

Options to refine the UK competition regime

The CMA's response to the government's consultation

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1. Introduction and executive summary

Introduction

- 1.1 The Competition and Markets Authority (CMA) is an independent non-ministerial government department. We work to promote competition for the benefit of consumers, both within and outside the UK. Our aim is to make markets work well for consumers, businesses and the economy. We welcome the opportunity to respond to the government's consultation on possible refinements to make the competition regime as effective and efficient as possible (the Consultation).
- 1.2 Effective competition is vital to the economy. We welcome government's recognition that the CMA's work to date has delivered significant financial benefits for consumers and improved awareness of competition and consumer law, leading to changes in damaging business practices.
- 1.3 As set out in our Annual Plan for 2016/17, we are committed to achieving robust outcomes more quickly:

We will redouble our efforts to carry out all our work with greater efficiency, without compromising quality and fairness. This includes finding new ways to achieve the outcomes we need with leaner project teams and lower resource costs, while maintaining legal and economic rigour. We must keep up the pace of improvement we have achieved so far, and be ambitious and innovative in how we use our resources to tackle market problems and achieve our mission.

- 1.4 Notwithstanding the progress made to date against this objective, we believe there is further scope within the existing statutory regime for the CMA to continue to improve its processes. We welcome the opportunity to complement this by exploring with government whether there are ways to improve the statutory regime.

Executive summary

Markets and mergers proposals

- 1.5 We are keen to find ways to improve the end-to-end process for our markets and mergers work, from project initiation through to handling potential appeals, and remedies implementation. The CMA has an ongoing programme of work intended to address this and we welcome the opportunity to engage with government and stakeholders to identify appropriate areas of focus –

whether this results in changes to operational practice within the existing statutory scheme or statutory amendments. However, we consider that radical legislative changes are unlikely to be appropriate at this juncture given the limited evidence provided by the operation of the new regime introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA) during the first two years of its operation.

- 1.6 Ultimately the goal must be to ensure the process enables swift and efficient information gathering to support proportionate, evidence-based, robust and coherent decisions, subject to appropriate procedural safeguards. Thus, we consider that any reforms to the law or CMA process should be assessed by reference to their impact on the following criteria: timeliness of interventions; cost (both to the public purse and to affected businesses); rigour of evidential analysis; quality and robustness of outcomes; and fairness.
- 1.7 In doing so it is important to have regard to both the similarities, and material differences, between merger and market cases (see paragraph 1.10 below), and to make judgements by reference to the end-to-end process (from work prior to launch of a market study or phase 1 merger investigation through to any post-phase 2 appeals), rather than simply focusing on phase 2.
- 1.8 A defining feature of both the mergers and markets regime currently is the introduction of new decision takers at the point at which a potential competition problem, which merits in-depth investigation, has been identified (ie at phase 2). We consider that the two phase system is an important and valued part of the UK markets and mergers regime, and this was reflected in considerable external stakeholder support for the retention of a 'fresh pair of eyes' at phase 2 when changes to the regime were proposed at the time of the ERRA reforms. Central to this support was the view that the phase 2 system helps to ensure fair, evidence-based decision-taking, safeguards against risks of confirmation bias, and improves the robustness of overall decision-taking. We do not believe the evidence base for this has altered since the CMA's formation and hence any changes proposed now should not undermine the core principles of independent, rigorous and evidence-based decision-taking at phase 2 on which this system is founded.
- 1.9 That said, the CMA is committed to identifying further opportunities to improve efficiencies, provided that this is not at the expense of robust decisions. There is an inherent risk that any two phase system extends the overall time taken for an investigation and could potentially lead to a degree of inefficiency or duplication. The CMA has already taken a number of steps to manage and mitigate these risks but nonetheless welcomes the opportunity to comment on the proposals set out in the Consultation which identify a number of areas for further potential improvement. Additionally, it is important that the regime

strikes the right balance between independent decision-taking and institutional responsibility. The formation of the CMA created a different institutional structure from the Office of Fair Trading (OFT) and Competition Commission (CC). While we do not believe any radical restructuring is required, we agree with government that it is appropriate – two years in – to consider whether any incremental refinements would be beneficial.

