# COMPETITION REGIME

## CONSULTATION ON STATEMENT OF STRATEGIC PRIORITIES FOR THE CMA – CONSOLIDATED STAKEHOLDER RESPONSES

1 OCTOBER 2013

# Contents

Allen & Overy

# Response Form

Name: Allen & Overy LLP
Organisation (if applicable): Allen & Overy LLP
Address: One Bishops Square, London, E1 6AD

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| ☐ | Business representative organisation/trade body |
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| ☐ | Other (please describe): |

**Chapter 2. The Strategic Steer to the Competition and Markets Authority**

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

Comments:

**We welcome the Government's proposal to increase the transparency of its engagement with the CMA through publication of a high level statement of strategic priorities. The identification of areas on which the Government would like the CMA to focus provides useful insight for business on possible competition work streams. The Steer strikes the right balance between providing guidance to the CMA as to the types of work it should undertake, but not restricting its independence to determine its activities.**

**We agree with the statements that the CMA should try to conclude cases more quickly. We also note the emphasis in the Steer on the CMA increasing the number of cases investigated and concluded as compared to the OFT's historical record. However, it is clearly vital that the quality and robustness of decisions is not compromised by any pressure for a greater number of finalised cases.**

**We look forward to having sight of, and the chance to consult on, the CMA's prioritisation principles (referred to at paragraph 6 of the proposed Steer) which we expect will be closely linked to the Steer. We have asked the Transition Team for clarity on its plans for the adoption of any such guidance since we have not found any reference to them in the documents the CMA has so far released for consultation.**

**We agree that a three year review period for the Steer would be sensible, and will ensure it is kept relevant without imposing an unnecessarily frequent work programme on the Government.**

**Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014**

*Question 2: What is your view on the proposed maximum penalty levels?*

Comments:
**We do not see the justification for increasing the maximum penalty levels. In our view the arguments set out in paragraph 3.4 for retaining the current levels are far more persuasive, in particular the point that the power to impose a penalty has not been used to date.**

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

Comments:
**No. In our view specifying similar maximum amounts across the merger, markets and antitrust regimes will help to achieve business awareness and certainty as to the potential administrative penalties for failing to comply with various investigatory requirements. A consistency in level accords with the fact that similar conduct (for example a failure to produce documents) is being penalised by the fines, regardless of whether the conduct takes place during a merger, markets or antitrust investigation.**

**However, we reiterate our comments in response to question 2 that there is no justification for increasing the maximum penalty level.**

*Question 4: Do you have any other comments on the draft Order?*

Comments:
**No comments.**

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

Comments:
**As we have commented in our response to the CMA's consultation document "Administrative Penalties: Statement of Policy on the CMA's approach", we agree with the CMA's concerns, voiced in that consultation, that assessing material influence is not straightforward. The primary concerns when calculating an administrative penalty should be legal certainty together with a speedy resolution. Engaging in an analysis of material influence will result in an unwarranted distraction from the ongoing progress of the merger investigation. Moreover, it is not unusual for different tests to be used for first, the jurisdictional assessment of a merger and second, other procedural matters. For example, under the EU Merger Regulation the definition of "control" for the purposes of calculating turnover is different to (and more simple than) the definition of "control" for the question of jurisdiction. Our preferred approach would therefore be one in which the concept of material influence is not relevant to an assessment of the turnover of enterprises owned or controlled by P.**

*Question 6: Do you have any further comments on the draft Order?*

Comments:
**No comments.**

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

Comments:
**No comments.**

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

Comments:
**The introduction of a statutory Merger Notice for all notified mergers necessitates a revision of the rules on merger fees. We are pleased that the Government is proposing to drop the current approach of requiring payment at the time the Merger Notice is submitted in favour of a rule where payment must be made once the CMA has made a decision following a Phase 1 investigation. This has two advantages: first, to reduce complexity and create a single consistent rule for payment of fees for all mergers, and second, to avoid the need for repayment of the fee in the event that the CMA subsequently decides that the notified transaction would not result in a relevant merger situation.**

Ashurst

**RESPONSE OF ASHURST LLP TO BIS CONSULTATION ON THE STRATEGIC STEER TO THE CMA AND DRAFT SECONDARY LEGISLATION**

## 1. INTRODUCTION

1.1 Ashurst LLP welcomes the opportunity to respond to the consultation published by the Department for Business, Innovation and Skills (**"BIS"**) on 15 July 2013 on the proposed strategic steer to the new Competition and Markets Authority (**"CMA"**) and some of the draft secondary legislation required to provide detail on the revised UK competition regime (the **"BIS Consultation"**). We confirm that nothing in this response is confidential.

1.2 This response is made on our own behalf, drawing on our professional experience. We are not responding on behalf of any particular client.

## 2. GENERAL OBSERVATIONS

2.1 We note that the BIS Consultation is being undertaken in parallel with a consultation on the first tranche of draft new CMA guidance documents (the **"CMA Consultation"**). Some of those draft CMA guidance documents tie in directly with the proposed secondary legislation being consulted on by BIS, and whilst we recognise that the two consultations are separate, some of the points arise in relation to both. We understand that the responses to the two consultations will be considered by two separate teams, and given that it is unclear whether responses will be shared between those teams, we have repeated certain points in our responses where appropriate.

## 3. THE STRATEGIC STEER FOR THE CMA

### Q1. Do you have any comments on the proposed Steer for the CMA?

3.1 With regard to the suggestion in paragraph 7 of the Steer that the CMA should seek to "*achieve a greater number of successfully concluded cases and investigations as compared to the historical record*", we do not consider that the volume of cases is necessarily an appropriate measure of the effectiveness of the new UK regime (as previously emphasised in our response to the earlier BIS consultation on the UK competition regime reforms launched in March 2011[1]). Whilst we agree that the CMA should enforce antitrust rules robustly where they are infringed, we do not consider that simply looking at the number of concluded cases and investigations should be the key metric used to assess whether the CMA is doing so. A more important measure would be whether firms are generally complying with competition law.

3.2 On a related note, whilst we welcome efforts to improve efficiency in the decision-making process, the success of the new regime should not be measured by reference to speed of decision-making to the exclusion of other important factors. The key objective should be to ensure correct and consistent decisions which are supported by the evidence, and a decision-making process which respects parties' rights of defence (albeit that good decisions and quick decisions are not mutually exclusive).

## 4. COMPETITION AND MARKETS AUTHORITY (PENALTIES) ORDER 2014

### Q2. What is your view on the proposed maximum penalty levels?

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[1] See paragraph 2.3 of our response to the BIS consultation on reforming the UK competition regime, dated 13 June 2011.

4.1 We do not consider that there is a sufficient evidential basis to support the proposed increase in the statutory maximum penalty levels for a failure to comply with certain administrative requirements of the Enterprise Act 2002 or the Competition Act 1998.

4.2 In particular, we do not agree that the current maximum levels are set too low. As no penalties at all have been imposed under the current Order, there is no evidence of businesses being able or willing simply to absorb the costs of administrative penalties in order to "game the system". In our experience, the opposite is in fact true as the possibility of fines (at the level currently set) does act as a deterrent to failing to comply with procedural requirements.

4.3 Further, we disagree with the suggestion in the BIS Consultation that the current penalty levels are low when set against the turnovers of many businesses which engage with the UK competition regime.[2] It is important to note in this context that in practice the majority of larger transactions and investigations will fall under the jurisdiction of the European Commission. The turnover of many businesses engaged with the UK regime is relatively small: for example, in the mergers context, the application of the share of supply test under the Enterprise Act 2002 means that businesses with a UK turnover well below £70 million can often be caught by the UK merger regime,[3] and small business are often also involved in market and antitrust investigations. Against this background, the level of fines which can be imposed under the current rules can already add up to a significant proportion of the turnover of many businesses engaged with the UK competition regime, particularly if both a fixed rate and a daily penalty rate for each calendar day were to be applied (resulting in a potential fine under the current rules of £55,000 for a failure to comply for just one week, and further fines of up to £35,000 for each additional week).

4.4 Given the frequent difference in size of businesses engaged with the UK regime compared to the EU regime, we also consider that the comparison in the BIS Consultation with the level of penalties available to the European Commission is inappropriate. That said, we note that for many businesses subject to the UK competition regime, the proposed maximum daily rate penalty of £15,000 would in fact exceed the maximum daily penalty which can be imposed by the European Commission (in all cases where the annual turnover of the business is less than £109.5 million[4]).

4.5 In addition, as acknowledged in the BIS Consultation,[5] in maintaining the maximum penalties which the Secretary of State could specify under his order-making powers when confirming and extending the civil enforcement regime in the Enterprise and Regulatory Reform Act 2013, Parliament did not signal that any increase in the level of penalties was considered necessary. Had there been concerns as to the effect of inflation since 2003 on the maximum penalty levels and/or that the current levels were set too low to act as an effective deterrent, then these concerns could have been addressed at that time.

4.6 Finally, whilst we do not consider that any evidence currently supports an increase in the maximum penalty levels, we note that it would remain open to the Secretary of State to increase the penalty levels in future, should such evidence arise.

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2 Paragraph 3.3 of the BIS Consultation.

3 Indeed, the BIS consultation on options for reform of the UK competition regime launched in March 2011 noted that the majority of cases found to meet the "realistic prospect of a substantial lessening of competition" test for reference at the OFT stage qualified on the basis of the share of supply test, rather than on the basis of turnover, and that the percentage of such cases has increased over time, from 43 per cent in 2004-05 to 68 per cent in 2009-10 (Box 4.1, BIS consultation on options for reform of the UK competition regime, March 2011).

4 Under the EU regime, the European Commission may impose daily penalties of up to five per cent of the undertaking's average daily turnover in the preceding business year. The maximum penalty which could be imposed under those rules would be less than £15,000 (i.e. the maximum daily penalty proposed in the BIS Consultation) wherever the annual turnover of the business in question was less than £109.5 million.

5 Paragraph 3.4 of the BIS Consultation.

**Q3. Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?**

4.7 We support the application of the same maximum penalty levels to the merger, markets and antitrust regimes. We do not consider that there are good reasons to differentiate between the regimes.

**Q4. Do you have any other comments on the draft Order?**

4.8 No further comments.

5. **MERGERS: ENTERPRISE ACT 2002 (MERGERS)(INTERIM MEASURES: FINANCIAL PENALTIES) (DETERMINATION OF CONTROL AND TURNOVER) ORDER 2014**

**Q5. Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?**

5.1 We have no comments on the provisions for determining the turnover against which any penalty will be calculated. We note that there appear to be no substantive differences between the approach proposed in this context and that applicable to calculation of turnover under the jurisdictional tests of the UK or EU merger regimes (which we welcome, given the potential for confusion if a different approach were to be adopted in this context).

5.2 With regard to the provisions defining control of an enterprise, we consider that the concept of control should be limited to enterprises in which a person has a controlling interest. Defining the concept of control to include the ability materially to influence and/or ability directly or indirectly to control the policy of the relevant enterprise (as envisaged by Article 2(4) of the draft Order) will require the parties and the relevant regulator to engage in a potentially complex assessment, which would be likely to be the subject of challenge in many cases. We consider that limiting the definition to enterprises in which a person has a controlling interest would provide greater certainty to businesses in understanding the potential penalties they might face, and so increase the potential deterrent effect of the penalty.

**Q6. Do you have any further comments on the draft Order?**

5.3 No further comments.

6. **MERGERS: ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE INTERESTS) (AMENDMENT) ORDER 2014**

**Q7. Do you have any comments on the draft Order?**

6.1 No comments.

7. **MERGERS: ENTERPRISE ACT 2002 (MERGER FEES AND DETERMINATION OF TURNOVER) (AMENDMENT) ORDER 2014**

**Q8. Do you have any comments on the draft Order?**

7.1 We agree with the proposed harmonisation for all merger cases of the point in time at which the merger fee is payable, and for that point in time to be once the CMA (or the Secretary of State) has made a decision following a Phase I investigation that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

7.2 We note that this amendment will avoid the situation which arises under the current rules whereby the merger fee paid in respect of a transaction notified to the OFT using a statutory merger notice has to be repaid if the transaction is subsequently found not to qualify as a relevant merger situation (a **"FNTQ decision"**). We welcome this change, and anticipate that it will also be welcomed by businesses.

7.3 However, it is unclear to us whether the deletion of Article 10 of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (pursuant to Article 13 of the draft Order) may have the effect of changing the current rules as to whether a merger fee may be repayable/not payable in the event that the CMA decides not to make a merger reference because section 22(3)(e) or section 33(3)(e) of the Enterprise Act 2002 applies (i.e. a request by the OFT to the European Commission for a "reference-up" pursuant to Article 22(1) of the EU Merger Regulation is being considered by the European Commission or has been accepted).

7.4 Under the existing rules, Article 10(c) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 provides that where a merger fee has been paid upon submission of a statutory merger notice, the OFT may repay the whole of the fee in such circumstances (i.e. a request for a "reference up" is being considered by the European Commission or has been accepted). Following the deletion of that provision, it seems to us that there is ambiguity as to whether the CMA could be considered to have taken a relevant "decision" that there was a relevant merger situation within the meaning of Article 3 (such that a merger fee is payable) in circumstances where the CMA concluded that a relevant merger situation had been created, but neither a clearance decision nor a reference decision was ultimately made due to a successful request being made for a "reference up" to the European Commission under Article 22(1) of the EU Merger Regulation. We note in this regard that the OFT's existing policy is not to make a request for a "reference up" unless it would have jurisdiction to review a transaction under the UK regime, i.e. it must reach a "decision" that a relevant merger situation has been created (even if no formal decision to that effect is published).[6]

7.5 Whilst it would appear that, even if a relevant "decision" were considered to have been made in such circumstances, the time at which the fee would actually fall due for payment under Article 9 (as amended) would never arise (because a clearance or reference decision would not be published by the CMA), we consider this to be an unsatisfactory way of dealing with this point (not least because Article 3 clearly states that "*a fee of the amount specified in Article 5 shall be payable*" (emphasis added)).

