



Department  
for Business  
Innovation & Skills

## COMPETITION REGIME

RESPONSE TO  
CONSULTATION ON  
STATEMENT OF STRATEGIC  
PRIORITIES FOR THE CMA

1 OCTOBER 2013

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## Foreword from the Minister for Employment Relations and Consumer Affairs

Lively competition and open markets are vital for building a stronger economy. We need our competition regime to create an environment that encourages business to invest in new and better ideas, driving growth and delivering better and cheaper products and services for consumers. The Coalition Government introduced changes in the Enterprise and Regulatory Reform Act 2013 to make the regime even more effective.



The single new Competition and Markets Authority will have stronger powers and faster decision-making procedures. The CMA will be more flexible and responsive in its use of competition tools and resources to tackle competition problems. It will help to create the right conditions for business to thrive and enter new markets and deliver better outcomes for consumers. The establishment of the CMA today represents a major step in the transition to the new regime.

The Coalition Government consulted over the summer on a draft ministerial statement of strategic priorities for the CMA (the Steer) and a first tranche of detailed secondary legislation. Independence in selecting priorities, choosing the right tools for addressing problems and in making final decisions is crucial to the CMA's success. The Steer for the CMA therefore recognises and supports this independence. It focuses on high level priorities, and importantly, it is a transparent statement of the Government's aspirations, publicly setting out the long term goals of the Government in relation to competition and growth.

The Steer will complement the formal accountability framework, including the CMA's statutory reports and a Performance Management Framework set by HM Treasury and the Department for Business, Innovation and Skills. The Steer does not affect either the scope of the CMA's powers or the legal tests that it must apply in making its decisions. It does however, make clear that the Government is asking the CMA to: consider particular aspects of the way markets work and whether there are sectors where enhanced competition can promote growth; enforce antitrust rules robustly and fairly; and provide leadership to and work closely with sector regulators.

I welcome the new members of the CMA and look forward to it becoming fully operational next year, when it will start to play a major role in making UK markets more competitive and therefore benefit consumers and promote growth.

The Government and CMA transition team are currently consulting on supporting secondary legislation and CMA guidance. I would again encourage you to provide your comments on these.

A handwritten signature in blue ink that reads "Jo Swinson".

**Jo Swinson MP** Minister for Employment Relations and Consumer Affairs

## Introduction

1. As part of its proposals on the establishment of the Competition and Markets Authority (CMA) and broader competition reforms, the Government proposed the setting of a non-binding Ministerial statement of strategic priorities for the CMA, the Steer. The Steer is intended to provide a transparent statement of how the Government sees the competition regime fitting with its broader economic priorities. It sits alongside the CMA's accountability framework and legal duties, particularly the duty to promote competition for the benefit of consumers. The CMA will be asked to have regard to the Steer but the CMA will operate independently and is not obliged to follow the Steer. The CMA will be accountable for its decisions taken in light of the Steer and other considerations.
2. The Government therefore consulted over the Summer on a draft Steer, alongside a first tranche of detailed secondary legislation. Government and stakeholders recognise that the independence of the CMA is vital to its success. This applies to the CMA's setting of its priorities, the choice of tool it uses to address problems it has identified and in making final decisions on cases. The Steer for the CMA therefore reflects and supports this independence. It focuses on high level priorities, and importantly, provides a transparent statement of the Government's aspirations for the development of the competition regime. It publicly sets out the long term goals of the Government in relation to competition and growth. The Steer is non-binding on the CMA and does not affect either the scope of the CMA's powers or the legal tests that it must apply in making its decisions. It does, however, make clear that the Government is asking the CMA to: consider particular aspects of the way markets work and whether there are sectors where enhanced competition can promote growth; enforce antitrust rules robustly and fairly; and provide leadership to and work closely with sector regulators.

