

Prioritisation principles for the CMA

Consultation document

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This publication is also available at: www.gov.uk/cma.

CONSULTATION INFORMATION PAGE

Scope of this consultation	<p>The consultation is intended to give partner and interested parties the opportunity to provide views and comments on the CMA's prioritisation principles. These principles build on those of the Office of Fair Trading, and contain only small revisions of those principles.</p> <p>We are consulting on our draft Prioritisation Principles alongside our draft Annual Plan which sets out what we propose to do in our inaugural year and how we propose to achieve our objectives. Alongside these consultations, we are publishing a final version of our Vision, Strategy and Values following the consultation we launched on 1 October, and a formal response to that consultation.</p>
Duration	22 January 2014 to 5 March 2014
Enquiries	<p>By telephone: 020 7271 0021</p> <p>By email: strategy@cma.gsi.gov.uk</p> <p>By post: Paul Latham, Director of Strategy, Communications and Devolved Nations, CMA, Victoria House, Southampton Row, London WC1B 4AD</p>
How to respond	<p>Respondents to this consultation are asked to supply a brief summary of the interest or organisations they represent, where appropriate. We ask that any suggested changes or comments on the documents be submitted in writing by email, letter or by 5 March 2014 at the latest.</p>
After the consultation	<p>We will collate responses to the consultation and publish a formal summary of these, along with a final version of the Annual Plan 2014/15 in April 2014.</p>
Compliance with the Cabinet Office Consultation Principles	<p>This consultation is compliant with the latest Cabinet Office Consultation Principle. The Cabinet Office Consultation Principles criteria can be found at www.gov.uk/government/publications/consultation-principles-guidance.</p>
Feedback about this consultation	<p>If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:</p> <p>Alex Chisholm, Chief Executive CMA Victoria House Southampton Row London WC1B 4AD</p>

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1 INTRODUCTION

- 1.1 The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy. Markets work well when businesses compete vigorously and fairly to win customers' business. In well-functioning markets consumers have confidence that market processes deliver excellent outcomes for them in terms of price, quality, variety, innovation and service. When markets work well, efficient businesses are rewarded and productivity growth is higher.
- 1.2 Markets usually work well for consumers and the economy without any need for intervention, in a virtuous circle. Competition provides firms with incentives to deliver what consumers want, to provide value for money, to produce efficiently and to innovate; whilst well-informed, active consumers can play a key role in driving competition between firms. The CMA only intervenes where necessary to protect competition or when it believes it can improve the way in which markets work. The CMA's interventions therefore seek to promote open competition, and to encourage greater availability of products and services and the provision of accurate, non-deceptive information between businesses and consumers.
- 1.3 We therefore focus our efforts and resources on deterring and influencing behaviour that poses the greatest threat to consumer welfare, and intervene in order to protect consumer welfare and, in the process, drive higher productivity growth. We also recognise the need to avoid imposing unnecessary burdens on business.
- 1.4 In order to make the best use of our resources in terms of real outcomes for UK consumers, we need to ensure that we make appropriate decisions about which projects and programmes of work we undertake across all areas of our responsibility. The CMA has agreed with the Treasury that we will deliver direct financial benefits to consumers of at least ten times our relevant costs to the taxpayer (measured over a rolling three-year period)
- 1.5 In seeking to target both our resources and enforcement strategy, the CMA needs to consider a range of factors including impact on consumers, strategic significance, risks and resources. We also need to take account of the activity, capacity and interests of our partners.
- 1.6 The principles for prioritisation set out in this document build on the principles introduced by the Office of Fair Trading in 2008.
- 1.7 In this document we set out how we use the principles, along with detail of the principles and explanatory notes. The discussion of the principles and

how we use them is not intended to be exhaustive. As well as consideration of the principles, it may be necessary for the CMA to take other factors into account where appropriate. We will continue to keep the principles under review.