7.6 We therefore suggest that the draft Order should be amended to either clarify that no relevant "decision" is made by the CMA within the meaning of Article 3 where a "reference up" request by the OFT is being considered by the European Commission or has been accepted, or alternatively that in such circumstances no merger fee will be payable.

7.7 We also consider that it would be in the interests of clarity to include the notes to the draft Order in the usual way, at the end of the draft Order, rather than using footnotes labelled (a)-(c) which are potentially confusing for the reader as currently drafted (we do not consider that the use of bold text sufficiently distinguishes the (a)-(c) references from the Enterprise Act section references to which they relate).

7.8 Finally, we wish to raise a concern with BIS that we have also raised with the CMA in the context of the CMA consultation. Under the OFT's current approach, it is not possible for parties to approach the OFT to discuss a proposed transaction without the OFT opening a case file, which has the consequence under its internal procedure that the OFT must issue

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[6] See paragraph 11.46 of the OFT's guidance document "*Mergers: jurisdictional and procedural guidance*" (OFT527). We note that the European Commission has recently proposed that all national competition authorities should adopt the same approach i.e. a "reference up" request should only be possible where the national competition authority would have jurisdiction to review the transaction under its own national merger regime. This proposal is currently the subject of an ongoing European Commission consultation.

a decision and as a result levy a merger fee (unless a FNTQ decision is reached or one of the very limited exceptions applies). We would suggest that, under the new regime, it should be possible for parties to approach the CMA to discuss a proposed transaction (as indeed parties are encouraged to do in the CMA's draft mergers guidance) without a case file being automatically opened and the consequent likelihood of a merger fee becoming payable. Whilst this may not be an issue which can be addressed as part of this draft Order, we consider that it is an important related concern which should be considered by BIS in conjunction with the CMA.

**Ashurst LLP**

**6 September 2013**

Aviva

# Aviva Response to BIS Consultation on the Proposed Steer for the CMA

**Question 1: Do you have any comments on the proposed Steer for the CMA?**

Aviva supports a common aim that protects the interests of consumers and ensures a level playing field for businesses to compete fairly. We agree that agreements, practices or abusive behaviours that restrict competition are damaging.

We agree that the CMA in carrying outs its work should be transparent and act as quickly as possible to reduce any undue burden on business, on the understanding that such action follows robust and thorough investigation and the production of clear, corroborated evidence. We would welcome the CMA operating in a way which minimises the time and cost which a competition investigation requires of a business, whilst of course not jeopardising the CMA's necessary activities.

The CMA should ensure consistency and joint approaches with other regulators and legislative bodies to ensure co-ordination at a governmental level so that companies do not have to deal with different regulators on the same or overlapping issues. This is particularly important given the FCA's new competition remit, which creates the potential for financial services companies to have to deal at the same time with two different competition regimes.

We would also like to see the CMA consider potential competition concerns arising from the beneficiary or user of a product or service being separate from the purchaser of that product or service. This is an issue that arose from the Competition Commission's investigation into the private healthcare market and into motor insurance where often the user of a product or service is not the same as the person paying for that product or service.

We support working with the regulator to enable growth of the economy.

**Question 2: What is your view on the proposed maximum penalty levels?**

We recognise that in some circumstances the imposition of penalties may be an effective deterrent. In order to consider this question fully it would be useful to understand the CMA's proposed steps that would precede a fine and for the CMA to provide analysis of the impact of penalties imposed to date and whether there is any evidence to indicate that the current level of financial penalty is / is not effective as a deterrent or punishment.

With regard to the imposition of penalties where information requests are not responded to, this would have to be with reference to a reasonable timeframe, dependent on the particular circumstances of the request. Whereas there is a place for penalties where there is a wilful disregard to reasonable requests for information there will be times where large organisations will reasonably require sufficient time to collate information.

**Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?**

We support this rationale-provided it is clear when penalties will be imposed.

**Question 4: Do you have any other comments on the draft Order?**
**N/A**

**Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?**

We are fully supportive of clarity; many organisations are very complex and there need to be clear safeguards in place to ensure the right individuals are targeted.

**Question 6: Do you have any further comments on the draft Order?**
n/a

**Question 7: Do you have any comments on the draft Order?**
n/a

**Question 8: Do you have any comments on the draft Order?**
n/a

# Bar Council

# Bar Council response to the consultation paper: Competition Regime: CMA Priorities and Draft Secondary Legislation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business Innovation and Skills consultation paper entitled Competition regime: CMA priorities and draft secondary legislation.[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board

**Overview**

1. On 15 July 2013, the Government published the following series of consultations, with responses due by 6 September 2013:

a) Competition and Markets Authority (CMA) priorities and draft secondary legislation
b) Towards the CMA
c) Mergers – guidance on the CMA's jurisdiction and procedure
d) Market studies and market investigations – supplemental guidance on the CMA's jurisdiction and procedure
e) Administrative penalties – statement of policy on the CMA's approach
f) Cost recovery in telecoms price control references – guidance on the CMA's approach, and
g) Transparency and disclosure – statement of the CMA's policy and approach.

[1] Department for Business Innovation and Skills (2013) CMA priorities and draft secondary legislation

2. Many of the consultations seek input on the draft guidance produced by the Government in the run-up to the establishment of the CMA.

3. The Bar Council will focus its response on the first question in the first paper as it raises some important issues of principle.

4. Before dealing with those issues, the Bar Council wishes to record concern regarding the timing of these consultations which were published shortly before the summer break with deadlines ending in September. The issues raised in these consultations are extremely important to the existing regulatory and appellate framework and the new world of the CMA. It would be most unfortunate if by front-loading the consultation process over the summer period, the number and quality of responses was impacted adversely. The Bar Council, in its submission to the House of Lords Secondary Legislation Scrutiny Committee's call for evidence on the government's new consultation principles, reported that it had noticed a recent trend in government departments issuing multiple consultations in discrete areas of policy, all with short and overlapping deadlines, which show no regard to the burden on consultees. This set of consultations is another example of that trend.

**Question 1: Do you have any comments on the proposed Steer for the CMA?**

5. The Bar Council has numerous concerns about the concept of the Steer and its proposed contents and guiding principles.

6. The foreword to the consultation from the Minister for Employment Relations and Consumer Affairs sets out the draft Ministerial statement of strategic priorities for the CMA, the "Steer".

7. In this context, the Minister makes the following clear statement:

> *"Independence of competition authorities is crucial to their success. We therefore want to be transparent about the way we engage with the CMA, and the Steer publicly outlines the long term goals of the Coalition Government in relation to competition and growth without interfering with the CMA's operational independence."*

8. In the consultation paper itself, reference is made to the CMA's accountability to the Government and the need for the CMA to report on its performance annually. It is in that context that the Steer has been published, which in the words of the consultation the CMA "must have regard to."

9. As a preliminary remark, the Bar Council has concerns about the ability of the CMA to be independent of Government when it has to have regard to Government-listed principles. The Bar Council would prefer to see the CMA when operational determine its own principles, which can then be scrutinised by Parliament if necessary.

10. As to the Steer itself and the principles contained therein, they are set out in Annex 1.

11. The first point is that the central task of the CMA should be to ensure that the forces of competition are harnessed to support the return to strong and sustained growth. The Bar Council is concerned by this statement as it presupposes that the central task of the CMA (as identified by the Government) is tied to the current state of the economy. The central task of the CMA should, in the Bar Council's opinion, be to ensure the proper working of competition in the economy, whatever the latter's state.

12. The second point is that the CMA should identify markets where competition is not working well and tackle the constraints on competition in those cases. The Bar Council does not cavil with this general point. However, the Government seeks to nuance the position by contending that consumer behaviour issues should be central to any analysis as to the performance of those markets and should inform the remedies the CMA seeks to put in place. The importance of the consumer interest in competition law is well-known. However, the Bar Council is concerned that by making consumer behaviour issues central to any analysis of particular markets, the CMA will be unnecessarily constrained in its task.

13. The third main point is that the CMA should be a strong defender of competition and enforce anti-trust rules robustly. The Bar Council agrees with this contention.

14. Fourthly, the Government asserts that the CMA should engage in broad strategic dialogue with the regulators, work with sector regulators and enhance its leadership position in the EU and internationally. Again, the Bar Council is content to endorse such a statement of principle.

15. The Government then identifies four guiding principles to inform the Steer for the CMA. The first is:

> *"(i) 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 the medium to long-term problems and high-level goals. It should focus on issues which affect the whole economy or on improvements across the regime."*

16. The Bar Council is concerned about the vague nature of this guiding principle – what are "medium to long-term problems and high-level goals"? What are "improvements across the regime"?

17. The second principle is:

> *"(ii) Independence: The Steer should avoid being perceived as compromising the independence of the CMA in how it achieves outcomes, its choices of cases or final decisions."*

18. Whilst the Bar Council endorses the hope expressed in this principle, for the reasons set out above, it is concerned that the Steer itself could impact on the independence of the CMA.

19. The third principle is:

*"(iii) Accountability: The Steer should feed into the broader accountability framework."*

20. The Bar Council finds this stated principle difficult to understand – what is the "broader accountability framework" and how is the Steer meant to feed into it?

21. The fourth principle is:

*"(iv) 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."*

22. The Bar Council is unsure how the Steer will on the one hand provide a high level direction of travel to the CMA whilst on the other hand ensuring that it does not compromise the independence of the CMA, given that the former by definition will impact on the latter. The Bar Council is also unsure as to how such high level direction of travel will build the credibility of the regime.

**Bar Council**[2]
**August 2013**

*For further information please contact*
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[2] Prepared for the Bar Council by the Law Reform Committee

# Bird & Bird LLP

# COMPETITION REGIME: CONSULTATION ON CMA PRIORITIES AND DRAFT SECONDARY LEGISLATION

## Annex 8: Response Form

Name: Richard Eccles
Organisation (if applicable): **Bird & Bird LLP**
Address: 15 Fetter Lane, London, EC4A 1JP.

Please return completed forms to:
**Xinru Li**
**Consumer and Competition Policy Directorate**
**Department for Business, Innovation and Skills**
**1 Victoria Street**
**WC1H 0ET**

Telephone: 020 7215 2078
Fax: 020 7215 0235
email: competition.consultation@bis.gsi.gov.uk

The closing date for this consultation is **6 September 2013**.

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| | Business representative organisation/trade body |
| | Central government |
| | Charity or social enterprise |
| | Individual |
| | Large business (over 250 staff) |
| | Legal representative |
| | Local Government |
| | Medium business (50 to 250 staff) |
| | Micro business (up to 9 staff) |
| | Small business (10 to 49 staff) |
| | Trade union or staff association |
| √ | Other (please describe)<br><br>Law firm (solicitors) |

**When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.**

This response is submitted by and on behalf of Bird & Bird LLP, an international law firm with substantial experience of representing and assisting businesses before competition authorities in a number of jurisdictions. The views now expressed are those of Bird & Bird LLP and not necessarily those of the firm's clients.

## Chapter 2. The Strategic Steer to the Competition and Markets Authority

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

Comments:

We welcome the statement in paragraph 7 of the draft Steer that the CMA should enforce antitrust rules robustly, and also the specific objectives set out in the bullet points in that paragraph 7. However, we have the following comments with regard to paragraphs 6, 8, 9 and 11 of the draft Steer.

Paragraph 6 states that the CMA should identify markets where competition is not working well and tackle the constraints on competition in these cases. In doing so, it should inter alia (fourth bullet point) assess specific sectors where enhanced competition could contribute to faster growth. Paragraph 11 also refers to the central task of the CMA as being to ensure that competition supports growth. We believe that paragraph 6 refers to the CMA's powers under the Enterprise Act 2002 ("the 2002 Act") as amended by the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act"), concerning market studies and market investigations. The CMA's powers in respect of market investigations are essentially set out in sections 131 and 134 of the 2002 Act, which enable it to take action where any feature or combination of features of a relevant market prevents, restricts or distorts competition. Thus the CMA's powers concern the removal of barriers to competition rather than identifying sectors where competition could be enhanced to achieve faster growth. We consider that the wording of the Steer should take into account the specific statutory powers and duties of the CMA in this respect.

Paragraph 8 and also paragraph 11 refer to a role of the CMA in challenging government where the government is creating barriers to competition. The relevant legislation (the Competition Act 1998 ("the 1998 Act"), the 2002 Act and the 2013 Act) do not grant powers to the CMA to take action against the government. Rather, the CMA's powers will apply in relation to undertakings, under the 1998, 2002 and 2013 Acts (or, as regards merger control, enterprises). We recommend that the wording of the Steer be amended to reflect this.

