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Consultation Response

Which? response to the Department for Business and Trade's consultation on Refining our Competition Regime

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Summary

Which? supports the government's ambition for the UK to have an international 'best in class' competition regime. We believe the consultation contains some proposals that could bring improvements to the mergers and markets regimes, which would benefit businesses and ultimately UK consumers. However, we feel there is a lack of evidence supporting the arguments for several of the proposals and, overall, we feel the consultation fails to make a persuasive case that the proposals will make fundamental improvements to the competition regime as a whole.

In brief:

- The stated rationale for reforming CMA decision-making by abolishing the Panel and placing more duties on the Board are flawed. The government has not sufficiently considered the potential for unintended consequences.
- The proposals to the markets regime have clearer benefits, but we would like to understand how the government intends to mitigate potential risks from moving to a single-phase market review tool.
- With regard to mergers, we support the extension of the timeframe for submitting and considering Phase 1 undertakings, but are unconvinced that changes relating to the jurisdictional tests are needed.
- We strongly support the CMA being given enhanced powers to investigate algorithms in its competition and consumer protection functions.
- We oppose the Secretary of State having a formal role in a wider range of key guidance documents. No objective observer of the CMA since January 2025 could make the case that it lacks political accountability. Giving the Secretary of State a greater role in approving operational guidance invites businesses to lobby Ministers

to change CMA guidance rather than arguing their case on the merits of competition law. It is unclear how this change will make the CMA faster and more effective.

Which? believes there are some improvements that could be made with a careful redesign of elements of the competition regime, but we encourage the government to explore more deeply the trade offs at stake and to do more to demonstrate that the changes will have benefits for UK consumers and their trust in markets and competition.

Responses to specific questions

Chapter 1. Enhancing accountability for CMA decision-making in mergers and markets

Q1. What impact do you think the proposed reform would have on the consistency and predictability of decision-making in merger and markets cases?
Q2. Would the proposed reform for greater accountability for the CMA Board for merger and markets decision-making be something you would welcome?

We do not support the government's proposals for replacing the CMA Panel and transferring decision-making power to merger and market boards (or sub-committees of these). It is unclear how the proposed change will make the system more effective or accountable. We believe the proposals ultimately increase the risk of regulatory failure and political interference.

The government gives three reasons for the proposed changes. It believes the current regime could be improved by:

- *Increasing accountability of the CMA Board for merger investigations and single-phase market reviews.*
- *Strengthening engagement between representatives of the CMA Board and parties to an investigation throughout the process*
- *The proposed changes would align the CMA's approach with that already adopted for its digital markets functions.* [Paragraph 9]

All three of these arguments are flawed.

First, while it is right that the CMA is held accountable to the government and parliament (and to those affected by its decisions through the courts), the proposed changes increase the risk of political interference in individual cases. The government should be deeply wary of eroding the independent decision-making ability of the CMA if it wants to protect the substantial benefits of an independent competition regulator. If that independence is perceived to be lost then this would shatter any aspirations for predictability and consistency in decision making and it would have far-reaching, long-term negative impacts on economic growth.

Second, while it is important that there is dialogue between the CMA and the parties to an investigation so that they understand concerns and can engage meaningfully, it is hard to

imagine how Board members who are stretched across responsibilities will be able to engage in depth with parties. In fact, it seems more likely that there will be unintended consequences with the quality or the pace of decision-making reduced. Further, it is important that this engagement happens without the threat of powerful firms undertaking political lobbying to exert influence on CMA decision makers, but this could happen under the government's proposals.

Finally, aligning the CMA's approach with that used in the digital markets regime appears to have no intrinsic value. The regimes are fundamentally different and it is reasonable to have different processes. It stretches credulity to believe multinational businesses who engage with the CMA across multiple functions are unable to understand differences in approach to different aspects of competition law. Moreover, there is not even any evidence yet that the decision-making approach used for digital markets is leading to good outcomes in the context for which it was designed. The Digital Markets Unit has so far failed to implement any meaningful interventions and deadlines have slipped repeatedly across all its investigations.

We strongly recommend that the government takes more time to explain and evidence the problems with the existing regime and to consider a range of alternative mechanisms for dealing with these.

Q3. Do you support the proposed membership requirements for the mergers and markets sub-committees/committees?

No. We think there are multiple problems. For example, for the reasons outlined above we do not think it is desirable for the CMA Board to have responsibility for these decisions, and the skills and experience required to be a successful Non-Executive Director at an organisation such as the CMA are not the same as those needed to make good decisions in mergers and markets cases. Further, we already have concerns about the lack of consumer expertise in the existing Panel and would want these to be addressed should the Panel be replaced by a pool of non-CMA staff experts. On the latter point, we would reiterate arguments made and amendments tabled during the passage of the Enterprise and Regulatory Reform Act 2013 that those adjudicating on such matters should also be appointed explicitly with a consumer protection background, as well as those with experience from an industry perspective.