2 HOW WE USE THE PRINCIPLES

- 2.1 We generally prioritise according to the impact of work on consumers and according to the strategic significance of the work. We balance this against the risks and resources involved. Our vision, values and high-level strategy¹ guide our actions and our annual plans and other corporate documents² describe what we intend to do. We are also required to have regard to the Government's non-binding Ministerial statement of strategic priorities for the CMA.³
- 2.2 The list of factors to consider under different principles is illustrative and not exhaustive. We will not apply the principles in a mechanical way: judgement and a reasoned balancing exercise are required for each case which necessitates that we consider the principles in the round and on a case-by-case basis. Where appropriate, we may also consider other relevant factors. In other words, prioritisation will not take place in isolation but will always be a relative question which necessitates considerations of the CMA's overall portfolio and resources available at that time. It is therefore not possible to give guidance such as to allow an advance external assessment of whether a particular case would or would not be taken on by the CMA.
- 2.3 When deciding which new projects and programmes of work to take on, we will consider the timing and resource requirements of projects and other work going on across the CMA at that time. As part of this we will assess the resources required over the life of the projects under consideration as well as their potential impact. At particular points in the life cycle of a project we may consider whether it warrants the continued commitment of resources, especially when weighed against other potential work that we could take forward using those resources.
- 2.4 In some cases we have a legal duty to act once certain relevant circumstances have materialised. For instance:
- Once we have received a 'super-complaint'⁴ from a designated consumer body we must respond to this within 90 days

¹ Published after consultation in January 2014.

² www.gov.uk/cma

³ Published after consultation at the time of the CMA's launch on 1 October 2013.

⁴ Receipt of a complaint from a designated consumer body that any feature or combination of features of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers.

- We have a duty actively to assist the European Commission in carrying out its inspections if we receive a request for assistance from the Commission
- Where we apply national competition law we are obliged to apply Articles 101 and 102 of the EC Treaty as appropriate and applicable
- We have a function to obtain and review information relating to merger situations, and a duty to refer for an in-depth 'Phase 2' investigation any relevant merger situation where we believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market
- We have a duty to conduct regulatory appeals and references in relation to price controls, terms of licences or other regulatory arrangements under sector specific legislation

3 CMA PRIORITISATION PRINCIPLES

We generally prioritise our work according to the principles set out below. Where appropriate, we may also take account of other relevant factors. All relevant considerations will be balanced in the round.

Account will also be taken of whether we have a legal duty to act once certain circumstances have materialised. During prioritisation we will consider the timing and resource requirements of our work and ensure that our duties are appropriately met within the confines of the resources available to the CMA.

A. Impact

- 3.1 What would be the likely direct effect on consumer welfare in the market or sector where the intervention takes place? Consumer welfare includes better value for consumers in terms of price, quality, range or service, both static and dynamic, and may also include non-financial detriment such as the avoidance of physical harm or emotional distress. We may prioritise work because the direct effects would specifically benefit disadvantaged consumers.
- 3.2 What would be the likely indirect effect on consumer welfare? This principle captures further improvement to consumer welfare and consumer confidence that results from changes in consumer, business or government behaviour which is prompted by the CMA's action. It thus captures deterrence and improved awareness for consumers, business and government.
- 3.3 What would be the expected additional economic impact on efficiency, productivity and the wider economy? This captures whether, as a result of our actions, efficiency would be expected to increase or growth be encouraged in a particular sector or across the economy.

B. Strategic significance

- 3.4 Does the work fit with the CMA's strategy and/or with other CMA objectives? This will include whether there are elements of strategic significance of the work that are additional to impact. The CMA will periodically review and publish its strategy in line with its overall ambition of being consistently one of the leading competition and consumer agencies in the world.⁵

⁵ The vision, values and strategy published at its shadow launch: www.gov.uk/government/consultations/competition-and-markets-authority-vision-values-and-strategy:

3.5 Is the CMA best placed to act? Alternatives to CMA action could include:

- Private enforcement
- Action by CMA partners such as members of the Consumer Protection Partnership or the UK Competition Network, other UK regulators or law enforcement bodies, or the European Commission
- Market developments, self-regulation, or new UK or EU regulatory or legislative developments.

3.6 What would be the impact of the new work on the balance of the CMA's current portfolio of work?

C. Risks

3.7 What is the likelihood of a successful outcome?

D. Resources

3.8 What are the resource implications of doing the work? This includes:

- Whether the resource requirements of the work are proportionate to the benefits from doing the work
- The period over which the resources will be needed
- Any savings created for the CMA by enabling us to meet our objectives more efficiently.