## Consultation process

3. The Department for Business, Innovation & Skills published a consultation document entitled *Competition regime: CMA priorities and draft secondary legislation* on 15 July 2013. The consultation closed on 6 September.
4. The consultation document is available online at <http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation>. It explained the Government's approach to issuing the Steer and invited comments.
5. The consultation document also sought views on draft statutory instruments, and in parallel the CMA transition team<sup>1</sup> consulted on draft CMA Guidance. This document is not a response to the comments on the draft secondary legislation, as the second tranche of secondary legislation is still open for consultation, and can be found at <https://www.gov.uk/government/consultations/competition-regime-draft-secondary->

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<sup>1</sup> The Transition Team, which was appointed by the CMA Chair Designate and Chief Executive Designate, consists of individuals from the OFT, the CC and elsewhere. Pending formal creation of the CMA on 1 October 2013, the OFT and CC acted on behalf of the CMA through the Transition Team.

[legislation-part-two](#). A single response to the consultations on secondary legislation will be issued in due course.

## Responses received

6. The Government received 18 formal responses to the consultation, 17 of which commented on the Steer. A full list of respondents to the consultation can be found at Annex 2. The full consultation responses are published at <http://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation>.
7. The table below provides a breakdown of written responses by type of responding organisation.

Type of Organisation	Responses
Business Representative Group	4
Large Business	4
Legal Representative Group	2
Legal Advisors	6
UK Government Body	2
<b>Total</b>	<b>18</b>

## The Government's proposals

8. The independence of the CMA is important and, as a Non Ministerial Department, the CMA will have freedom to prioritise its own resources and annual plans of activity. It will also take decisions in particular cases independently, subject to the relevant legal tests. However, it will be accountable to Parliament, and will be required, publically, to set out and consult on its annual plan for the coming year. It will be subject to a formal Performance Management Framework set by the Department for Business, Innovation and Skills and HM Treasury and will be obliged to report annually on this. The Government is keen to increase transparency in the way in which it engages with the CMA and therefore committed that it would consult on, and publish, a high level ministerial statement of strategic priorities (the Steer) for the CMA to have regard to. The draft Steer outlined the long term goals of the Government in relation to competition and growth and provides an open and transparent statement which the CMA can reflect upon, but is not bound by – it is important that the Steer is not seen by the CMA, business and consumers as seeking to reduce the CMA's independence or prescribing its day to day work.

### Guiding principles

9. Four guiding principles were proposed for the Steer for the CMA:
- **Strategic priorities:** The Steer should support the CMA in selecting markets for scrutiny and deciding its own approach to maximise its impact. The Steer

should focus on strategic priorities, setting out medium to long-term problems and high-level policy goals. It should focus on issues which affect the whole economy or on improvements across the regime.

- **Independence:** The Steer should avoid being perceived as compromising the independence of the CMA in how it achieves outcomes, its choice of cases or final decisions.
- **Accountability:** The Steer should feed into the broader accountability framework.
- **Transparency:** The Steer should provide an open and transparent mechanism by which Ministers can openly provide a high level direction of travel to the CMA, thus further building the credibility of the regime.

## Background

10. The Steer is part of an overall accountability framework which also comprises the legal framework (e.g. the CMA's duty to 'promote competition, both within and outside the UK, for the benefit of consumers', its powers and other duties (including statutory reporting duties)) and it will also be subject to the performance management framework when it is developed.
11. Greater independence for competition regimes in the UK and elsewhere in recent decades has been a key part of reform and stakeholders continue to regard independence as one of the key elements of an effective regime. The recent competition reforms preserve the independence of the CMA. Statements in the Steer are of a 'have regard' nature so as not to unduly constrain the CMA's ability to prioritise its activities, develop improved processes or be seen as biasing its case decisions.
12. The Steer also includes statements on how the work of the CMA should support the Government's overarching priorities, given current economic circumstances. It includes statements on the importance of taking a dynamic approach to competition and reflecting how consumers behave in practice, as well tackling particular sorts of economic problems. It also sets out what sort of institutional improvements the government wants in the new regime, e.g. the need to 'have regard to the need to improve transparency and certainty for business, including in setting its own prioritisation principles'.
13. The draft Steer set out that the Government would like the CMA's work to support its approach to growth, and that the Government considers that the CMA should assess whether improved competition in particular sectors could contribute to growth. It is also suggested that the CMA should carry out a balanced portfolio of different types of work across the economy and strengthen enforcement activity. This will be done without specifically stating targets for different types of activity so as not to compromise robustness of decisions or fairness. The appropriate balance of activity would be a judgement call for the CMA between enforcement and non enforcement activity, to ensure that effective deterrence is created alongside addressing market problems in the absence of a competition infringement or merger. While the Steer asks the CMA to maximise its impact and tackle issues that affect the whole economy, as part of a balanced portfolio that provides effective deterrence, the CMA will have complete freedom to address issues in particular markets. Nor is the Steer