Paragraph 9 describes the CMA as "the single expert UK-wide competition agency" and states that the CMA should "engage in a broad strategic dialogue with the regulators" and should "work with sector regulators ... including through joint enforcement work". First, the opening statement in this paragraph disregards the competition law powers and experience of specific sector regulators which hold concurrent powers with the OFT under the 1998 and 2002 Acts. Whilst the subsequent bullet points at paragraph 9 refer to the sector regulators, we consider that the reference to joint enforcement work by the CMA and sector regulators is inappropriate, taking into account the relevant statutory provisions. Section 54(6) of the 1998 Act, as amended by section 51 of the 2013 Act, provides for regulations to establish the circumstances in which the CMA would exercise powers under the 1998 Act rather than a sector regulator, subject to prior consultation by the CMA with that regulator, and subject to the regulator consenting to the CMA exercising such powers where the regulator has already given notice of its intention to make a decision. Also, the present Concurrency Regulations (SI 2004/1077) provide for one or other authority to exercise powers under the 1998 Act, rather than both together: see Articles 3 and 4. Also, certain legislation makes specific provision of a similar nature. For example, the Communications Act 2003 provides that before the OFT or Ofcom first exercises concurrent powers concerning market investigations under the 2002 Act, it must consult the other and not exercise such powers if they are already being exercised by the other: see section 370(5) and (6). For these reasons, we consider that the reference to "joint enforcement work" by the CMA and sector regulators should be reconsidered.

Also, in paragraph 9, the final bullet point refers to the CMA maintaining and enhancing its "leadership position" in the EU and internationally. This is stated in the context of competition in markets outside the UK being beneficial to UK firms. However, the CMA's powers will be jurisdictionally limited to the UK under the relevant legislation. We therefore recommend that clarification of this reference to a "leadership position" be considered. For example it should be explained whether this refers to the intended role of the CMA in the European network of competition authorities.

**Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014**

*Question 2: What is your view on the proposed maximum penalty levels?*

Comments:

We agree that the proposed maximum fixed penalty is reasonable. However, we consider that the proposed maximum daily penalty is relatively high as a proportion of some companies' daily turnover, taking into account the comparator under the relevant EU Regulations of a maximum daily penalty of 5 per cent of average daily turnover.

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

Comments:

We agree that it is logical for the same or similar maximum amounts to be specified in relation to the merger, markets and antitrust regimes. This is consistent with the position under EU law, with regard to EU Regulation 1/2003 and the EU Merger Control Regulation 139/2004.

*Question 4: Do you have any other comments on the draft Order?*

Comments:

We have no further comments on the draft Order.

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

Comments:

We consider that, as a general rule, the turnover of the enterprise in question should only include the turnover of companies or entities which are actually controlled by it, not those over which it merely has material influence. Whilst it may be appropriate for a material influence threshold to be applied under the merger control rules for purposes of defining a merger situation, the policy issues are different where the turnover of a group of companies is being measured for purposes of setting a penalty. The turnover of a company or entity is

not available as a resource to a company which merely has material influence over that company or entity, as opposed to one which has actual control of it. Moreover, such turnover would not normally be consolidated in the accounts of an enterprise which has merely material influence as opposed to control.

*Question 6: Do you have any further comments on the draft Order?*

Comments:

We do not have any further comments on the draft Order.

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

Comments:

We do not have any comments on the draft Order.

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

Comments:

We consider that it would be preferable to repeal the 2003 Order which the present draft Order will amend, because of the complexity of the drafting of the changes which are necessary to achieve the intended result by means of an amending Order. Therefore, we believe it would be preferable to restate the entire revised Order as a single new Order.

We agree with the approach of harmonising the requirements for payment of merger fees so that they will always be payable only when a decision is announced following a phase 1 investigation as to whether or not a phase 2 referral is made, confirming that the merger qualifies for investigation. This will provide an administrative advantage in avoiding enterprises making payments on the submission of a merger notice in respect of a merger which is subsequently found not to qualify for investigation, and will in turn avoid the need for the CMA to arrange a repayment of that amount when such a finding is made. This change will therefore improve efficiency for both notifying enterprises and the CMA in such situations.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☑

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☑ Yes ☐ No

# British Chambers of Commerce

# Competition regime: Competition and Markets Authority priorities

## British Chambers of Commerce submission

The British Chambers of Commerce (BCC) is an influential network of 53 Accredited Chambers across the UK, representing tens of thousands of businesses with millions of employees nationwide.

No other business organisation has the geographic spread or multi-size, multi-sector membership that characterises the Chamber Network. Every Chamber sits at the heart of its local business community, providing representation, services, information and guidance to member businesses and the wider local business community.

The BCC welcomes the opportunity to respond to this consultation on the priorities of the Competition and Markets (CMA), and the BCC supports the overarching objective of the CMA to secure vibrant, competitive markets.

### Regulated sectors

The BCC supports the proposal in the Steer to give the CMA a stronger role in coordinating and managing the sector regulators. There is little competition in many of the sectors in which there are concurrent competition law enforcement regimes, and yet they have a significant effect on the rest of the UK economy. Many of the regulators in these sectors have a relatively poor enforcement record, and the BCC therefore welcomes the stronger role for the CMA in these areas, as well as the proposal that the CMA will be able to take over a case from a concurrent regulator. That the Secretary of State will have the power to withdraw powers from a regulator if it consistently underperforms is welcomed by the BCC. As a result, the regulators should have greater motivation to investigate and enforce antitrust breaches so as not to risk losing their power either in an individual case, or altogether.

### The role of the CMA in market investigations and mergers

The BCC supports the proposal for the panel to be involved in market investigations. This will give a level of independent perspective on the market. The BCC welcomes that references to phase 2 investigations will be a rare occurrence under the CMA, and that it will seek to resolve cases through greater use of alternative remedies, reducing the costs to both businesses and the public purse. The BCC believes that the CMA should also have a role in examining how competition and mergers are beneficial to the UK economy, and the effect that mergers could have on the UK's place in the global economy.

### Timescale of the Steer

The guidance gives a three year time span for the Steer, although as this is a non-statutory document, there would be an opportunity for a new government in 2015 to revise it. In the consultation on this, it was estimated that the average time for a market investigation was three years, meaning that any review would probably only encompass one round of decisions. It is therefore unlikely that a proper assessment of the effectiveness of any remedies issued by the CMA could be done within the suggested time span of the Steer. The BCC believes that stability is crucial in the implementation of the Steer, and therefore suggests that the Steer be in place for a minimum of three years, prior to any changes being made to it.

The proposed Steer suggests that the CMA should be willing to consider potential competition concerns in business to business markets; including the differences in power between firms in the supply chains – a proposal supported by the BCC. The Steer states that 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 it is inadvertently creating barriers to competition. The BCC supports this, as the CMA must be a strong and independent competition authority. The Steer indicates that as the single expert UK-wide competition agency, the CMA has an an important role to play in providing leadership across the economy and working with and through partner agencies to deliver positive competition outcomes. The BCC agrees with the important role of the CMA in this area, however it is also crucial that the CMA retains its independent status, and does not inadvertently became an apparatus of government, or a means by which to implement government policy priorities.

For further information please contact:

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# Civil Aviation Authority

# Response Form

Name: Paul Taylor
Organisation (if applicable): Civil Aviation Authority
Address: 45-59 Kingsway, London, WC2B 6TE

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| ☐ | Business representative organisation/trade body |
| ☐ | Central government |
| ☐ | Charity or social enterprise |
| ☐ | Individual |
| ☐ | Large business (over 250 staff) |
| ☐ | Legal representative |
| ☐ | Local Government |
| ☐ | Medium business (50 to 250 staff) |
| ☐ | Micro business (up to 9 staff) |
| ☐ | Small business (10 to 49 staff) |
| ☐ | Trade union or staff association |
| ☒ | Other (please describe): Regulatory authority |

**Chapter 2. The Strategic Steer to the Competition and Markets Authority**

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

| |
|---|
| Comments: |

**Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014**

*Question 2: What is your view on the proposed maximum penalty levels?*

| Comments: |
| --- |
| |

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

| Comments: |
| --- |
| |

*Question 4: Do you have any other comments on the draft Order?*

| Comments: |
| --- |
| **The preamble refers to section 44B(1) of the Airports Act which relates to references made under section 43. The CAA's powers to make references under section 43 (both for price controls and discretionary conditions) are repealed with effect from 1 April 2014 in accordance with the Civil Aviation Act 2012 (Commencement No 1, Transitional, Transitory and Saving Provisions) Order 2013 (SI 2013/589)**<br><br>**The CAA notes from the Explanatory Note that the CMA may impose penalties under sections 26, 26A, 27, 28 and 28A of CA98 yet the concurrent regulators may only impose penalties under sections 27, 28 and 28A. It would seem therefore that the concurrent regulators would not be able to impose penalties under sections 26 and 26A despite having concurrent functions under those sections.** |

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

| Comments: |
| --- |

*Question 6: Do you have any further comments on the draft Order?*

| Comments: |
| --- |

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

| Comments: |
| --- |

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

Comments:

Centrica

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06 September 2013

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**Centrica plc response to BIS consultation on CMA priorities and draft secondary legislation**

Centrica plc is a UK-based FTSE 30 company. Through its subsidiary British Gas, it is the leading energy and home service provider in the UK. It has 12 million residential customers, around 900,000 business accounts and employs around 30,000 people.

Centrica welcomes the opportunity to respond to the BIS Consultation entitled "Competition Regime: Consultation on CMA Priorities and Draft Secondary Legislation." This response focuses on the draft strategic steer to be provided by Government to the new Competition and Markets Authority (CMA) rather than the secondary legislation which also forms part of the consultation document and is provided by the Centrica group of companies (other than Centrica Storage). We have confined our comments to the steer as it represents a new approach to competition policy and enforcement in the UK and we believe it raises issues, described below, which need to be fully considered and properly understood before any steer is considered.

The creation of the CMA as an independent body free from political interference is consistent with the principles that underpinned the creation of a "world class competition regime" in the UK. The notion of a "steer", however, can only dilute the integrity of that regime and damage investor confidence in it. It is our view that the steer (and the description of it in the consultation document) creates difficult tensions for the CMA and risks undermining its credibility from the very outset.

For the most part, the Steer is appropriately strategic: setting out high level principles one would expect of the CMA whilst allowing the CMA to decide how to utilise its resources appropriately to achieve the best outcomes for competition and consumers. However, it is difficult to balance clear statements in the consultation (and in the steer itself) that "the CMA will be expected to have regard to the steer", with others that it will retain "full independence in how it approaches its work and in its selection of cases and the tools is uses to tackle them" in the context of references to specific practices and industry sectors as described below.

Such references go beyond a "strategic" steer and, we believe, sit at odds with the suggestion that the CMA is independent. The specific references to "financial services and infrastructure sectors, including energy" in paragraph 6 of the steer are disappointing for a number of reasons. Not only do these statements undermine the independence of the CMA before it has even been created, they possibly even place pressure on the CMA to launch an investigation into those named areas immediately following its creation.

Furthermore, it suggests political prejudice against the energy sector (which is only one of many infrastructure sectors that could have been referred to) without disclosing, or even hinting at, the basis for that concern.

The consultation document itself (although not the draft steer) makes a particularly unhelpful reference to the energy sector. Paragraph 2.7 of the consultation document refers to the energy sector without limitation to infrastructure so, even though that paragraph states that the steer would not specify increased anti-trust enforcement in the energy sectors, the inclusion of the reference in that context suggests to the reader that there are existing problems which remain unchecked today in the wider energy sector (ie not just infrastructure).

It is also concerning that the steer focuses so clearly on the energy sector where a specific regulatory body (set up by Government) and with concurrent competition powers already exists.

The references ignore the work carried out by Ofgem in regulating the energy markets using a range of established ex ante and ex post tools. As well as setting and monitoring infrastructure price controls, Ofgem's Retail Market Review in relation to the supply market is just being finalised following nearly 3 years of thorough review, consultation and debate. With those measures taking effect on a staggered basis until Spring 2014 (some of which are fundamental to the way the retail market operates and will take time for their impact to be felt), Ofgem has itself stated it will not undertake a further review for 3 years. Against this specific background, it is inappropriate to give the CMA a steer to consider whether competition in this sector is sufficient above that of other sectors.

In fact, the energy sector in the UK has been the subject of numerous investigations at UK and EU levels over recent years – we have compiled a list of 13 such investigations since 2001 set out in the Annex which, to a greater or lesser extent considered the extent of competition in the sector. A further inquiry (or even a threat thereof) would undermine investor confidence in the energy market (as demonstrated by the quotes included in the Annex from Nomura and Cazenove in 2009, when a Competition Commission inquiry was last mooted). Following the economic downturn, the investment climate is fragile. Due to uncertainties about its outcome, a competition inquiry will add considerable regulatory risk to investments during its investigation. Investors are likely to want to wait for the outcome before committing capital. All the energy companies operating in the UK have the opportunity to invest in other markets overseas and boards are likely to look more favourably at these options and wait until any inquiry is completed before investing in the UK. This would occur at a time when the UK badly needs new investment to ensure security of supply and to meet environmental objectives.

For financial services, where the Financial Conduct Authority has recently gained competition powers (albeit limited, falling short of full concurrency), they risk being undermined if the CMA is being "steered" towards that sector.

Given all this, it is our strong view that the first four bullets of paragraph 6 of the Steer should be removed in their entirety as they step beyond a strategic steer and seek to lead an independent CMA into specific sectors (even if not specifically named) and/or practices. That cannot be the purpose of the steer. A truly strategic steer should comprise only the broad direction (that the CMA should identify markets where competition is not working well) and the final bullet about their process.

We are also uncomfortable with the governance planned for the steer – the consultation suggests that the steer is updated every 3 years but it's likely that any new government would want to revisit the steer. So, rather than nudging the CMA to examine a new range of sectors each time it is updated, the steer should aim to provide a truly strategic framework within which the CMA is able to operate, confident in the knowledge that its independence will not be compromised.