4 EXPLANATORY NOTES

Direct effect on consumer welfare (impact)

- 4.1 This is the benefit arising to consumers as a result of the change in behaviour of those that are the subject of CMA intervention. It will most likely arise from a CMA action that leads to preventing or terminating activity that would have negatively affected consumers for some time into the future. We will have regard to the potential effect if an action is taken, regardless of whether it is due to direct action by others (for example, the courts or the Government) pursuant to a CMA intervention.
- 4.2 Where the problem is in an upstream market and benefit arises in the first instance to businesses, we assume that benefits will be passed on to final consumers as a direct effect unless there is evidence to the contrary. Accordingly, for example, an increase in manufacturer competition that resulted in a reduction in wholesale prices that were passed on to final consumers in terms of lower retail prices would be treated as a direct effect. The effects of increased competition in a market serving businesses would therefore also be considered as a positive direct impact.
- 4.3 Disadvantaged consumers may be particularly vulnerable to exploitation within markets or may simply not share in the benefits of greater competition. Disadvantaged consumers may be served less well by markets because, for example, they may be more expensive to serve, they have less market access, they are in debt, or they cannot afford the higher risk that often accompanies better value. While the CMA has no legal or other mandate to redistribute wealth or power to intervene in individual disputes, we may sometimes favour projects that would benefit disadvantaged consumers, in order to build overall consumer confidence in markets.
- 4.4 Similarly, we recognise that some or all customers in certain markets may be subject to information asymmetries or may make decisions based on behavioural biases. We will take account of the observed behaviour of customers in our analysis of markets and in the design of any market interventions.
- 4.5 The CMA sets out examples of direct benefits to consumers in its evaluation work⁶ and its Annual Reports.

⁶ This comprises annual reports on the positive impact of our work, and evaluation of the impact of individual cases or groups of cases.

Indirect effect on consumer welfare (impact)

- 4.6 Indirect effects arise from changes to the behaviour of those other than the direct subject of the CMA's intervention. While the deterrent effect of civil or criminal enforcement is the most obvious example, another example may be the increased consumer and business confidence in the correct functioning of the markets.
- 4.7 Whether a specific action will be likely to lead to wider behavioural changes can be difficult to gauge. Our work will be informed by the evidence available on deterrence and other indirect effects.⁷
- 4.8 Examples of where indirect effects might exist include:
- The deterrent effect of taking action in a market where similar issues exist in other markets (for example, we might expect a successful case relating to a particular drug to influence behaviour across the wider pharmaceutical sector)
 - Action that clarifies the law in a way that enables other businesses to engage in pro-competitive practices that were previously considered potentially illegal
 - Action that demonstrates to national or local government the benefits from removing disproportionate public restrictions on competition
 - Action that leads to consumers being more or better informed, empowered or active
 - Publication of guidance which affects policy and practice across all sectors

Effect on efficiency/productivity (impact)

- 4.9 Competition is crucial in stimulating efficient and strong economies and encouraging growth; it drives productivity growth by shifting market share to more efficient firms and induces all firms to become more efficient, often through innovation, in order to survive. We will look at whether there is the potential for additional economic impact on efficiency or productivity in the market in question or other markets. In markets where competition is weak or absent, substantial inefficiency may arise. This could take the form of poor cost control, weak internal managerial or strategic incentives, lack of innovation, or high levels of rent-seeking to prevent increased competition.

⁷ The CMA will continue to assess the deterrent effect of its work, building on work done by the OFT which is available on the OFT website at www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft1391.pdf

- 4.10 An initial action that increases competition in the market may deliver further consumer benefits over time resulting from the improved competitive process. For example, liberalisation of the air passenger transport market had initial direct effects on consumer welfare, and also long-term productivity effects as new entrants drove cost reduction and innovation in areas ranging from online booking to airport competition.
- 4.11 Evidence of such inefficiency could take many forms, including lack of responsiveness to customer demand, high costs or low innovation relative to comparable industries, or high levels of anticompetitive lobbying.