intended to, nor could it, influence case decisions. Those will be made fairly and on the merits, and judicial scrutiny can ensure the decision makers do not take account of factors which are irrelevant to the decision in a case. The Steer relates to the CMA's overarching approach to its choice and conduct of cases or investigations.

14. The steer applies across the range of tools that the CMA has discretion to use but it does not preclude the CMA from undertaking competition or consumer work, deciding which markets to investigate, or the balance of enforcement, advocacy, research or education. Some of the CMA's work is also demand led, such as merger control, Market Investigations referred by a sector regulator and regulatory appeals – in certain circumstances the CMA is required to undertake these and the Steer does not affect this or how the CMA takes its decisions. It also recognises that there will be lumpiness and evolution in the different types of work, and gives the CMA flexibility to develop new approaches. The CMA will be accountable to Parliament for its overall success and will report to it annually.

## Consultation responses

15. Respondents largely approved of a high level Steer which gives long term guidance on the Government's view of how the regime fits with economic priorities. They wanted in particular, however, for the CMA's independence not to be undermined by the Steer. A large proportion were therefore concerned that guidance on issues for consideration, such as suggesting that the CMA should assess whether enhanced competition in specific sectors could contribute to faster growth, could undermine the CMA's independence. Most of those who commented also opposed the Government suggesting to the CMA particular issues or approaches to its analysis for it to consider. This was in part because they thought that this risks distracting the CMA from the appropriate competition analysis. Some also argued the CMA shouldn't focus on contributing to growth and should instead look to remove barriers to competition (which could in turn contribute to enhanced growth). A few respondents, however, supported detailed considerations being proposed by Government e.g. competition problems in business-to-business markets.
16. Some respondents, while supporting robust enforcement of antitrust rules, noted that robust and swifter enforcement should not be at the expense of making correct decisions or fairness.
17. Those who commented on the proposal that the CMA should challenge Government where it acts as a barrier to competition supported this. Individual respondents also noted that CMA's powers to impose remedies do not apply to Government and asked that the CMA also challenge sector regulators.
18. Those who commented generally agreed that the CMA should work with and provide leadership to the Sector regulators. It will need to work within the legal framework for coordinating concurrent competition powers and ought to recognise the particular expertise and duties of the regulators.
19. A few respondents commented that the timeframe for the Steer should be once a parliament, as proposed in the initial government response to the competition consultation rather than once every three years. These respondents suggested that

a three year period would be too short given the length of CMA inquiries and could undermine the CMA's independence. A couple of the respondents, however, were content that a three-year period would keep the Steer relevant.