The Enterprise and Regulatory Reform Act contains provisions which will impact the sector regulators and, in particular, the use of their concurrent competition powers, so it is clear that the CMA is likely to work closely with the regulators in the future. However, we have yet to see the proposed new guidance on the concurrent application of competition law to regulated industries (which is not due out until mid-September and should, arguably, have run alongside the consultation on the draft steer) and we are invited to comment on a draft steer which refers clearly to sectors already subject to sector specific regulation without a clear understanding of how concurrency will operate under the new competition regime and institutional structure. This is unsatisfactory.

We also find the specific references to energy infrastructure in the steer surprising given that the OFT's "Infrastructure Ownership and Control Stock-take", which took place during 2010, considered a range of infrastructures (including energy) but raised no specific concerns in relation to energy infrastructures. Whilst the OFT did note that infrastructure prices had risen during the period that infrastructure funds had been investing in the sector, and that, in regulated sectors, there were concerns whether normal incentive mechanisms work effectively, the OFT was very aware of the potential risks to investment of intervention by competition authorities in infrastructure markets and the potential chilling effects of intervening in markets where firms have taken commercial risks in establishing their position. The draft steer is therefore at odds with the OFT's recent conclusions – a very real example of the tension between the draft steer and an independent competition authority.

The Government should also review the powers already available to the Secretary of State/Minister in the Enterprise Act today. Those provisions (section 132) define a route pursuant to which Government can take steps to seek appropriate intervention by the CMA in markets; being either because the OFT (CMA in future) decides not to make a market investigation reference or where the Minister has provided information to the OFT and no reference has been made within a reasonable period. It is our understanding that those statutory powers have never been exercised and it is our view that they provide adequate and clearly prescribed, transparent routes for the Government to achieve its stated desire that the competition regime fits with its wider economic priorities. Arguably, therefore, there is no need for a strategic steer or, at the very least, any such steer should contain high level principles only and no reference to specific industries/sectors/practices. Those are matters for an independent CMA to decide, subject, as now, to the Ministerial powers in the Enterprise Act today.

So, in summary, it is our view that:

- The new institutional structure and competition regime under the CMA following implementation of the changes arising from the Enterprise and Regulatory Reform Act should be given chance to bed in,
- If a strategic steer is to be provided at all, it should contain high level general principles only,
- Reference to specific sectors/industries/practices in the current draft steer should be removed entirely, and
- Government should rely on its existing Enterprise Act powers rather than seeking to act through a strategic steer.

If you have any questions on this response, contact details for Sarah Hartnell are set out below.

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**Annex – Recent inquiries into the UK Energy Market**

1. November 2001 – DTI Consultation into concerns about gas prices and possible improvements to market efficiency. Concluded that the UK market is working effectively
2. March 2002 - European Commission Investigation into the operation of the IUK gas pipeline. Found "no evidence of cartel-like behaviour between the companies that ship gas on the interconnector."
3. November 2003 Ofgem investigation into wholesale gas price rises. Ofgem's analysis found that the main reasons for the high gas price was high oil prices feeding through to British prices predominantly via the pipeline to the rest of Europe and declining UKCS supplies
4. November 2003 - FSA investigation into price fluctuations and whether they amounted to "a breach of the market abuse regime." Found no "evidence of such a breach occurring".
5. November 2004 - Gas Probe into flows of gas from Sean fields. Analysis concluded that there is no reason to take any further action at present in respect of flows of gas from the Sean fields or the Sean sales contracts.
6. November 2004 DTI Select committee inquiry into fuel prices. March 2005- report concluded that without further real (not just cosmetic) liberalisation of the European gas market, the wholesale market in the UK will malfunction.
7. June 2005 House of Lords European Union Select Committee Inquiry into "Gas: Liberalised Markets and Security of Supply," concluded that the liberalisation of the United Kingdom gas market and the Regulator's defence of customer interests has brought about the lowest gas prices in the European Union. EU measures to liberalise European gas markets would enhance the security of gas supply
8. June 2005 EU Competition Directorate sectoral inquiry into EU's gas and electricity markets Focused almost entirely on the continent with particular "…problems including high levels of market concentration; vertical integration of supply, generation and infrastructure leading to a lack of equal access to, and insufficient investment in infrastructure; and, possible collusion between incumbent operators to share markets. EON recently "forced" to divest electricity transmission networks. RWE, EDF and GDF still under investigation.
9. BERR 2007 Energy White Paper Outlined that the Oxera report, "Energy market competition in the EU and G7: preliminary 2005 rankings", shows that the UK leads the EU rankings in both electricity and gas markets
10. July 2007 - Ofgem's annual analysis into health of retail energy markets "all segments of the market remain highly competitive"
11. February 2008 - BERR Select Committee Inquiry into possible anti-competitive behaviour in the UK's energy market.
12. February 2008 - Ofgem Probe into energy supply markets.
13. 2011-2013 - Ofgem Retail Market Review

**Nomura (30th November 2009):** "[It is] very difficult to see how these proposals would be enacted and how the Conservatives could claim lack of competition in the UK market in comparison to other European countries. A referral to the competition inquiry would be a very long winded process (up

to four years) and may uncover little given that Ofgem has carried out numerous of its own investigations in recent years. Any break up would also make it more difficult for the UK industry to deliver the £200bn of estimated investment between now and 2020 to upgrade assets and deliver on emissions targets."

**Cazenove (30th November 2009):** "it is slightly strange for the Tories to promise to refer the industry to the CC and also seemingly prejudge the results of that investigation by drawing up plans to force the companies to divest of assets. The forced divestment of assets is always legally difficult and we are not convinced that it would deliver consistently lower energy prices for customers (in all likelihood prices would become more volatile). It would certainly make it harder for the companies to invest in infrastructure at a time when there is huge investment required (smart meters, renewables, nuclear, gas storage) […] In our view, investors are beginning to question the traditional defensive qualities of the sector. On the one hand there is huge investment required which is putting pressure on cash flows, on the other hand the press and politicians criticise the companies for high prices and threaten reregulation"

## Confederation of British Industry

## CBI Competition and Markets Authority Strategic Steer Consultation Response

The CBI supports the decision to combine the Office of Fair Trading (OFT) and the Competition Commission (CC) to create the new Competitive Markets Authority (CMA). We welcome the Government's decision to consult with stakeholders ahead of the strategic steer it will offer the CMA this autumn.

In October, the CBI will set out principles for the CMA within a wider report that will highlight that competitive markets and consumer empowerment are key to securing benefits for both consumers and growth. It will set out a framework of principles for how to identify where markets are competitive, as well as offering a hard-headed analysis of sectors where challenges remain. The report will also stress that a robust competition regime is fundamental to ensuring that market benefits are safeguarded in the future.

A robust competition body has a key role to play in making sure that markets continue to stimulate growth and deliver for consumers. The CMA must be an efficient and fast-reacting organisation capable of delivering consistent outcomes while taking a proportionate approach to ensure that interventions are commensurate with the scale of the problem.

On this backdrop, the decision to introduce a strategic steer presents an opportunity to enshrine competition in the growth agenda. In order to achieve this while maintaining a strong and effective competition regime, this response argues that:

- The strategic steer must not undermine the independence of the CMA or target specific markets
- The steer needs to be clear on the remit of the CMA
- The steer should offer certainty to businesses and investors on the consistency and predictability of the CMA's decisions

**The steer must not undermine the independence of the CMA or target specific markets**

An effective competition regime is vital to ensure that markets continue to function effectively. The UK has traditionally had one of the best competition regimes in the world and the creation of the new CMA should help to ensure this remains the case. However, the CMA must remain independent from government if it is to fulfil its objectives. Political interference risks undermining its credibility and will only serve to damage the CMA's ability to encourage long-term growth and investment through competition.

The CBI's main concern in the Government's draft steer is the decision to name specific markets. This runs against the principle of an independent competition regime. The current text references knowledge intensive sectors, financial services and infrastructure sectors including energy. The role of the CMA, as highlighted earlier in the draft steer, is to identify markets where competition is not working well. It is not appropriate for the Government to play this role. Instead, the Government should use the steer to set out the wider role it envisages a robust competition regime playing in helping to deliver long-term growth while setting out unequivocally, the CMAs independence.

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A further element which must be made clear is the independence of the quasi-judicial elements of the CMA. For example, regulatory price control review appeals which are referred out by the Competition Appeals Tribunal must continue to be dealt with free of political guidance. The Government's steer needs to draw a clear distinction between the more judicial elements of the CMA's work and should not seek to influence these.

On a practical point, the Government has also decided that the strategic steer will be renewed every three years having previously stated that it would be once a Parliament. The CBI disagrees with this change and supports a move back to once a Parliament. If it occurs every three years it will keep moving around in the electoral cycle providing additional uncertainty and the risk of political interference. In 2020 for example, it will fall in an election year. Instead, if it is to be introduced, it should be renewed once a Parliament, at the midway point, to minimise the risk of the strategic steer becoming a political issue just before or after an election.

**The steer needs to be clear on the remit of the CMA**

Although the CMA's primary focus is competition, it has a wide ranging and complex remit that supports this main aim. The Government, in its steer, must be careful not to overly simplify or distort the many components that make up the activities of the CMA.

The CBI supports the Government's focus on securing long-term, sustainable growth in the UK economy and the assertion that fair competition is a vital ingredient in achieving this. The Government needs to ensure its strategic steer reflects the role that the CMA can play in targeting long-term growth and must not attempt to distract from this by encouraging a short-term focus on specific issues such as those highlighted in the current draft. These include differences in bargaining power between firms in a supply chain and whether firms' buyer power is distorting competitive outcomes. It is the role of the CMA to identify and impose remedies where markets are not working effectively, not the role of the Government.

There were also concerns that the emphasis on long-term growth could encourage the CMA to overreach in pursuing this goal. The CMA's primary focus is competition. The Government should make sure that its steer reflects the fact that only growth that can be delivered through competition policy is in the CMA's remit.

It is not just the relationship between competition and long-term growth that the Government's steer should be careful not to distort. Although competition is the primary focus of the CMA, and it is through competition that consumers can be offered the best deal, the CMA will retain considerable consumer powers and responsibilities. It is up to the CMA to pursue the competition and consumer protection elements of its remit in the most effective manner. The Government's steer must be careful not to impose undue pressure on either element while recognising that the CMA maintains these twin roles.

**The steer should offer certainty to businesses and investors on the consistency and predictability of its decisions**

It is not the role of the Government to set out the work the CMA should undertake or serve to unduly influence or apply pressure on the competition regime to address specific issues. However, the CBI would encourage the Government to highlight the importance of providing certainty and consistency to the business community in its strategic steer.

The Government's draft steer currently recognises that the CMA is the single expert on UK-wide competition and can play a leadership role working with partner agencies. The CBI supports this aim but urges further clarity on how the CMA will engage with regulators, particularly over the use of concurrent competition power. This will partly be addressed through changes to the guidance documents that will be consulted on shortly but concurrency also needs to be referenced more clearly by the Government in its steer.

In addition to this, the CMA should look to engage with businesses regularly to better understand both how they operate and how the competition regime can best deal with the issues businesses face that can hold back growth. The Government's steer should highlight the benefits that open channels of communication with the business community can bring. Separately, the CMA will contain a considerable resource of expertise on competition policy. The Government's steer should encourage the CMA to engage where possible across Whitehall and Parliament with policy makers and legislators to foster a more comprehensive understanding of the benefits of competition and the challenges associated with ensuring markets continue to function effectively.

It is not just engagement with business and politicians that could help to foster business and investor certainty. The UK competition regime does not function in isolation. For example, the Statutory Audit Market Investigation currently undertaken by the Competition Commission (CC) is looking at an area that the European Commission is also exploring. While the CC has rejected mandatory switching of auditors, the Commission is considering introducing this. The Government, in its steer, should encourage the CMA to keep fully abreast of domestic, EU and international legislative developments to ensure that any conclusions they draw will not lead to contradictory or confusing outcomes when set against other requirements.

The Government should also be careful in its draft steer when calling for the CMA to seek to conclude cases more swiftly. While businesses do not wish cases to drag on unnecessarily as this increases costs and uncertainty, the same problems occur when decisions are rushed. The CMA must take the time required to ensure that each case is dealt with comprehensively and correctly. Streamlining should be undertaken where possible but only if it doesn't damage the quality of the final decision.

An independent competition regime is a vital component of the UK economic landscape. The CMA should help to oversee the effective functioning of markets while using competition to drive long-term growth. The Government must be careful to ensure that its strategic steer does not compromise this.

**Dickson Minto W.S.**

# Dickson Minto W.S.

**RESPONSE TO THE BIS CONSULTATION:**
**"COMPETITION REGIME: CONSULTATION ON CMA PRIORITIES AND DRAFT SECONDARY LEGISLATION"**

## A. Introduction

1. Dickson Minto W.S. welcomes the opportunity to respond to the Department for Business, Innovation and Skills' consultation on the consultation document "Competition Regime: Consultation on CMA priorities and draft secondary legislation" (the "**BIS Consultation Document**"), including the draft "Strategic Steer to the CMA" (the "**Steer**") and draft secondary legislation", i.e. the draft Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 (the "**Penalties, Control and Turnover Order 2014**"), and the draft Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014 (the "**Merger Fees and Turnover Order 2014**").

2. The paragraph and footnote references in this response refer to the BIS Consultation Document, unless otherwise stated.