Chapter 2. Markets Work and Market Remedies

Q4. Do you agree the existing market study and market investigation model should be replaced with a new single-phase market review tool?

We agree that there may be benefits from making changes to the existing market study and market investigation model. The process should be as efficient as possible to reduce consumer harm and to minimise the adverse effects of uncertainty on market participants. It is clear that the regime currently has some undesirable features that may distort CMA decision-making, create inefficiencies and increase the burden on firms. It may ultimately

lead to slower implementation of remedies and continued consumer harm. We are therefore tentatively supportive of a single market review tool.

The proposals in the consultation have the effect of combining the two proposals for structural reform that were contained in the government's previous consultation on competition policy in 2021.

At that time, we supported the proposal to give the CMA the ability to apply a limited range of remedies at the end of a market study and to allow the CMA to extend the duration of the market study for that purpose. We believed this was a way to make the regime more effective and allow the CMA to operate in a more flexible and agile way.

Conversely, we did not feel able to support the move to a single-phase market inquiry. In part this was because the proposal was for the single legal test to be an adverse effect on competition, which we believe would have been detrimental to consumers. Given the government now proposes to adopt an adverse effect on consumers as the single legal test, we would be more supportive of a single-phase tool.

However, the consultation document is lacking in some respects. First, while the existing system has inefficiencies, the obvious benefit is that by bringing in different decision makers in a market investigation, it introduces a safeguard against confirmation bias. Therefore, losing this check and balance increases the likelihood of bad decisions. The consultation fails to propose mitigations for this or, alternatively, adequately explain why the trade off it proposes should be made. There is a heavy reliance on the example of digital markets regime, but this ignores that the trade off is different in digital markets because it is an ex ante regulatory regime. In that case, repeated interactions with the same firms means that inefficiencies introduced by having different decision makers would be more acute. Second, the distinction is not made clear between what are defined as 'less/more intrusive remedies' and hence it is difficult to determine the appropriateness of the mechanism that would determine whether the market review follows the first path with a maximum duration of 18 months or the second lasting up to 30 months.

Until these issues are thoroughly explored, we cannot fully support this proposal.

Q5. Do you agree the statutory time-limit for market reviews should be 24 months, with a possibility to extend by a maximum of 6 months?

Yes, this seems a reasonable time period for a single-phase market review. Removing the inefficiencies of a two-stage process should enable a shorter overall duration than is currently the case, but the proposal still gives enough time for a sufficiently rigorous market review in the event that the CMA imposes strong behavioural or structural remedies.

Q6. Do you agree there should be a single legal test for single-phase market reviews? Q7. If so, should this be the adverse effect on consumers test?

Yes. There should be a single legal test and this should be an adverse effect on consumers. The CMA should be able to impose remedies where it finds consumers are suffering detriment, even where it cannot be established that the consumer harm is linked causally to an adverse effect on competition. The only alternative we could support would be to broaden the single test to an adverse effect on competition or consumers.

Q8. Do you agree the CMA should consider sunset clauses when designing remedies?

We support the use of sunset clauses to avoid needless proliferation of obsolete regulations and welcome the CMA's commitment to do this by default. We are sceptical that the government needs to put this on a statutory footing, but have little objection.

Q9. Do you agree the CMA should review market remedies at least once every 10 years?

No. It's unclear how this would be an improvement on the CMA's existing statutory duty to keep remedies under review. The CMA's decision to conduct its current strategic review of remedies as part of its commitment to implement the 4Ps framework, and ultimately as part of its commitment to satisfy the government's desire that it pays more explicit attention to economic growth, is a clear demonstration of the effectiveness of both the CMA's existing powers and duty and the political accountability it already feels. The 10 year review period appears arbitrary and it imposes an administrative burden on the CMA with doubtful benefit.

Q10. Should the CMA be able to delay reviews beyond 10 years in exceptional circumstances, providing it publishes its reasons for doing so?

N/A

Q11. Should sector regulators be able to oversee market remedies imposed or accepted by the CMA?

Yes. We believe this could be a useful development. Ofcom's monitoring of the Network Commitment in the Vodafone-Three merger illustrates how this can work. An advantage is that it may allow the CMA to draw from a wider range of remedies in market cases because there may be some that it would have been infeasible or impractical for the CMA to monitor and enforce, for example because it lacks the necessary sectoral expertise.

Q12. Do you support the proposed consultative approach, where the CMA must consider undertaking a single-phase review following a request from sector regulators?

We are not persuaded by the merit of this. Given the infrequency with which sectoral regulators have made market investigation references to the CMA it seems unlikely that this will lead to a meaningful change in the extent to which the CMA has control over its resource, which is the stated aim in consultation.

We presume that consideration is being given to this because of Ofcom's MIR on cloud services. However, the circumstances of that are highly unusual. To avoid a similar situation occurring in the future, a better change may be to allow the CMA to directly open an SMS investigation as an alternative response to a market investigation reference from a sectoral regulator (acknowledging that at the time of Ofcom's MIR the digital competition regime was not in operation).