Fit with the CMA's strategy and objectives (strategic significance)

- 4.12 We will consider whether the proposed new project or piece of work would help further our key strategic objectives. Our five strategic goals, which support our mission, are:
- Deliver effective enforcement
 - Extend competition frontiers
 - Refocus consumer protection
 - Achieve professional excellence
 - Develop integrated performance
- 4.13 In selecting and delivering our portfolio of work, we will seek to improve the skills and talent of our staff, the quality of our intelligence, our leadership ability and excellence on consumer and competition issues, our ability to work in partnership, or the capacity of our partners in areas where they work with us to achieve our objectives. Taking forward work of this type will enhance the long-term ability of both the CMA and its partners in the UK consumer and competition policy framework to target intervention and deliver better outcomes.
- 4.14 Examples of the types of work that could enhance our capacity in this way include:
- Innovation: establishing or testing new legal and economic approaches (for example, intervening in private actions involving alleged CA98 infringements⁸)
 - Work that clarifies the law in areas of practical commercial importance, therefore facilitating compliance and potentially promoting productivity

⁸ Article 15 of Council Regulation (EC) No 1/2003.

- Policy work that leads to improvement in the consumer and competition policy framework (for example, new legislation)
- Work that results in greater international quality or consistency in approach
- Work that coordinates our activities with those of partners, for example sector regulators, in a way that promotes and reinforces consistency and increases impact
- Work that enhances our ability to deal with complex cases where deterrence considerations play a role in our decision to pursue

Is the CMA best placed? (strategic significance)

4.15 We always examine whether any work is best carried out by the CMA, having regard to whether there are alternative ways of achieving the desired or similar result. The CMA works in partnership with a number of bodies with which it shares competition and consumer powers, most notably through the UK Competition Network and the Consumer Protection Partnership, and it may be more appropriate for these partners to lead in some cases. Other bodies that might, in some cases, be better placed to take particular pieces of work forward include the Financial Ombudsman Service, the Serious Fraud Office and the Lord Advocate in Scotland. We also work in partnership with competition and consumer authorities in other countries, including the European Commission (DG Comp), and national competition authorities around the world.

Potential impact on the CMA's portfolio (strategic significance)

4.16 As well as considering individual projects, we will also consider the impact on the CMA's ongoing portfolio of work. The performance framework we have agreed with the Government⁹ requires us, among other things, to demonstrate direct financial benefits to consumers of at least ten times our relevant costs to the taxpayer (measured over a rolling three-year period). We will therefore also consider work in terms of its contribution to our portfolio as well as its individual impact.

4.17 Important portfolio considerations will include an appropriate balance:

- Between tackling both public and private restrictions on competition
- Across the full range of legislative tools available to the CMA
- Between established approaches and more innovative work

⁹ The performance framework is included in our Annual Plan.

- Between work which builds capacity (investment) and work that uses that capacity (output)
- Across sectors of the economy
- Of delivery over time
- Between risk and return in terms of outcomes for consumers

Likelihood of successful outcome (risks)

- 4.18 We take into account how likely the new project or programme of work is to achieve its desired impact. In some cases, recognition of there being only a relatively small likelihood of success could be a reason not to proceed with the project. In other cases, the likely scale of the detriment may be such that a project should be pursued despite there being a small likelihood of success because it will nevertheless provide clarity on the law. We also consider the overall balance of risk across the whole of the CMA's work portfolio.
- 4.19 In some cases the desired impact may be to establish consistent standards, create legal certainty and send clear long-term messages rather than 'win' a case. We will balance the risk of short-term failure with the chances of long-term success. We are obviously also subject to appeal to the Competition Appeal Tribunal and take account of this in our decisions.
- 4.20 Risk is inherent in everything that an organisation does. Consequently, good risk management at all levels is a critical success factor for any organisation. A core component of good corporate governance is risk management. The CMA will therefore carefully manage risk throughout the process of making decisions on its work programme.

Resource implications of doing the work (resources)

- 4.21 When considering the resource implications of a proposed new project or programme of work, we will take into account all resources required to undertake the work. Over the course of a piece of work the resource allocated to it may change, depending on its requirements and the requirements of other projects, so that the CMA's resources are allocated in the most efficient way to cover all of our work.
- 4.22 We will take into account the resource availability of other parties, including our enforcement partners.