3. We are providing a separate response to the various documents which the CMA Transition Team has put out for consultation.

4. The views expressed in this response are solely ours and should not be attributed to any of our clients.

## B. CMA Independence – general comment regarding the BIS Consultation Document

5. We consider that one of the most important factors in the design of the new regime will be to retain the independence of the CMA. In our view, the Government should not be able to exercise control over the activities of the CMA in individual cases, or to give specific instructions as to the way in which the CMA should allocate its finite resources.

6. Para 2.6 of the BIS Consultation Document states that "it is reasonable to say that the Government would like the CMA's work to support its approach to growth, and to set out that the Government considers that improved competition in particular sectors (such as energy) is important to this". Furthermore, in para 6 of the Steer the Government gives the following direction to the CMA: "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)". This may suggest an attempt by the Government to exercise a degree of influence over the particular sectors that the CMA should focus its work on. As stated above, we consider it important to ensure that the CMA retains independence, for example by leaving the identification of the specific "focus" sectors to the CMA, based on the market feedback it receives and assessments it makes.

## C. The BIS Consultation Document – specific comments

Section 2 – the Steer

7. The BIS Consulation Document describes the Steer as "a high level statement of strategic priorities".

Para 2.5 states that the Steer will set out prioritisation principles for the CMA. It is not clear however whether, and if so how, such prioritisation principles will co-exist with the principles that currently guide the OFT's prioritisation policy (see OFT guidance document OFT953, dated September 2008) or whether the CMA is expected to draw up new prioritisation principles in due course. We would be grateful for clarification.

Section 4 – the draft Penalties, Control and Turnover Order 2014

8. The draft Penalties, Control and Turnover Order states, at section 2(d), that material influence is a relevant threshold to calculation of group turnover in the determination of a penalty for breach of interim undertakings and orders. We would query why material influence should be relevant here. While 'material influence' is an appropriate standard for determining control in a voluntary merger control regime, we consider that it is unduly low as a threshold to be used for fining purposes (and it also, without any good reason, out of step with the EU regime).

9. It seems to us that there is a significant degree of overlap between the draft Penalties, Control and Turnover Order 2014 and the draft Merger Fees and Turnover Order 2014, especially as regards the group concept and turnover calculation. Would it not be more efficient to combine these two documents in a single piece of secondary legislation?

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We would be happy to clarify or discuss any of the above if it would be of assistance. If so, please contact Ajal Notowicz (t: +44 (0)20 7649 6838, e: ajal.notowicz@dmws.com) or Ruth Osborne (t: +44 (0) 20 7649 6896, e: ruth.osborne@dmws.com).

**Dickson Minto**
**W.S.**
**(AJN/RLO)**
**London/Edinburgh, 4 September 2013**

EDF Energy

# Response Form

Name: Sebastian Eyre
Organisation (if applicable): EDF Energy
Address: 40 Grosvenor Place, Victoria, London SW1X 7EN

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| ☐ | Business representative organisation/trade body |
| ☐ | Central government |
| ☐ | Charity or social enterprise |
| ☐ | Individual |
| ☒ | Large business (over 250 staff) |
| ☐ | Legal representative |
| ☐ | Local Government |
| ☐ | Medium business (50 to 250 staff) |
| ☐ | Micro business (up to 9 staff) |
| ☐ | Small business (10 to 49 staff) |
| ☐ | Trade union or staff association |
| ☐ | Other (please describe): |

**Chapter 2. The Strategic Steer to the Competition and Markets Authority**

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

Comments:

**EDF Energy agrees with the four guiding principles as stated in Annex 1 of the consultation.**

**The steer from Government seems to make a distinction between the competitive nature of the market and problems associated with asymmetries of information. These "behavioural issues should be central to the CMA's analysis of whether markets are working well" (point 6 p25). This is a major change in direction in competition policy which has up until the steer been based on what has become known as "competition economics." This new benchmark will require fundamentally different analytical skills based on preference theory (for example, willingness to pay, willingness to accept compensation, stated preference etc). More generally there will need to be reference to consumer satisfaction that will inevitably lead to trade offs between different consumer groups, usually those who engage with the market and those who do not. These**

**issues are more public policy based than we have been used to in the past and will lead to more uncertainty than a strict competition based approach**

**Furthermore, it is also difficult for market players to understand the concept of "enhanced" competition and the impact of the competition now and future innovation.**

**We also believe it is inappropriate within such a strategic guidance document for the Government to divert the CMA to any specific sector. We are concerned that, by mentioning the energy sector specifically, BIS risks been seen as populist, prejudicing the CMA's work and thereby compromising its independence and credibility.**

**The guidance talks about the CMA selecting an appropriate balance of complex and simpler enforcement cases. We believe that the CMA should select cases as and when they develop following the principle that they should prioritise markets where competition is not working to the detriment of consumers.**

**Finally, we would have preferred a steer to the CMA regarding Government interventions that have an impact on the market but are designed for specific policy goals. This has been an issue in other jurisdictions.**

**Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014**

*Question 2: What is your view on the proposed maximum penalty levels?*

Comments:
**EDF Energy recognises that the setting of an appropriate maximum penalty amount for persons who fail to comply with requirements of the Enterprise Act 2002 and the Competition Act 1998 is difficult given the differing scale and circumstances that will exist in the various types of investigations. The overriding principle should be that the setting of any such fine should be proportionate to the case.**

**In terms of a penalty regime that is designed to incentivise a persons compliance with the regulations, we question the relevance of of the business turnover in determining appropriate individual liability. Furthermore, it is**

**important to consider the overall incentive to comply with the regulations, as any holding back of information by an individual is likely to have a significant detrimental impact on the conclusion of the investigation.**

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

Comments:
**We see no reason why similar maximum amounts should not apply across all the regimes.**

*Question 4: Do you have any other comments on the draft Order?*

Comments:
**No.**

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

Comments:
**In principle we support the draft Order. However, we note that the provisions that establish enterprises controlled by a person is widely drawn and may lead to instances where confidently determining direct and/or indirect control of enterprises may be challenging.**

**We recognise that the appropriate calculation of turnover is an integral element of the penalty regime and we broadly agree with the provisions set out in the Order. However, It is important that there is confidence that the regime can be equally applied to all business types where turnover can vary greatly over time as function of its normal tradng functions.**

*Question 6: Do you have any further comments on the draft Order?*

Comments:
**No.**

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

Comments:
**We support the amendments proposed that are designed to maintain the protection of legitimate interests arrangement following the abolition of the CC and OFT.**

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

Comments:

**We support the introduction of consistent arrangements that will appy in terms of merger fees irrespecive of the nature of the merger. Requiring such fees to be paid following the merger decision appears appropriate.**

# Energy UK

The voice of the energy industry

Xinru Li
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Sent via e-mail: competition.consultation@bis.gsi.gov.uk

06 September 2013

Dear Ms Li

**Competition regime: BIS consultation on CMA priorities and draft secondary legislation**

Energy UK is the trade association for the energy industry. Energy UK has over 80 companies as members that together cover the broad range of energy providers and supplies and include companies of all sizes working in all forms of gas and electricity supply and energy networks. Energy UK members generate more than 90% of UK electricity, provide light and heat to some 26 million homes and last year invested £10billion in the British economy.

Energy UK is pleased to respond to the Department for Business, Innovation and Skills (BIS)' consultation on the Competition and Markets Authority (CMA)'s priorities and draft secondary legislation. This submission concentrates specifically on the Strategic Steer to the CMA ("the Steer"). However, our members may also provide individual views on the Steer and/or the draft statutory instruments.

Energy UK supports the guiding principles that BIS has used to inform its draft Steer for the CMA, and the broad approach that it is taking. In particular, we believe that BIS is right to be cautious in mentioning particular tools or problems that it wants the CMA to use or address. In this regard, Energy UK does not believe that the Government should divert the CMA to any specific sector. We are concerned that, by mentioning the energy and financial services sectors specifically, BIS risks prejudicing the CMA's work and thereby compromising its independence and credibility. We also feel that such a level of intervention in the work of the CMA is inappropriate for this level of strategic guidance. In any case, Ministers already have the ability (under section 132 of the Enterprise Act 2002) to refer a market to the CMA for investigation.

Energy UK is pleased to see that BIS sees the CMA as playing a key role in challenging Government where the latter inadvertently creates barriers to competition. We believe that BIS should explore the merits of the CMA playing a similar function with respect to the activities of sectoral regulators, whilst

ensuring that their independence is not compromised. We believe that such a role would be particularly valuable where the sectoral regulator's duty to promote competition is mitigated by competing statutory priorities. For instance, s. 4AA of the Gas Act 1986 states that Ofgem must "carry out functions in the manner which it considers is best calculated to further the principal objective, wherever appropriate by promoting effective competition"[1]. The phrase "wherever appropriate" gives Ofgem discretion to choose not to promote competition. It would be helpful if the effect of such discretion was monitored by the CMA, whose duty is to, less ambiguously, "promote competition".

BIS has stated that there will be a "presumption that all [the CMA's] recommendations will be accepted unless there are strong reasons not to do so". We note that such a commitment will give the CMA significant policymaking power, and believe that such influence should be subject to appropriate controls, in this case an obligation to consult on its recommendations. Such an obligation would be consistent with BIS' guiding principles of accountability and transparency. It is also important that a robust appeals mechanism exists for CMA decisions. With respect to appeals to regulatory and competition appeals more generally, Energy UK intends to submit a response to BIS' consultation on the matter.

In the draft Steer, the Government makes a distinction between "lack of competition" and consumers struggling to compare or facing costs of switching[2]. It further states that "behavioural issues should be central to the CMA's analysis of whether markets are working well"[3]. This appears to be a change in direction in competition policy, diversifying from conventional "competition economics". For instance, the CMA needing to take into account consumer behaviour might lead to the need to make trade-offs between different customer groups, potentially leading to winners and losers. These might be considered as quasi public policy decisions, and BIS needs to think through the full implications of tasking the CMA to look at them.

On a similar subject, the draft Steer states that "the CMA should take account of consumer behaviour particularly in markets where there are information problems or asymmetries". This direction is slightly puzzling, since it appears to Energy UK that understanding consumer behaviour is a precondition to ascertaining whether there are information problems or asymmetries in a market. Information problems or asymmetries cannot and should not be assumed.

Energy UK agrees that the CMA should be encouraged to identify markets where competition is not working so well and tackle the constraints on competition in these cases. We also believe it would be helpful if the CMA could also identify markets where competition is working effectively, and explain why. Doing so could help promote understanding and dissemination of good practice, as well as trust, potentially bringing benefits to consumers.

Energy UK notes the Government's intention for the CMA to assess specific sectors where "enhanced competition could contribute to faster growth", and BIS provides "infrastructure sectors, including energy" as an example. As stated above, Energy UK does not believe that the CMA Steer should single out any particular sector. In addition to the more general arguments against doing so outlined above, it is also worth pointing out that the OFT produced a report on infrastructure ownership in December 2010[4], and we would question the need to revisit the issue so soon afterwards.

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[1] Gas Act 1986, as amended (s. 4AA)
[2] BIS, Consultation on the strategic steer to the CMA and draft secondary legislation, p. 25 point 6
[3] Ibid.
[4] http://www.oft.gov.uk/OFTwork/markets-work/othermarketswork/infrastructure-ownership/#named3

Notwithstanding these points, Energy UK would like to take the opportunity to underline the critical role that the energy sector has to play in boosting economic growth up and down the country. Between 2007 and 2011, energy companies doubled their investment in the UK to £43 billion. In 2012, the number of people directly and indirectly employed in the sector was over 600,000.

The energy market is changing significantly. For example, the Government is aiming to attract an additional £110 billion in energy infrastructure by 2020. The current Energy Bill introduces a number of mechanisms to incentivise such investment and reform the electricity market. Changes intend to increase investment in renewable generation to help meet environmental goals, and build adequate capacity to ensure secure energy supplies. Introducing support mechanisms across a range of different technologies will change the nature of competition.

For instance, bilateral negotiations are already underway between government and developers to secure contracts for difference for some projects. Once the market is fully functioning, capacity contracts (to provide adequate capacity), or auctions for Contracts for Difference (supporting low carbon generation) will be the main focus for developers. Securing a route to market for generated electricity will also be an important part of accessing finance. Government has taken further powers in this area, but these are not yet clearly defined.

These support mechanisms for energy are underpinned by statute and will be facilitated by Government. Updates to the delivery plan are expected every five years. Further adjustments to instruments such as the Emissions Performance Standard (which creates a ceiling for power plant emissions) will also be administered centrally. This means that Government attitudes to energy policy and electricity generation technologies will be at the heart of investor considerations when looking at the UK and policy change could have impacts upon the competitive environment.

It is also worth noting that the energy retail market is also changing significantly. On the supply side, more small suppliers are entering the market, and we expect this to continue. On the demand side, the market for residential and small customers is also changing, for example via the reforms emanating from Ofgem's Retail Market Review. It is important that the impact of these changes is closely monitored; we look forward to working with Ofgem and other interested parties as this project develops.

Energy UK supports the Government's aim of promoting growth by enhancing competition. We would be interested to hear more about how BIS sees competition in the energy sector and the respective roles of the CMA and Ofgem in this regard. We would be pleased to meet with the CMA transition team to discuss this important area.

We hope that you find these comments useful. If you have any questions, please do not hesitate to contact me on 020 7747 2962 or alun.rees@energy-uk.org.uk.