## The Government's decisions

20. The Government has considered the comments provided by respondents and decided to publish a revised version of the Steer as attached at Annex 1. The Steer is based on the principles as originally set out in the consultation document and which were widely supported by respondents (who emphasised the principle of the Government respecting the independence of the CMA).
21. The Government believes that since it has views on the development of the competition regime, it is better for it to be transparent and that the Steer is the appropriate vehicle for publicising these views. The Steer will not undermine the CMA's independence or competition analysis, which will remain central to the CMA and other competition authorities. It will encourage the CMA to be innovative and address, for example, the way consumers act in reality and the problems faced by businesses in the supply chain.
22. The Steer also asks the CMA to assess whether there are particular sectors where enhanced competition could contribute to faster growth (for example, knowledge intensive sectors, financial services and infrastructure sectors including energy). These sectors form a substantial portion of the UK economy and addressing barriers to competition in financial services and infrastructure sectors form a substantial part of the Government's and regulators' reform agendas in recent years. The Government's view is that it is quite reasonable for the Government to ask the CMA to consider whether enhanced competition could contribute to growth, while leaving actual case selection and final decisions to the CMA in line with the legal tests which it must apply.
23. Respondents recognised that robust antitrust enforcement benefits consumers but warned against this, and more speedy cases, being at the expense of the robustness of decisions and fairness. The Government has decided that the Steer should, as proposed, highlight the importance of enforcement, but also of the CMA acting fairly and the successful conclusion of cases. The Steer does not affect either the legal tests or procedures that must be applied or appeal rights. It should therefore be seen as supporting the direction of reform of antitrust enforcement that has already begun under the OFT and which has been further embedded by the procedural reforms provided for by the Enterprise and Regulatory Reform Act 2013. As suggested by respondents, the Performance Framework will not set the number of cases as the main success measure: it will include a basket of measures, including for the CMA's impact, number and speed of cases and success in upholding its decisions on appeal.
24. The Government agrees with respondents that it is important that the CMA should challenge government where it is creating barriers to competition. The Steer will be clarified that the CMA can only make recommendations to Government rather than implement remedies.



25. The Steer asks the CMA to work with and provide leadership to the Sector Regulators. This part of the Steer complements the draft revised Competition Act 1998 (Concurrency) Regulations 2014 and CMA Guidance, which are now being consulted on. The Regulations and Guidance set out a detailed framework for the CMA to work with the regulators to promote competition, where appropriate, and improve the way in which competition law is enforced in the regulated sectors.
26. The Government agrees with those respondents who suggested that the issuing a Steer every three years provides a good balance between ensuring the Steer remains relevant while not varying too frequently.

## **Next steps**

27. The Steer is being published at the establishment of the CMA on 1 October 2013. The next step will be for the CMA to work towards transition to the full operation of its powers on 1 April 2014. During this time the Government is consulting on further secondary legislation, including on concurrency and the CMA is consulting on a second tranche of Guidance. The Government will publish a performance management framework for the CMA before it becomes fully operational and the CMA will separately consult on its Annual Plan and strategy.

## Annex 1: Strategic Steer for the Competition and Markets Authority 2014-17

1. Securing strong, sustainable economic growth is the Government's central priority and open and fair competition is a vital ingredient in achieving this. The threat of new entry and development of new business models forces firms to innovate and puts them in the best position to compete internationally. Consumers benefit through greater choice, better quality, lower prices and innovation.
2. The Government has undertaken a series of reforms to the law and competition institutions aimed at strengthening the regime through stronger powers and more robust decision making and increasing its agility, speed and predictability for business.
3. This Steer to the new Competition and Markets Authority (CMA) sets out how the competition regime fits within the Government's wider economic priorities and the CMA's single primary duty to 'seek to promote competition, both within and outside the UK, for the benefit of consumers'. It supports the CMA's status as a strong, independent competition authority with consumer powers where it needs to apply them.
4. The Steer has been set within the context of the legal framework that sets out the functions, duties and governance arrangements of the CMA and the Performance Management Framework that will be established by HM Treasury and BIS. The CMA will be expected to have regard to the Steer but retains full independence in how it approaches its work, and in its selection of cases and the tools it uses to tackle them. A number of its functions are demand led, such as merger control, market investigations referred by the sector regulators and regulatory appeals, and in carrying out these and other functions it will apply the appropriate legal tests irrespective of the Steer.

### The Steer

5. The Government considers that the central task of the CMA will be to ensure that the forces of competition are fully harnessed to support the return to strong and sustained growth. In particular:
6. The CMA should **identify markets where competition is not working well** and tackle the constraints on competition in these cases using the competition and/or consumer enforcement tools that it considers most appropriate. In doing so,
  - the CMA should take account of consumer behaviour particularly in markets where there are information problems and asymmetries. Markets sometimes fail to work effectively not because of lack of competition but because consumers struggle to compare products or face costs of switching. The Government considers that these consumer behavioural issues should be central to the CMA's analysis of whether markets are working well, and where relevant, should inform the remedies it puts in place;

