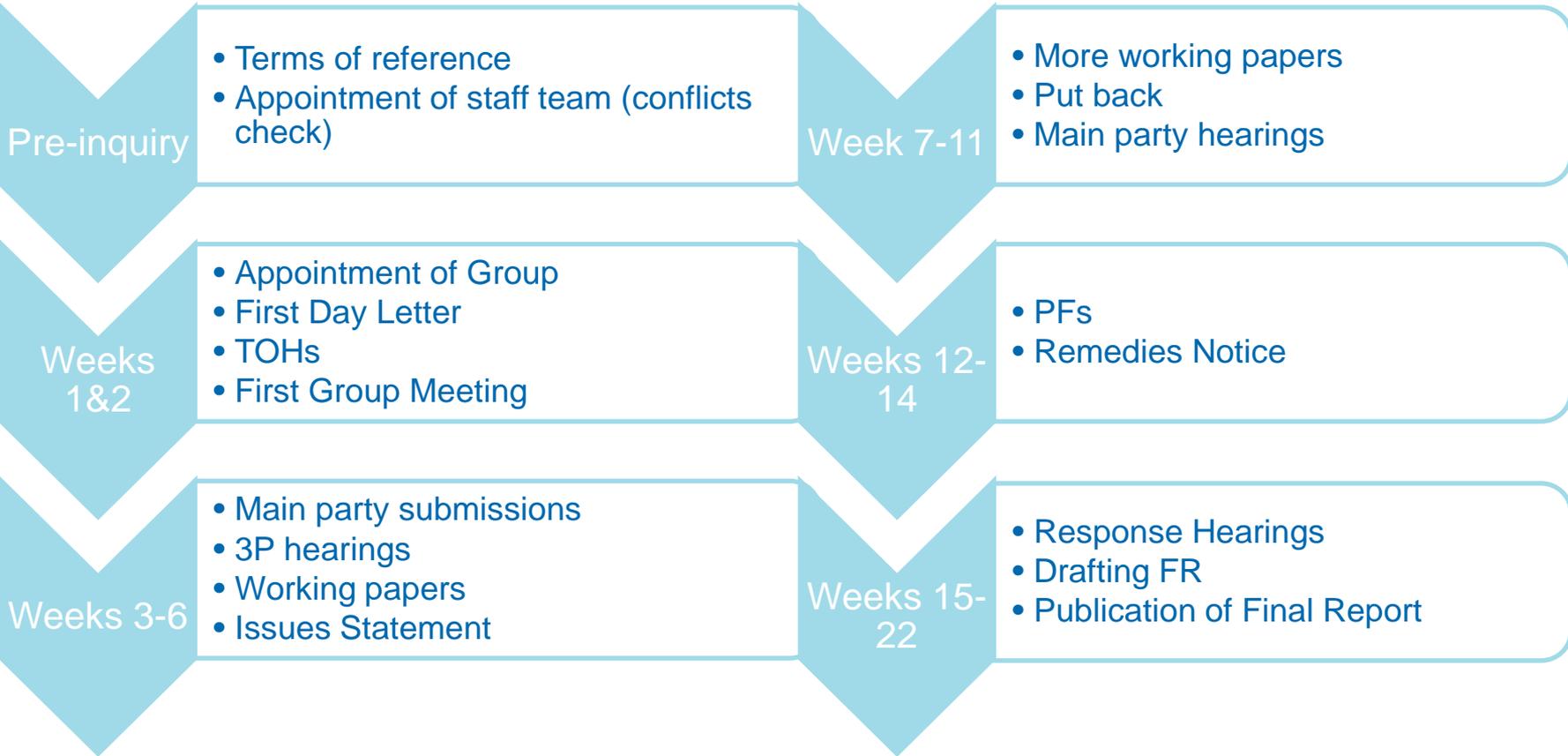
- A further constraint in any case – completed or anticipated – is the ability to gain more time to investigate. This may be due to difficulty in obtaining third party responses, staff resourcing issues or theories of harm/complaints being made late in the process.
- We cannot stop the clock for any of the above reasons. As such, one of our methods for managing this risk is to have a reasonable and proportionate period of pre-notification where we scope the case and obtain sufficient information to commence our investigation. We may, in certain cases, undertake some third party enquiries before starting the clock – with approval from the parties.
- We can stop the 40-WD clock where the parties have not complied with a mandatory information request under s109. This law does not apply to third parties.
- The clock stops on the date that we **publish** the extension of the clock.
- We can also stop the 40-WD clock by notice where the European Commission is considering a referral request by the UK under Art 22 of the EUMR. This extension begins when the notice is given.
- Where the clock has been stopped for non-compliance with a s109 notice, it starts again when a full response has been received to the s109 information request.