Q13. We welcome any other views or evidence on improving the concurrency framework.

It would be helpful to have more transparency, where appropriate, about cooperation between the CMA and sector regulators on competition matters. For example, in relation to the recent CMA / Ofcom cooperation on the Vodafone / Three merger.

Chapter 3. Mergers

Q14. Should share of supply be revised to a closed list of criteria, for both the share of supply and hybrid jurisdictional tests?
Q15. Do you support the proposed criteria for inclusion?
Q16. Are there any additional criteria that should be included?
Q17. Would the proposed reform for the share of supply test improve predictability for businesses?

No, we do not support closing the list of criteria and removing the ability of the CMA to use other criterion when deciding whether the 25% share of supply threshold has been met. Competition Appeal Tribunal case law shows clearly how complex such judgements can be, including in relation to newer business models. The CMA needs to have its discretion in this respect fully preserved.[1]

The government has failed to make the case that any benefits that could arise from potentially improved predictability for businesses would outweigh the potential harm from the increased risk of the CMA failing to prevent a harmful merger because it was no longer able to have jurisdiction over it.

Q18. Should the material influence and de-facto control tests be revised to a closed list of statutory factors?
Q19. Do you support the factors proposed for inclusion?

[1] See, for example the case of Sabre Corporation v Competition and Markets Authority involving software merchandising and distribution for airlines.

Q20. Are there any additional factors that should be included?
Q21. Would the proposed reform for the material influence test improve predictability for businesses?

We would not object to the government defining a statutory list of factors that the CMA can consider for defining de facto control and material influence, and the factors proposed in the consultation appear reasonable, according as they do with the factors discussed in the CMA's recently published guidance on jurisdiction and procedure in merger cases.

However, we are sceptical that this will make much meaningful improvement to predictability for businesses given the CMA's recently published guidance. Further, we would advise that an open-ended factor, similar to that which currently exists in the criteria for determining share of supply thresholds, ought to be added to any list of factors for defining de facto control and material influence.

The CMA has clearly changed its approach in the past year and it did not prohibit any mergers in 2025. This shows that changes to the jurisdiction requirements are likely to have little impact on CMA behaviour as the government is clearly capable of holding it to account and influencing its prioritisation and general trend in enforcement decisions. The most obvious risk to UK consumers is one of underenforcement in the merger regime and we would not support legislative changes that make this even more likely.

Q22. Should the timeframe for submitting and considering Phase 1 remedies be extended from up to ten to up to twenty working days?

Yes, we support the extension of the timeframe for submitting and considering Phase 1 undertakings. We believe that the benefits of this (more rapid resolution of concerns, albeit in a very small number of cases) are likely to outweigh any costs (slightly longer merger inquiries if the CMA still does not accept undertakings; an increased risk that the CMA accepts sub-optimal complex remedies in a case that might have been better resolved with a Phase 2).

Chapter 4. Further cross-cutting changes i. Stronger investigative powers for algorithms

Q23. Should the CMA be granted enhanced powers to investigate algorithms in its competition and consumer protection functions?

Yes, the CMA should be granted enhanced powers to investigate algorithms in its competition and consumer protection functions. The CMA has information gathering powers because it is often not possible to determine whether or not a business has broken competition or consumer law solely by observing the outcomes of firm behaviour. Clearly, in circumstances where a breach of the law may result from the use of algorithms the CMA needs to be able to determine this in an efficient manner.

However, the government should consider whether a general power to investigate algorithms is sufficient to capture large language models and agentic systems. The government should consider whether it needs to go beyond the powers given to the CMA under its digital markets function through the DMCCA. In this context, the information powers of the CMA under competition and consumer protection legislation need updating and modernising to take account of the functionalities and complexities of advanced digital systems more widely, and not just in relation to algorithms. This would also bring the CMA's investigative powers more in line with those of Ofcom under the Online Safety Act 2023.[2]

Q24. Should the Secretary of State have a formal role in a wider range of key guidance documents?

No. This is not an effective method of having regulatory accountability. Giving the Secretary of State a greater role in approving operational guidance invites businesses to lobby Ministers to change CMA guidance rather than arguing their case on the merits of competition law. It is unclear how this change will make the CMA faster and more effective, on the contrary it seems less likely to produce high quality guidance. The rationale for the Secretary of State to approve the guidance for the digital competition regime was more obvious, but in fact we ultimately detected no beneficial impact from this. On the contrary it slowed the implementation of the regime, ie was detrimental to acting at pace.

Q25. Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits? Please explain why. Q26. If so, what length should the pause be?

Yes, we would support excluding the period between Christmas and New Year from statutory time limits.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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[2] See, for example, section 100(3) of the Online Safety Act 2023 which covers (amongst other things) being able to view real time demonstrations of systems, processes or features.