- the CMA should take full account of longer-term dynamic competition through innovation and the development of new business models, as well as short-term competition in the market. The CMA should consider whether there are appropriate structures in place to support sustainable competition, consistent with long-run growth;
  - as part of this, the CMA should be willing to consider potential competition concerns in business-to-business markets, including the effects of differences in bargaining power between firms in a supply chain, and whether firms' buyer power is distorting competitive outcomes;
  - the CMA should assess specific sectors where enhanced competition could contribute to faster growth (for example, knowledge intensive sectors, financial services and infrastructure sectors including energy) – working with the responsible regulator where appropriate; and
  - in carrying out this work the CMA should address emerging competition problems early and increase the number and speed of cases, to the benefit of consumers and the wider economy while ensuring fairness and avoiding undue burdens on business. The CMA should have regard to the need to improve transparency and certainty for business, including in setting its own prioritisation principles.
7. The CMA should be a strong defender of fair competition and **enforce antitrust rules** robustly and fairly where they are breached so sending the message that the UK will not allow infringements against competition law that harm consumers:
- the CMA should select and conclude an appropriate mix of complex and simpler enforcement cases to maximise its impact, end abuse and create a credible deterrent effect to anticompetitive behaviour across the whole economy;
  - the CMA should seek to conclude cases more swiftly while maintaining fairness and ensure its decisions are robust to achieve a greater number of successfully concluded cases and investigations, as compared to the historical record; and
  - the CMA should act as an effective advocate to ensure that business of all sizes and in all sectors have an appropriate understanding of competition law, the sanctions and what they need to do to comply. Where the CMA finds competition in a market is working well it should consider whether and how to explain this to stakeholders, thereby promoting understanding and good practice as well as trust.
8. The Government recognises that it can affect markets through regulation, procurement and other activities, and sees the **CMA playing a key role in challenging government** where government is creating barriers to competition. The Government will be open to new ways of delivering services or intervening in the economy and commits to accept the CMA's recommendations for improving competition. There will be a presumption that all recommendations will be

accepted unless there are strong policy reasons not to do so. The CMA should also assist Government in implementing its recommendations.

9. The CMA is the single expert UK-wide competition agency and as such it has been given an important role to play in providing leadership across the economy and **working with and through partner agencies** to deliver positive competition outcomes:
  - the CMA should engage in a broad strategic dialogue with the regulators and look for opportunities to promote effective competition through either carrying out its own work or actively supporting regulators' analysis, enforcement and markets activity;
  - the CMA should work with sector regulators, including the Financial Conduct Authority, to build up its sector capabilities and continuing to share competition expertise, including through joint enforcement work (within the legal framework), training and research; and
  - competition and markets issues often have an international dimension and the openness to competition of markets outside the UK can benefit UK firms. The CMA's powers only apply within the UK, but it should maintain and enhance its leadership position in the EU and internationally.

## Conclusion

10. The Government has created the CMA and given it stronger powers as strengthening the competition regime will benefit consumers and help promote growth. The Steer sits alongside other elements of the CMA's accountability and performance frameworks. By providing a transparent statement of Government priorities it strengthens the CMA's status as a strong, independent competition authority.
11. The Government considers that the central task of the CMA will be to ensure that competition supports growth and that it should identify and tackle constraints in markets where competition is not working well. In doing so it should take account of consumer behaviour and longer-term dynamic competition through innovation and the development of new business models, and consider potential competition concerns in business-to-business markets. The CMA should also enforce antitrust rules robustly and fairly, challenge government where it is creating barriers to competition and work with and through partner agencies to deliver positive competition outcomes.

## **Annex 2: List of Respondents**

The following organisations responded to the consultation:

Allen & Overy

Ashurst

Aviva

Bar Council

Bird & Bird LLP

British Chambers of Commerce

Civil Aviation Authority

Centrica

Confederation of British Industry

Dickson Minto

EDF Energy

Energy UK

Freshfields Bruckhaus Deringer

Joint Working Party of the Law Society and Bar Council

National Federation of Retail Newsagents

Northern Power Grid

Ofgem

Simmons & Simmons LLP

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