# Stopping the 40 day clock (2)

- If the clock re-starts because a full response to the s109 request has been received, the extension of the clock ends only once we have had a reasonable opportunity to consider whether the s109 request has been complied with.
- We may also cancel the extension of the 40-WD clock, for example when we accept that the parties are unable to respond fully. The extension ends only we have published our decision to cancel the extension.
- Where the clock has been stopped due to a referral request to the European Commission under Art 22 EUMR, the clock re-starts when we give notice of the completion by the European Commission of its consideration of our referral request.
- Under s107 we need to publish all extensions of the initial period (ie the 40-WD clock).
- In cases where the Secretary of State has issued a public interest intervention notice (PIIN), we can extend the 40-WD clock by up to 20 WDs.
  - There is no formal notice for an extension in PIIN cases.
  - This extension starts on publication and can only be made once.

# Timing: phase 2

# Chronology of Phase 2 Inquiry



# Extensions, phase 2

- Following reference of an anticipated merger, in order to prevent wasted or unnecessary work, if the merging parties request it and the CMA considers there is a possibility that the merger will be abandoned by the merging parties, the CMA can suspend its Phase 2 inquiry for a period of up to three weeks.
- The CMA has 24 weeks to publish its final report, which can be extended by up to 8 weeks. Provisional Findings and Remedies Notice are due in weeks 12-14.
  - The final report must normally be published within 24 weeks of the date of the reference. The inquiry can be extended, once only, by up to eight weeks if the CMA considers there are special reasons why a report cannot be prepared and published within the statutory deadline.
  - In addition to an extension for special reasons, inquiry period can be extended if (as in phase 1) one of the main parties fails to provide information in response to a formal section 109 notice within the time stated in a section 109 notice.
    - In this case the inquiry timetable is extended until the information is provided to the satisfaction of the CMA or the CMA decides to cancel the extension.

# Extensions, phase 2

- Remedies process: CMA is subject to a statutory deadline of 12 weeks following its final report, extendable once by up to six weeks if the CMA considers there are special reasons for doing so, to implement its Phase 2 remedies.
  - Again, these time limits may be further extended where a relevant party has failed to comply with the requirements of a notice requiring the submission of evidence issued under section 109 of the Act
- CMA will draw up a timetable for the drafting and implementation of undertakings or an order, and share key milestones with the main parties to help them plan their input to the process.

# **Session II: Developing reliable evidence in merger cases**

**Sheldon Mills, Senior Director, Mergers**

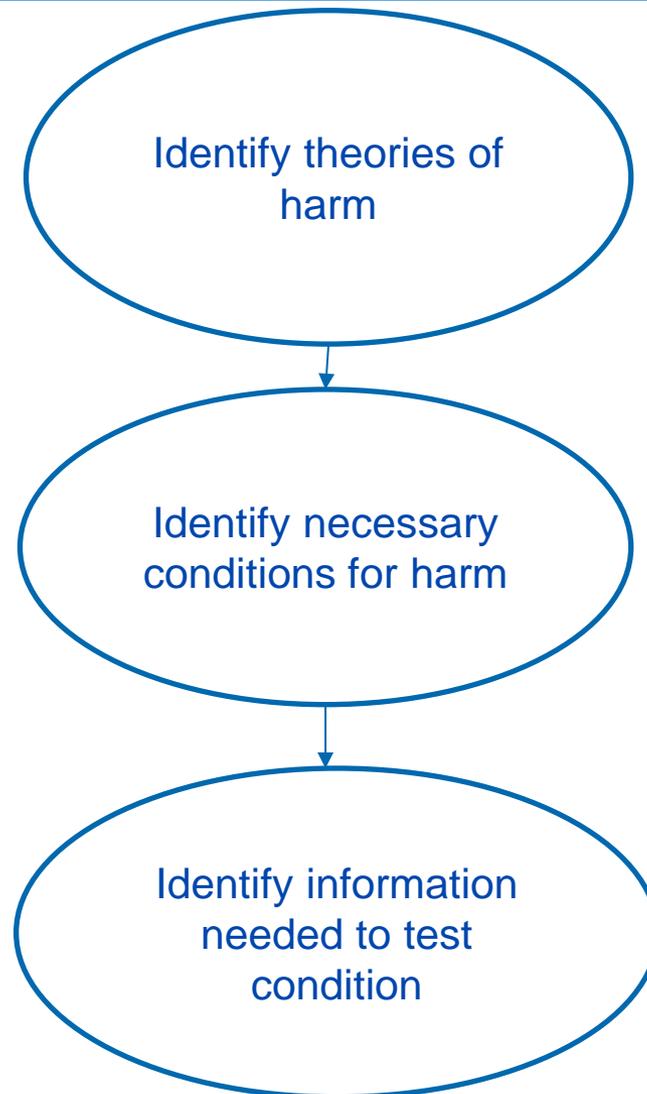
**Competition and Markets Authority, United Kingdom**