Yours sincerely

Alun Rees
**Policy and External Relations Manager**

Freshfields Bruckhaus Deringer

# Response Form

Name: Sarah Jensen
Organisation (if applicable): Freshfields Bruckhaus Deringer LLP
Address: 65 Fleet Street
London, EC4Y 1HS

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| ☐ | Business representative organisation/trade body |
| ☐ | Central government |
| ☐ | Charity or social enterprise |
| ☐ | Individual |
| ☐ | Large business (over 250 staff) |
| ☒ | Legal representative |
| ☐ | Local Government |
| ☐ | Medium business (50 to 250 staff) |
| ☐ | Micro business (up to 9 staff) |
| ☐ | Small business (10 to 49 staff) |
| ☐ | Trade union or staff association |
| ☐ | Other (please describe): |

**Chapter 2. The Strategic Steer to the Competition and Markets Authority**

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

Comments:

**1. INTRODUCTION**

**1.1 Freshfields Bruckhaus Deringer LLP (Freshfields) welcomes the opportunity to comment on "Competition Regime: Consultation on CMA Priorities and Draft Secondary Legislation" (the Consultation).**

**1.2 Freshfields is a leading international law firm. Our comments are based on our extensive experience of representing clients in the full range of competition law enforcement in the UK and in other jurisdictions. We believe this experience gives us valuable insights into both institutional design and enforcement procedures.**

**1.3 We have confined our comments to those areas which we feel are most significant in terms of the impact on the UK competition and consumer regime.**

**The comments in this response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.**

## 2. SIGNIFICANT RISKS FOR CMA INDEPENDENCE

**Risks for independence in prioritisation**

**2.1 We welcome the Government's consistent commitment to maintaining the independence of the CMA from political interference. This commitment was repeated in the Government's Response to Consultation, when the Government confirmed that the CMA would be "free from influence from Ministers" and "free to prioritise its own resources and annual plans of activity", whilst still being accountable to Parliament.**

**2.2 Set against these policy objectives, the Government's decision in March 2012 to publish a "high level strategic steer" (the Steer) from the Government to the CMA was somewhat surprising, although we were reassured by the Government's statement that the Steer would "outline the long term goals of the Government in relation to competition and growth", which the CMA would not be bound by and which would not reduce the independence of the CMA. The overall aims of the Steer appeared to be to increase transparency in the way in which the Government engages with the CMA, rather than to influence how the CMA uses its powers and resources.**

**2.3 However, we are concerned that some of the sections of the Steer, as currently drafted, could lead to a change in the relationship between the CMA and Government and create risks for the CMA's independence.**

**2.4 In particular, "singling out" specific sectors, such as energy and financial services, risks crossing the line between "high level" political goals designed to improve transparency in Government/CMA interactions, and political influence over how the CMA prioritises its resources.**

**2.5 Irrespective of the Government's emphasis on the importance of the CMA's independence, singling out specific sectors may affect the CMA's decision making (indeed, if it did not, it is unclear what reason there could be to refer to them in the Steer), because:**

**(a) the Government notes that it expects the CMA to "have regard" to the Steer;**

**(b) the CMA leadership will expect to receive questions about its activity, or perceived inactivity, in these sectors from Ministers, Parliament and the media; and**

**(c) the CMA's reputation as an independent authority may risk being compromised whatever it decides to do in relation to such sectors. If the CMA launches an investigation it will be accused on bowing to political influence; if it does not it will be accused of ignoring the Government's strategic goals to support economic growth.**

**2.6 We note that at the time of its original consultation on the CMA's scope, objectives and governance, the Government specifically noted that it "[did] not envisage that it would seek a power to specify individual markets" for the CMA to keep under review. Whilst this statement referred to the CMA's statutory objectives or duties, we consider that it is equally, if not more, relevant to a steer from Government.**

**2.7 For these reasons, we would suggest that the final Steer does not refer to specific economic sectors.**

**Risks for clear accountability**

**2.8 In the Enterprise and Regulatory Reform Act (the Act), Parliament created a new statutory duty to guide the CMA's work. It also established clear accountability frameworks to Parliament and the Government, including the CMA's Annual Plan, and its Performance and Concurrency Reports. Those arrangements are sufficient to allow the CMA to form its own enforcement priorities and to make it accountable for its performance.**

**2.9 However, the publication of the Steer could introduce uncertainty about the accountability framework for the CMA. Moreover, any lack of clarity about how the Government proposes to hold the CMA to account could undermine the Government's objective to increase transparency about the way it engages with the CMA. We consider that in order to address any actual or perceived risks to the CMA's independence arising from this lack of clarity, it would be helpful for the Government to explain its position on the following:**

**(a) How, if at all, does the Government intend to assess whether the CMA has responded effectively to the priorities in the Steer?**

**(b) If the Government considers that the CMA has not done so, what action will the Government take?**

**(c) Will the CMA be expected to report on its performance against the Steer, or explain how it has taken account of the Steer in determining its enforcement priorities?**

**3. INCREASING THE ABSOLUTE NUMBER OF CASES**

**3.1 The Steer includes an objective that the CMA "increase the number and speed of cases..." and "...achieve a greater number of successfully concluded cases and investigations, compared to the historical record." We agree that competition enforcement, when appropriately targeted, provides significant benefits to consumers and makes a contribution to economic growth. However simply launching more cases or reaching more decisions does not of itself achieve that. It is crucial that cases are carefully selected in order to maximise the chances of success and their impact; this cannot be measured solely by the absolute number of cases.**

**3.2 The Steer already suggests that 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 to anticompetitive behaviour across the whole economy". We consider that this is the appropriate measure because it takes account of the impact of cases. We further consider that the inclusion of an additional objective of increasing the absolute number of cases could be contradictory and counterproductive, for example by incentivising the CMA to take "easier" cases which might have less of an impact.**

**4. APPLICATION TO CMA CONSUMER PROTECTION POWERS**

**4.1 It is not clear whether the Government intends the Steer to apply to the CMA's consumer protection powers in addition to its competition powers. For example, the preamble to the Steer notes that it "sets out how the competition regime fits within the Government's wider economic priorities and the CMA's single primary duty 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."**

**4.2 This lack of clarity about the application of the Steer to the CMA's consumer protection powers raises questions about whether, and if so how, the Government will set strategic priorities for those powers separately. It would clearly be important to avoid inconsistency.**

**4.3 In order to avoid any risk of actual or perceived political interference in the exercise of the CMA's consumer protection powers, we would suggest that the Government consider either:**

**(a) publicly committing not to interfere in the CMA's exercise of its consumer protection powers; or**

**(b) (if it wishes the CMA to take account of the Government's strategic priorities) explicitly stating that the Steer applies to all of the CMA's functions and powers.**

**5. FOCUS ON BUYER POWER**

**5.1 We were also surprised that the Steer identifies buyer power as an issue meriting particular scrutiny by the CMA, given that:**

**(a) buyer power often leads to more competitive markets and to a better deal for consumers, and only in unusual circumstances to potential competition issues; and**

**(b) there are a number of economic factors that more frequently lead to competition issues, such as highly concentrated markets, which are not referred to in the Steer.**

**5.2 We find it surprising and counter-intuitive that this particular technical issue deserves such prominence. We believe that it is appropriate for the CMA**

**to strike the correct balance in addressing these and similar technical issues.**

## Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014

*Question 2: What is your view on the proposed maximum penalty levels?*

Comments:
**N/A**

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

Comments:
**N/A**

*Question 4: Do you have any other comments on the draft Order?*

Comments:
**N/A**

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

Comments:
**1.1 We set out below our comments on the Order, which replicate some of the comments we have made in response to the consultation on Administrative Penalties: Statement of Policy on the CMA's approach.**

**1.2 In our view "material influence" is not an appropriate test for assessing the turnover of an undertaking for the purposes of imposing penalties. The purpose of the turnover test is to allow penalties to scale with the financial strength of the particular undertaking, thereby ensuring that the CMA can impose an adequately deterrent penalty and also so that excessive and disproportionate fines are avoided. The material influence test was conceived for an entirely different purpose – to serve as a jurisdictional threshold for merger control. Accordingly, in our view the use of the material influence test is at odds with the role of the turnover test in the assessment of penalties. The approach is also inconsistent with the methodology for calculating penalties in other contexts.**

**1.3 The material influence test represents the "lowest level of control" that may give rise to a relevant merger situation. It serves as a jurisdictional threshold identifying the circumstances in which one undertaking exercises sufficiently material influence over another undertaking (which is otherwise independent) to influence policy relevant to that undertaking in the marketplace, and therefore, to warrant merger control review. Material influence may, according to the CMA, arise at shareholdings of as little as 15%, through Board representation (which may well be minority Board representation) or through contracts or arrangements which allow one undertaking to exercise influence over the other.**

**1.4 In the penalty context the turnover test is typically limited to the turnover of the "undertaking" in order to give a measure of the financial strength of the**

**undertaking, in order to allow for an appropriately scaled maximum penalty. Material influence, by contrast, is not intended to measure the financial strength of an undertaking on the market. The turnover of undertakings subject to material influence will often not be consolidated into the accounts of the influencing undertaking. In many cases, the influencing undertaking's stake in the materially influenced undertaking will be a financial investment only, where the value of that investment to the influencing undertaking is measured only in terms of the earnings and capital gains or losses that accrue directly to the influencing undertaking. In other circumstances beyond the scope of pure financial investments, material influence may be acquired without deriving any financial benefit through share ownership, such as through Board representation. Applying the material influence test in the context of determining relevant turnover for penalties therefore risks inadvertently capturing the turnover of undertakings that should not properly be considered as part of the undertaking subject to the penalty: for example companies in which pension or private equity funds have minority financial investments.**

**1.5 Accordingly, there is a real risk that the application of the material influence test would give rise to disproportionate and unreasonable penalties by overstating the financial strength of the undertaking in the market.**

**1.6 We note also that calculating turnover with reference to the material influence test is at odds with the approach taken in relation to fines for breaches of competition law more generally. For example, the material influence test is not referred to in the OFT's 2012 guidance on penalties, which focuses instead on the turnover of the undertaking itself. Applying the material influence test would also conflict with the European Commission's approach to assessing relevant turnover for penalties and could potentially lead to fines greater than those imposed for substantive infringements of competition law under the UK Competition Act 1998. This appears to contradict the Government's approach in its response to consultation on "A competition regime for growth". In that response, in explaining its decision to legislate for a maximum penalty of 5% of turnover rather than the 10% it had originally proposed, the Government referred to concerns that a 10% maximum penalty would be the same as for antitrust offences, which respondents considered to be a "much more serious matter".**

**1.7 Finally, the material influence test imports unwarranted uncertainty into the penalty regime for interim measures. The application of the material influence test is frequently contested in merger control proceedings, and the OFT has traditionally recognised that there is a certain amount of discretion involved in its assessment in any given case. In practice, if the material influence test is applied, it will be impossible for undertakings to identify their exposure to penalties. Not only is this lack of legal certainty in conflict with general principles of European Union law, but it also defeats the CMA's deterrent objective; in order for a penalty regime to have a genuinely deterrent effect, undertakings must be able to predict with some certainty the penalties that will apply should they infringe.**

*Question 6: Do you have any further comments on the draft Order?*

Comments:
**N/A**

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

Comments:
**N/A**

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

Comments:
**N/A**

# Joint Working Party of the Law Society and Bar Council

# Joint Working Party of the Law Society and Bar Council: CMA first tranche consultations and BIS draft "strategic steer"

In light of the fact that members of the JWP are aware that detailed comments on the CMA Consultation Drafts are being submitted by Law Firms and Counsel from whom the JWP membership is drawn, the JWP's comments are limited to the following points of general concern:

## Mergers

1 **Scope of information requirements in the new merger notice:** the new merger notice requires substantially more detailed and wide-ranging information than the old form, and in some respects goes even beyond the information requirements in the Form CO under the EU Merger Regulation (including those in the Commission's current consultation draft). It is hard to see the justification for this. Although the Guidance indicates that the CMA "may be willing to grant derogations" (paragraph 6.59), that does not give us sufficient comfort that the information requirements in the merger notice will be interpreted flexibly and pragmatically. Experience under the EU Merger Regulation is that case teams tend to be conservative in assessing requests for derogation and in practice it is often very difficult to obtain derogations. As a result, the pre-notification process can often be prolonged unnecessarily, and we see a significant risk that the same could happen in the UK if the wording of the draft merger notice is adopted in its current form. This will defeat one of the main (claimed) objectives of moving to a regime with fixed timetables, ultimately resulting in Phase 1 merger reviews becoming more protracted than is currently the case. Examples of what we consider to be unnecessarily broad information requirements include:

   (a) the scope of internal documents under paragraph 12, which extends to minutes of meetings, and analysis that may be contained in emails; the documents that are required to be produced are not just those that have been prepared for the board, but also those prepared by or for "personnel working on the transaction" (which in practice is likely to include in-house counsel) and those prepared by or for "senior management". It is not clear why the CMA needs to have sight of so many internal documents in a Phase 1 review, and this approach seems out of line even with the relatively burdensome requirements of the EU Merger Regulation;

   (b) the extent of customer and competitor contact information under paragraphs 20, 31 and 34 (and guidance note 11): it seems very surprising that the CMA should feel the need to have contact information for 10-20 competitors and 10-50 customers (in each case including overseas companies if appropriate), not just for areas of horizontal overlaps but also for vertically related markets and complementary product markets. This is out of line with the approach under the EU Merger Regulation and seems wholly disproportionate to a Phase 1 review;

   (c) the extent of information required on vertical links, seemingly irrespective of the parties' market shares at any level of the supply chain: again, this seems wholly disproportionate.