**EU-China Competition Week, 20 – 24 October 2014, Chengdu,  
China**

# Overview

- Identifying the types of information necessary to assess the merger
- Identifying relevant and reliable sources of evidence
- Value of using/seeking other information from others
- The range of tools available to gather evidence from the parties and market participants
- Effective use of the different investigative tools

# Identifying the types of information necessary to assess the merger



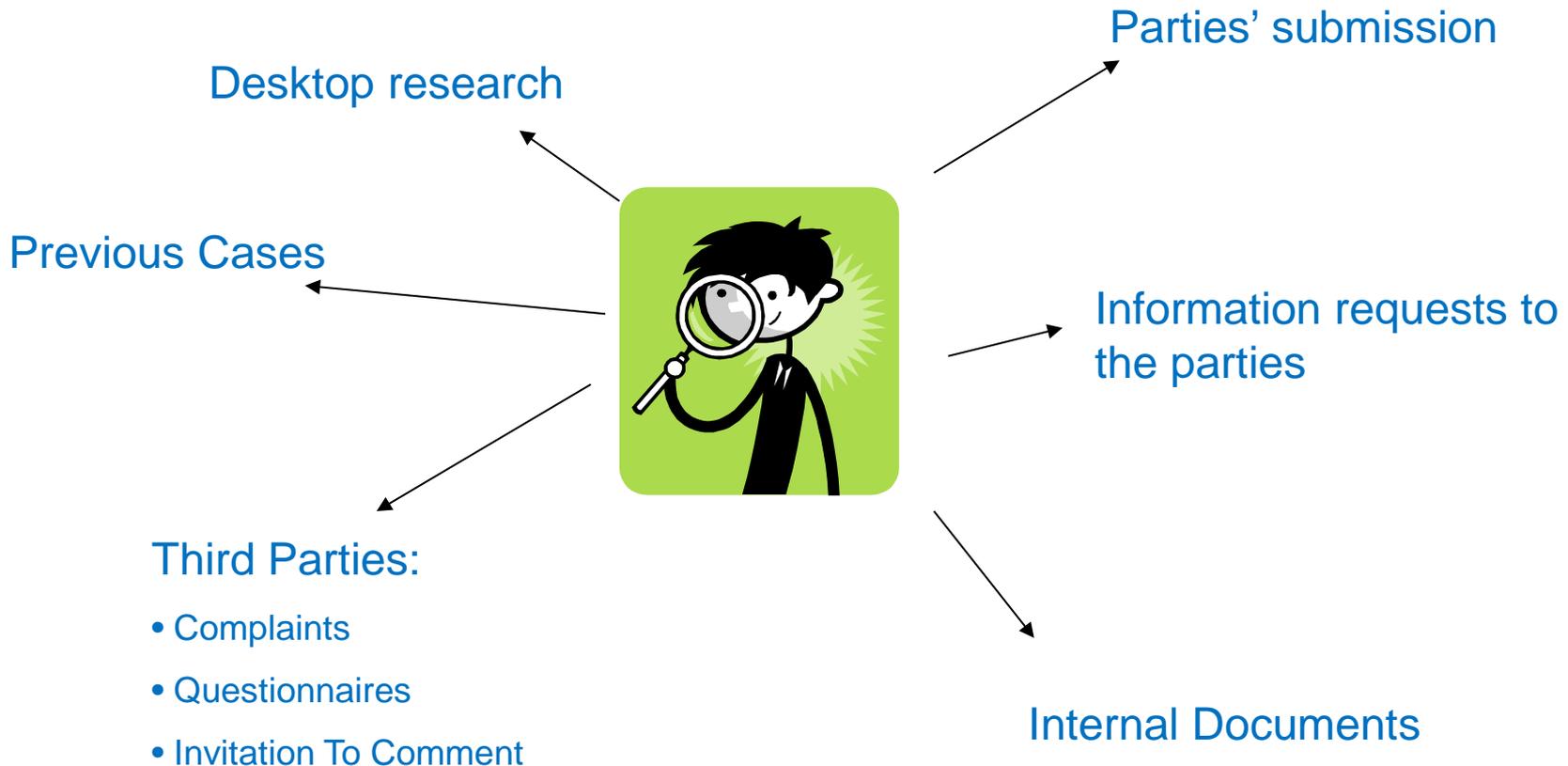
# Identifying information requirements at the two phases

## Phase I

- Submission from Parties
- Past cases
- Preliminary analysis notes (PAN) from Economist
- More emphasis on what the merging parties are submitting

## Phase II

- Phase 1 decision
- Theory of harm papers – similar to PAN notes but more detailed
- Inquiry group input
- Ability to consider issues in more detail and conduct larger evidence studies



# Identifying relevant and reliable sources of evidence

- **Internal documents from Parties**
  - Important as not produced for our investigation.
  - Can show us which companies seen as main competitors
  - How prices are set
  - Problems – how to identify important documents and can be time consuming to analyse.
    - Internal documents e.g. business plans, strategy documents, management accounts etc
    - Publicly available documents e.g. market research, industry reports etc
    - Contact details for competitors, suppliers, customers and trade associations
- **Third party evidence**
  - Seek the views of customers, competitors, suppliers, regulatory or governmental bodies
  - Mixture of written, telephone and face to face (rarer in Phase I). Sometimes recorded
  - Facts about the parties business e.g. products, sales levels, capacity
  - Way the market works e.g. price setting, contract length, competitors,
  - Questions on possible constraints e.g. barriers to entry and expansion, buyer power, imports
- **Expert / Quantitative evidence**
  - By Parties (often in Phase 1) or CMA (usually in Phase 2)
  - Dependent on data and timing considerations

# Transparency and disclosure

- Ensuring accuracy of information, particularly at Phase 2
  - “Put back” at Phase 2
- Transparency on where cases are heading to Parties and external stakeholders
  - State of Play calls and Issues meetings at Phase 1
  - Hearings and Provisional Findings at Phase
  - Provide access to decision makers for Parties at both Phases

## Objectives

- To gain a detailed understanding of:
  - what respondents do and why and
  - **What respondents do:**
    - travel purchased
    - reason for using a 'bricks and mortar' shop
      - and what they use it for?
    - channel preference (shop/ phone/ internet)
    - channels used to research and book holidays in the past 12 months
  - **Hypothetical questions**
    - response to closure of retail outlet and / or price or service quality change

# Phase two data meetings

- Important to have an early meeting with the parties regarding the data they hold
  - Initial meeting with right people - database managers / relevant staff
    - What do they hold
    - What data do the decision-makers use – type and aggregation
    - Format and ease of export
  - What are the relevant internal documents, eg pricing documents
- Try to be aware of burden on business – avoid unnecessary questions.
- Prefer raw data.
  - Raw data avoids problems with inappropriate weightings etc in aggregations; and gives
  - Flexibility

# Value of using/seeking other information from others

- Important source of information in many cases
- Information about the sector from a source other than the Parties
- Attempt to collaborate information from a number of sources
- Third parties (customers) in a good position to identify and evidence potential harm
- But:
  - Beware of preconceived ideas
  - Ensure up to date
  - Need to be challenged
  - Need to deal with a poor response rate
  - End consumers – not always practical (particularly in Phase 1)

# The range of tools available to gather evidence from the parties and market participants

## Phase 1

- Pre-notification meetings
- Merger notices / Enquiry letter from the parties
- Formal information gathering powers S109 notices
- Written submission, telephone conversations and (more rarely) meetings with Third parties
- Issues letter process with parties

## Phase 2

- First day letter from the Parties and hearings
- Data meeting
- Third party evidence and hearings
- More scope to design surveys (can include qualitative and quantitative)
- Formal information gathering powers

# Examples of types of analysis available

- Catchment areas
- Descriptive analysis - pricing
- Surveys
- Econometrics
- Upward Pricing Pressure
- Validating key assumptions of the theories of harm, eg on the basis of natural experiments
- Win/loss and participation analysis in bidding markets
- Critical loss analysis for homogeneous goods markets
- Possible assessments of entry/repositioning and efficiencies
- In Phase 1, parties expected to submit relevant information

# How to determine which method to use

- Interactions with Parties and third parties
  - Informal at first
  - Formal powers used if needed
- How vital is information for testing relevant theories of harm?
- What data is available?
- Resources / proportionality
- Have a work plan:
  - How long will analysis take?
  - Do we need to prioritise to meet the deadline?
  - What resources do we need?

## Relevance of the structure and characteristics of the industry/sector involved in the choice of information gathering tool

- Important to understand how industry works
- For phase 1 cases, might not be possible to talk to end customer (i.e. consumers)
- In such cases look for other sources of information – survey at Phase 2
- Data available will depend on industry
  - Published reports?
  - Information gathered by third parties (e.g. retail scanning data)
  - Aggregation of data may depend on industry