2 **Use of interim orders as the CMA's default position when an enquiry letter is sent:** we have some concerns about the statement in paragraph 7.35 that "the CMA will normally make an interim order at the same time as an enquiry letter is sent out". This pre-supposes that enquiry letters will only be sent in cases that raise significant prima facie competition concerns. However, the experience of some JWP members is that the OFT has from time

to time sent enquiry letters in cases that clearly raised no substantive concerns (e.g. involving very small market share increments), and which did not proceed to a case review meeting. Making an interim order in such cases would be disproportionate and it would seem preferable for the CMA to adopt a more flexible policy towards the use of interim orders (e.g. allowing the parties a short period to make representations as to why such an order should not be made). The CMA would be able to unwind any integration steps taken during this time, so the parties would be on risk if they attempted to use this window in order to game the system by carrying out integration before an interim order was in place.

3 **Procedure for submitting UILs:** although the Guidance recommends early discussion of possible UILs in suitable cases, even during pre-notification (paragraph 8.9), it acknowledges that in some cases, parties may wish to see the SLC decision before raising the issue of UILs with the case team (paragraph 8.12). Given that parties will have only a short period of time following receipt of the decision in order to table an offer of UILs, it will clearly be important for the case team to be forthcoming with the parties as to the scope of a potential UIL package, notwithstanding the point that they cannot pre-judge the decision-maker's ultimate decision on whether the case qualifies for a Phase 2 reference and whether to accept UILs. We recognise (and support) the desire to move away from the current artificial world of sequential sealed envelopes containing variants of potential UIL offers, but equally it is important to ensure that offers of UILs do not fail simply because (e.g.) the divestment package offered does not include all relevant overlaps considered to give rise to an SLC. Similarly, in "near miss" cases, it is vital that the CMA gives a clear steer to the parties as to the deficiencies of their UIL proposal, and what is needed to make it acceptable. We sense in paragraph 8.20 of the Guidance a willingness to do this, but it would be useful to have more clarity on this point. We also think it would add to the credibility of the regime if the Guidance noted that the CMA would accept remedies that are proportionate to its view of the SLC and could and would "hand back" remedies which it thinks are not needed, despite being proffered.

4 **Composition of Phase 2 Inquiry Groups:** we note the proposal (paragraph 10.8) that, in order to avoid unnecessary duplication and facilitate an efficient end-to-end review process, the Inquiry Group should include some members of the Phase 1 case team. This is a radical departure from the current regime, in which the CC starts a merger investigation with a clean sheet of paper, and no pre-conceived ideas about whether or not the merger in question may be anti-competitive. There is a risk that the inclusion of members of the Phase 1 team may lead to confirmation bias, and we would have expected the Guidance to acknowledge this concern and describe measures to address it. The JWP has consistently warned of the dangers of confirmation bias in the new regime, both in mergers and MIRs, and we would expect new senior economics and administrative professionals to be involved at Phase 2.

5 **Access to the Decision Makers:** we are concerned that important decisions are made in the regime with no access by parties to Decision Makers in Phase 1 and a sense of declining access in Phase 2. Whilst we understand the time pressures on Decision Makers we think, at least in relation to UILs in Phase 1, parties should be able to meet with the Decision Maker to ensure clear direct dialogue on suitability of remedies.

With the potential decline in relevance (or attendance) at site visits and possible reliance on "Phase 1" information in Phase 2, we are concerned that parties may not be able to interact with Phase 2 decision makers as much as in the past and as much as required to retain confidence in the system. Full and proper hearings will continue to be essential.

## Market Investigation References ("MIRs")

The greatest concern to JWP members is how little has been said so far about how the CMA plans to manage to deliver MIRs in the new statutory timetable. In our collective experience it is already proving difficult to conduct thorough, robust investigations to the relevant standards with longer deadlines than will apply from 1 April 2014. The CMA urgently needs to consider what will have to/should change in the conduct of these investigations. MIRs are not voluntary, they can result in significant change and upheaval, require extensive allocation of management resource and impose a substantial cost on the businesses involved in them, as well as being expensive for the authority to conduct. We are concerned that the credibility of the regime will be significantly undermined if thought is not given to proper preparation and consultation about change: simply aiming to do the same but quicker seems a poor recipe.

The above concerns would be particularly acute in respect of the new power to conduct investigations across markets. The JWP has serious doubts that this power will prove to be a valuable addition to the UK - in any event, from a purely practical perspective, the difficulties of managing such cases within the statutory timetable appear to us to be formidable.

## BIS Strategic Steer

Whilst we have no objection to the framework described in Section 2 of the Consultation Document and welcome the steer towards more and quicker decisions, we were surprised to see three sectors singled out in paragraph 6 of the draft (including two which have their own sectoral regulators, one of which has concurrent competition powers). We think that is not appropriate and would raise unfortunate expectations of what the CMA should (or could) do.

## Penalties

We are surprised at the suggestion that Penalties Decisions at Phase I could be capable of being made at "senior official" level. They should only be capable of being made at the level of CEO or his direct reports.

In respect of the expanded powers of the CMA to impose administrative penalties, the JWP does not consider that the current draft gives sufficient guidance or reassurance to businesses and their advisors as to the approach that will be adopted. These concerns are particularly acute in relation to CA 1998 investigations, where initial requests for information are frequently based on limited information held by the authorities and very broad in scope - the JWP considers that it is important to preserve the flexibility of the current system whereby advisors can discuss with CMA officials how best to respond to such requests without fear that this will be treated as non-cooperation risking the imposition of penalties on their clients.

We also do not agree with the proposal to increase the level of maximum penalties under the Competition and Markets (Penalties) Order 2014. As the consultation notes (at paragraph 3.4), no penalties have yet been imposed under the current Order, so we do not believe the case has been made out for needing to increase them.

*JWP*
*06 September 2013*

National Federation of Retail Newsagents

# Response Form

Name: Emma Thomas
Organisation (if applicable): National Federation of Retail Newsagents (NFRN)
Address: Yeoman House Sekforde Street London EC1R 0HR

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| ☒ | Business representative organisation/trade body |
| ☐ | Central government |
| ☐ | Charity or social enterprise |
| ☐ | Individual |
| ☐ | Large business (over 250 staff) |
| ☐ | Legal representative |
| ☐ | Local Government |
| ☐ | Medium business (50 to 250 staff) |
| ☐ | Micro business (up to 9 staff) |
| ☐ | Small business (10 to 49 staff) |
| ☐ | Trade union or staff association |
| ☐ | Other (please describe): |

**Chapter 2. The Strategic Steer to the Competition and Markets Authority**

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

Comments:
**In terms of the guiding principles of the Steer as set out in paragraph 2.2 on page 12, the NFRN considers it sensible that the "Steer should focus on strategic priorities, setting out medium to long-term problems and high-level policy goals".**

**However it takes issue with the suggestion that the CMA "should focus on issues which affect the whole economy or on improvements across the regime". There may be a number of markets which should be focused on but that do not necessarily affect the whole economy and we fear that this principle would be used to justify unwillingness to tackle competition issues in the news and magazine sector.**

**Regarding the Steer itself, the NFRN strongly supports paragraph 6, that the "CMA should identify markets where competition is not working well". From the perspective of the news and magazine industry, retailers are facing increasing charges to have newspapers and magazines delivered to their businesses. There is lack of competition in this market as there are only two national distributors who divide the country into two exclusive territories, which leaves retailers with**

**no choice in terms of suppliers. Consequently, the NFRN welcomes the fact that the Steer guides the CMA to investigate such situations, and we hope that this part of the Steer would lead the CMA to investigate the competition issues within the news and magazine industry.**

**The NFRN strongly agrees with paragraph 6, point 3, that 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". This is a pertinent issue for the NFRN as our members, indpendent retailers and convenience stores, do not have the same 'bargaining power' as large supermarkets, in the newspaper and magazine supply chain.**

**Paragraph 6 point 4, is an important point in the Steer. If there was enhanced competition in the newspaper and magazine distribution industry, it would likely lead to increased growth for independent newsagents and convencience stores. This in turn would impact positively on the revitalisation of the high street and of the economy more generally.**

**The NFRN also supports paragraph 6, point 5 of the Steer. It would be worthwhile for competition problems to be addressed as they emerge, to prevent situations similar to those that our members find themselves in now, where problems have built up over time. With regards to increasing the number and speed of cases examined by the CMA, the NFRN believes that this is a worthwhile development as long as it does not impact detrimentally on the quality of the investigations.**

**Pargraph 7 which states that the CMA should be a "strong defender of fair competition and enforce anti-trust rules" is fully supported by the NFRN.**

**With regards to paragraph 7 point 2, as discussed previously, the NFRN welcomes the Steer's advice that the CMA should seek to conclude cases swiftly, as long as this does not impact on the robustness of the investigation.**

**The NFRN agrees with paragraph 7 point 3 as it believes it would be beneficial to ensure that all businesses have an understanding of competition law to help prevent issues arising in the future.**

**The NFRN also agrees that the CMA should play a role in challenging government where it is creating barriers to competition, as proposed in paragraph 8.**

**Paragraph 9 and paragraph 9 points 1 to 3 are supported by the NFRN as a means of improving competition generally.**

**Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014**

*Question 2: What is your view on the proposed maximum penalty levels?*

Comments:

**The NFRN wishes to highlight that the maximum penalty amounts could have varying impacts depending on whom they are imposed. If the maximum penalty levels were applied to small businesses, it could result in closures in many circumstances. However, they are unlikely to have much of an effect on the finances of larger businesses.**

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

Comments:
**If maximum amounts are not set, it allows for a degree of flexibility to impose higher penalties (if the situation required it) than would otherwise be allowed, which could be of advantage in more serious cases involving large businesses.**

*Question 4: Do you have any other comments on the draft Order?*

Comments:
**The NFRN does not have any further comments to make on the draft Order.**

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

Comments:
**The NFRN does not have experience in this area and therefore does not wish to comment.**

*Question 6: Do you have any further comments on the draft Order?*

Comments:
**The NFRN does not have experience in this area and therefore does not wish to comment.**

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

Comments:
**The NFRN does not have experience in this area and therefore does not wish to comment.**

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

| |
|---|
| Comments:<br>**The NFRN does not have experience in this area and therefore does not wish to comment.** |

Northern Power Grid

Lloyds Court
78 Grey Street
Newcastle Upon Tyne
NE1 6AF

Xinru Li
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

6 September 2013

Dear Ms Li

**COMPETITION REGIME: CONSULTATION ON CMA PRIORITIES AND DRAFT SECONDARY LEGISLATION**

I am responding to the question 1 of the consultation on the Competition and Markets Authority (CMA) priorities on behalf of Northern Powergrid Holdings Company and its two regulated electricity distribution licensees, Northern Powergrid (Northeast) Ltd and Northern Powergrid (Yorkshire) plc.

Northern Powergrid falls into the large business category for the consultation, with over 2,000 employees, and distributes electricity to around 3.7 million customers in the North East of England, Yorkshire, and parts of North Lincolnshire. It is part of MidAmerican Energy Holdings company, and is ultimately a wholly owned subsidiary of Berkshire Hathaway.

The draft strategic steer for the CMA focusses on ensuring the benefits of competition are fully harnessed by promoting effective competition. This is to be achieved by addressing features of markets which could constrain competition, enforcing antitrust rules, and working with partner agencies such as sector regulators. We support these strands of the strategic steer.

Of course, there are circumstances where creating effective competition is not practicable. In these cases effective regulation is necessary to ensure balanced outcomes between consumers and the businesses providing regulated services. Great Britain enjoys a reputation as a jurisdiction where a sound and predictable regulatory regime for energy network utilities promotes long term investment and supports economic growth. This reputation is underpinned by the role of the Competition Commission as a strong and independent appellate body for regulatory decisions, with the necessary expertise to hear the merits of the case.

As the strategic steer reads at present, it appears that the CMA's priorities are being limited to circumstances where it can work with regulators to promote effective competition. Examples given of the role the CMA will play in regulated sectors include supporting regulators' markets activity, sharing competition expertise, joint enforcement work and taking an internationally leading role on competition and markets issues (paragraph 9 of the draft steer). None of these examples involve taking effective decisions on the merits of regulatory cases where an independent review is necessary.

Northern Powergrid believes that the strategic steer should therefore explicitly recognise the important role that the Competition Commission currently fulfils by acting as an independent appellate body with the necessary expertise to hear and judge the merits of cases regarding

regulatory decisions (assuming that this role will indeed transfer to the CMA). This work is 'on demand', and will only need to feature in the work programme of the CMA in years when regulatory appeals or references occur. But responding to such demand when it occurs, and promoting continued sound regulation in the UK through how it conducts this work, should be explicitly included amongst the strategic priorities of the CMA.

I hope these comments add to the steer, and would be happy to discuss the matter further if you would appreciate additional input on this issue.

Yours
sincerely

Keith Noble-Nesbitt
**Economic Regulation Manager**

Ofgem

ofgem
Making a positive difference
for energy consumers

Xinru Li
Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
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SW1H 0ET

Email: competition.consultation@bis.gsi.gov.uk

Your Ref:
Our Ref:
Direct Dial: 020 7901 1895
Email: Anthony.Pygram@ofgem.gov.uk

12 September 2013

Dear Ms Li,

**Consultation on CMA Priorities and Draft Secondary Legislation - Response**

Thank you for the opportunity to comment on the BIS consultation on the strategic priorities for the Competition Markets Authority ("CMA") and certain key pieces of secondary legislation.

The Office of Gas and Electricity Markets ("Ofgem") has concurrent powers with the Office of Fair Trading ("OFT") (soon to be the CMA) under the Competition Act 1998 and Enterprise Act 2002. These powers are an important part of our enforcement toolkit for protecting the interests of energy consumers. As a member of the Concurrency Working Party, we work with the OFT and the other sectoral regulators with concurrent competition powers to share best practice. Our comments on the consultation document are provided in this context.

***General comments***

We are generally supportive of the draft ministerial statement of strategic priorities for the CMA ("the Steer"). We also recognise that its introduction sends a clear and positive message regarding the central role of competition to the economy, so strengthening the new institutional regime wrought by the Enterprise and Regulatory Reform Act 2013. We note the efforts which the government has made to ensure that the Steer does not constrain the CMA's activities, thus highlighting the importance of an independent competition regime, and that this independence extends to the choice of tools utilised by the CMA when taking action. Below, we set out some particular points on the consultation document and would be happy to discuss them.

***Strategic Steer for the CMA 2014-17(Annex 1)***

The Steer specifies[1] that the CMA

> "should assess specific sectors where enhanced competition could contribute to faster growth (for example ... infrastructure sectors including energy) – working with the responsible regulator where appropriate".

[1] Annex 1 to the consultation document (bullet 4 of paragraph 6)

We agree that energy markets are of fundamental importance to both consumers and the economy more generally. We look to enhance competition wherever possible. Below we mention a few of the areas where we have been active in seeking to use competition to benefit consumers.

We worked closely with Government to establish a competitive, asset-based regulatory regime for new offshore transmission assets. This will ensure that new offshore renewable generation projects are connected to Great Britain's onshore electricity network economically and efficiently. Ofgem manages the competitive tender process for determining the Offshore Transmission Owner for a set of transmission assets.

We are also considering various options for introducing competition for onshore electricity transmission where there are discernible benefits for consumers. We are considering seeking further powers which would allow GEMA to use competitive tendering for all transmission licences, rather than just offshore transmission licences. The concept of a greater role for third parties in electricity transmission onshore was introduced as part of the RPI-X@20 review and subsequently included as part of the RIIO strategy.[2] We are now taking this project forward as part of our Integrated Transmission and Planning Regulation (ITPR) project.[3] The development of a framework to enable competition for electricity transmission onshore will ensure that we have appropriate tools at our disposal to ensure value for consumers. We anticipate that consumers could potentially benefit through reduced network charges as a result of increased innovation, lower construction costs, more timely delivery of infrastructure, and lower financing and operating costs that third parties could bring.

As part of the current electricity distribution price control (DPCR5) we also introduced a new approach to facilitate competition in connections to the electricity distribution network. Distribution Network Operators (DNOs) are able to earn a regulated margin, on some connection activities in market segments where we consider competition to be viable, to allow headroom for competition to develop. Our proposals also allow DNOs to apply for price regulation to be lifted, where they can demonstrate that effective competition exists in these market segments. This opportunity to earn an unregulated margin was designed to stimulate the removal of potential barriers to competition. Where effective competition has not developed by 31 December 2013, we will review the market and consider taking action, including by examining whether there are grounds for making a market investigation reference to the Competition Commission.

In the retail supply market, by the end of this year suppliers will be required to restrict the number of their core tariffs to four per fuel. Rules to give customers clearer information, including a requirement that suppliers put details of their cheapest offers, personalised for individual consumers, on all bills and annual statements, will come into force at the end of March 2014. We are confident that these reforms, along with a range of other measures currently being introduced, will give consumers a simpler, clearer and fairer energy market.

We look forward to working closely with the CMA to protect the interests of consumers across energy markets for which we are responsible, wherever appropriate by promoting

[2] http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=77&refer=Networks/Trans/PriceControls/RIIO-T1/ConRes

[3] The ITPR project is a review of the GB electricity transmission arrangements for system planning and delivery that currently applies onshore, offshore and for interconnection. The focus of this project is to ensure that the three separate regimes can continue to ensure the efficient, co-ordinated and economic development of the overall network over the longer term.



**The Office of Gas and Electricity Markets**
9 Millbank London SW1P 3GE **Tel** 020 7901 7000 **Fax** 020 7901 7066 **www.ofgem.gov.uk**

effective competition[4], while ensuring that our independence as a National Regulatory Authority is maintained.

Lastly, we agree with the government's proposal[5] to vary the Steer every three years rather than annually. Varying the Steer on an annual basis would give rise to uncertainty and allows insufficient time for the CMA to implement the government's strategic priorities in full using its competition powers. Reviewing the Steer every three years allows for greater consistency while still varying it sufficiently regularly to ensure that it remains relevant to economic priorities.

We do not consider this response to be confidential and we are content for it to be published in full.

Yours sincerely,

**Anthony Pygram**
**Partner, Enforcement and Competition Policy**

[4] In accordance with Ofgem's legal framework (Electricity Act 1989 and the Gas Act 1986), Ofgem must consider whether by promoting competition consumer interests would be protected and if in fact there are means other than by promoting competition that would better protect the interests of consumers.
[5] Section 2 of the consultation document (paragraph 2.10)



**The Office of Gas and Electricity Markets**
9 Millbank London SW1P 3GE **Tel** 020 7901 7000 **Fax** 020 7901 7066 **www.ofgem.gov.uk**

Simmons and Simmons

# Response Form

Name: EU Competition & Regulatory Group
Organisation (if applicable): Simmons & Simmons
Address: CityPoint, One, Ropemaker Street, London EC2Y 9SS

**Please tick a box from the list of options below that best describes you as a respondent.**

| | |
|---|---|
| ☐ | Business representative organisation/trade body |
| ☐ | Central government |
| ☐ | Charity or social enterprise |
| ☐ | Individual |
| ☐ | Large business (over 250 staff) |
| ☒ | Legal representative |
| ☐ | Local Government |
| ☐ | Medium business (50 to 250 staff) |
| ☐ | Micro business (up to 9 staff) |
| ☐ | Small business (10 to 49 staff) |
| ☐ | Trade union or staff association |
| ☐ | Other (please describe): |

**Chapter 2. The Strategic Steer to the Competition and Markets Authority**

*Question 1: Do you have any comments on the proposed Steer for the CMA?*

Comments:
**We believe that a strong and independent UK competition authority is in the best interests of business and consumers and endorse the development established in the Enterprise Act 2002 of keeping political influence separate from the competition process. In our view, it is crucial that the CMA should be able to pursue its legitimate objectives and prioritise activities free from political constraint. We therefore welcome the Government's statement that the steer is intended to strengthen the CMA's status as a strong, independent competition authority, as well as its confirmation that that it will not seek to reduce the CMA's independence or dictate its day to day work. That said, we do have some reservations about the degree of "steer" that is being offered to the CMA in this draft document and wonder whether the tone and granularity of the steer goes somewhat beyond what might be expected. The Government had intended to avoid a "shopping list", but we fear it may fall too far towards that. We are also concerned to see that the Government is now proposing to issue a "steer" not merely once in a Parliament, but every three years.**

**Paragraph 10.10 of the Government's response to the consultation Growth, Competition and the Competition Regime (March 2012) goes no further than to say that in order to increase the transparency of the role of Ministers the Government will "publically consult on and publish a high level strategic statement which sets out how the Government envisages that the competition regime fits into the wider approach of Government policy. This 'strategic steer' will not be binding, but it will allow Ministers to convey their views to the CMA in an open and transparent fashion" (emphasis added). The current draft of the document appears to be rather different in scope, both in terms of level of detail and use of language. The use of the words "the CMA should" throughout the document, for example, is surprising.**

**We are also of the view that competition has a role to play in ensuring that the economy is able to recover from the consequences of the 2008 financial crisis – but we question the proposition that the central task of the CMA should be to ensure that the forces of competition are fully "harnessed" to support a return to strong and sustained growth. The central task of a competition regime is to protect and enforce the process of competition as a means of maximising consumer welfare. Harnessing competition to a particular narrow goal constitutes a significant conceptual shift, and one which potentially limits the scope and therefore the independence of the new body.**

**Markets**

**We agree that one of the CMA's functions is to identify markets where competition is not working well and to tackle the constraints on competition. In our view, however, a high level statement need go no further than that, and we therefore recommend deleting the following sub-bullets setting out what the CMA "should" take account of, consider, and assess. In our experience, the OFT in market studies and Competition Commission in market investigations do take relevant consumer and business to business issues into account where appropriate, and we have no reason to believe that the CMA will do otherwise. Nor do we think it necessary to mandate, even if indirectly, specific sectors (financial services, infrastructure, and "knowledge intensive" sectors), for the CMA's attention. Whether or not these specific sectors will in fact contribute to faster growth is unclear, and in any event subject to change over time; moreover, as stated above, it is not clear to us that a return to growth should necessarily be such a central tenet for the CMA. A better yardstick in our view would be the degree to which a particular market appears not to be working competitively, and the impact of that market on the economy in general. We are also not entirely sure what would be included within the term "knowledge intensive sectors".**

**Antitrust enforcement**

**We agree that the CMA should be a strong defender of fair competition and enforce antitrust rules robustly where they are breached. We also agree with the description of the role of the CMA as an advocate for competition law awareness and compliance, and with the goal of the CMA concluding**

**investigations more swiftly, provided they are conducted fairly and the outcome is correct on the evidence. However, we query the emphasis on the CMA selecting and concluding "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". Whilst simpler cases are likely to be resolved more speedily, and hence improve the CMA's statistics in terms of length of investigation, in our view, a credible deterrence is more likely to result from the CMA taking on those cases where the harmful effects are the greatest. It would be unfortunate if the CMA having regard to this aspect of the steer resulted in more egregious cases escaping investigation. We therefore recommend deleting the first of these bullets.**

**Challenging Government**

**We welcome the Government's openness to being challenged by the CMA where it is inadvertently creating barriers to competition, as well as the fact that this aspect is indeed expressed in sufficiently high level terms to give an appropriate steer.**

**Overall**

**We recommend removing the detailed bullets in paragraphs 6, and 9, and the first of those in paragraph 7, so as to highlight the Government's overall priorities for an effective competition regime. The statement will then focus on key messages, avoid the detailed considerations which risk being interpreted as interference (indirect though that may be) and provide the CMA with appropriate scope to carry out its competition mandate independently. Clearly, however, it will not be sufficient simply to remove the wording, if political influence is then brought to bear upon the CMA behind the scenes in other ways.**

**Chapter 3. Markets, Mergers and Antitrust: Competition and Markets Authority (Penalties) Order 2014**

*Question 2: What is your view on the proposed maximum penalty levels?*

Comments:
**We are somewhat puzzled as to why it seems necessary to increase the current maximum penalty levels where there is no evidence that the current ceilings have been found to be too low (no penalties having been imposed under the current order). We therefore disagree in principle with the proposed increases. We also note the disproportionate relative increase in the ceiling for the daily rate from £5,000 to £15,000 as opposed to that in fixed penalties from £20,000 to £30,000. No explanation is provided for the disparity in the relative increases, which appears high even in the context of encouraging swift compliance. If the ceilings are ultimately increased, then the relative differences should at the very least be maintained so as to remain proportionate, or any disparity explained and justified. If the fixed penalty ceiling is to be increased by a third, so the ceiling for daily penalties should be increased by no more than that proportion. The possibility of combining daily rates with a fixed penalty, with a resulting level of fine that even the CMA acknowledges will be potentially high, means that an explanation of the increases is all the more necessary.**

*Question 3: Is there any reason why similar maximum amounts should not be specified in relation to the merger, markets and antitrust regimes?*

Comments:
**We have no particular objections to the maximum amounts being harmonised across the merger, markets, and antitrust regimes, though see above our objections in principle to these ceilings being increased at this juncture. It is not in any event possible to align the administrative penalty for failure to comply with an interim measure with other maximum amounts, given that the maximum statutory penalty has to be calculated in accordance with section 94A of the Enterprise Act 2002 as inserted by section 31 of the Enterprise and Regulatory Reform Act 2013.**

*Question 4: Do you have any other comments on the draft Order?*

Comments:
**We have no further comments on the draft Order.**

**Chapter 4. Mergers: Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014**

*Question 5: Do you have comments on the provisions in the draft Order defining control of an enterprise and the provisions for determining the turnover against which any penalty will be calculated?*

Comments:
**We note that the definition of control in the draft order incorporates the concept of material influence. However, as we observe in our response to the CMA's draft guidance on "Administrative penalties: statement of policy on the CMA's approach", in the context of calculating a ceiling for penalties for failure to comply with interim measures, the concept of material influence will pose difficulties. Ascertaining where a person has material influence over an entity (and possibly multiple entities) is a time consuming and by no means straightforward issue. Calculating the ceiling for a penalty on the basis of the turnover of enterprises by reference to material influence is therefore likely to prove complex in practice, with a greater potential to give rise to disputes, and to be at odds with the goal of using penalties to incentivise swift compliance.**

*Question 6: Do you have any further comments on the draft Order?*

Comments:
**We have no further comments on the draft Order.**

**Chapter 5. Mergers: Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014**

*Question 7: Do you have any comments on the draft Order?*

Comments:
**We have no specific comments on the draft Order.**

**Chapter 6. Mergers: Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014**

*Question 8: Do you have any comments on the draft Order?*

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| Comments:<br>**We have no specific comments on the draft Order.** |