- 1.10 As noted above, there are differences between merger and market cases. In particular, mergers are initiated by parties and driven by commercial imperatives requiring swift decisions, whereas market investigations are initiated by the authorities, and generally seek to resolve long-standing problems, where remedies may potentially need to be very wide ranging, or intrusive in their effect on parties. These differences in our view justify some process differences designed to expedite decision-taking in merger cases, as will be apparent in relation to certain issues in the main body of our response below.
- 1.11 As regards the specific options in the Consultation concerning **refinements to the decision-taking system for market and merger cases**, alongside the internal refinements we believe can be made without legislative change (as discussed in section 2 below), we support the following:
- (a) A reduction in the overall size of the current panel, while maintaining the current structure comprising a smaller number of inquiry chairs who spend a significant part of their working week on CMA matters alongside a larger more flexible pool of other panel members who are called upon according to operational need.
 - (b) Clarity on the length of appointments for panel members, with either a clear fixed term of sufficient length to maximise efficiencies or a shorter term with clear and appropriate scope for re-appointment where that would not compromise independence and operational need requires it.
- 1.12 As regards **market investigation time limits**, we recognise the importance of ensuring that phase 2 investigations are carried out as quickly as possible without compromising robustness or due process. We consider that some revision of the current limits may be possible but recognise that any timescale change would need to take account of the potential variety in the scale and complexity of different inquiries.
- 1.13 We think that a model in which the CMA carried out more straightforward (or narrowly scoped) market investigations in 12 months and more complex inquiries (or those broader in scope) in 18, may lead to more streamlined and quicker investigations in appropriate cases.

- 1.14 We suggest also that the possibility of an extension to the time limit (in either case) should be removed completely, thus ensuring certainty on the timescale from the outset. The CMA Board would determine – at the point of reference and in light of the scope of the issues identified at phase 1 as requiring further investigation – whether a 12 or 18 month time limit should apply. We consider that this approach would enable the duration of the investigation to be tailored to the scope and complexity of the inquiry while delivering upfront certainty on timescales and preserving robust decision-taking and due process. Failure to give sufficient time for a range of potential investigations may lead to a false economy if this in turn led to a higher likelihood of court challenge, which might be the case if the statutory deadline for all phase 2 investigations was 12 months alone.
- 1.15 We consider that the panel and timescale changes described at paragraphs 1.11 to 1.14 above, alongside ongoing internal work to review and improve current market investigation processes, provides sufficient scope for the CMA to ensure that it produces fair, evidence-based, robust and timely decisions that provide value for money in line with the criteria set out in paragraph 1.6 above.
- 1.16 In terms of **streamlining merger assessments**, we are not complacent about the need to try to streamline and expedite this work where possible, but we are doubtful about the need for statutory reform to change the phase 1 framework. We consider that the improvements we are currently implementing to achieve this objective in phase 1 mergers (introduced as a result of recent reviews) should be sufficient to address the concerns expressed in the Consultation.
- 1.17 We note that one area where delay in merger and market investigations can occur is through remittals by the Competition Appeal Tribunal (CAT) and other courts. We suggest time limits could be introduced to facilitate faster conclusion of remittals.

Proposals to support more effective enforcement

- 1.18 We consider it important that the UK competition regime provides mechanisms to enable effective investigation of competition concerns. In this context, we welcome the proposals outlined in the Consultation, which will in our view make useful improvements to our powers¹ in a variety of areas.

¹ We consider that proposals to enhance enforcement should apply equally to regulators in respect of powers held concurrently with the CMA, and references to the CMA in that context should be read accordingly.

- 1.19 We consider these proposals should be assessed by reference to the same criteria as those mentioned in relation to markets and mergers above, namely their likely impact on timeliness of interventions; cost (both to the public purse and to affected businesses); rigour of evidential analysis; quality and robustness of outcomes; and fairness.
- 1.20 The introduction of new fining powers for breach of undertakings and commitments will allow for more efficient and effective enforcement in the event of a breach. The ability to impose a civil sanction for the provision of false or misleading information, sitting as an alternative alongside the possibility of criminal prosecution, should also provide greater overall deterrence while allowing the CMA to more easily enforce against breaches in appropriate cases. Moreover, we consider that introducing powers of investigation to ensure the CMA can gather sufficient information to assess properly whether penalties are appropriate would also enhance effectiveness.
- 1.21 In respect of the level of administrative penalties, we consider that increasing the maximum penalties that may be imposed in case of breach, and changing the timing for the application of daily penalties, is important not only in respect of providing the CMA with an effective tool kit but also in providing additional certainty to external advisers and companies.

Other changes to the competition regime

- 1.22 Finally, we have taken the opportunity of responding to the Consultation to suggest that government considers a number of other minor desirable statutory changes to facilitate effective enforcement of the competition regime, in particular in relation to the recovery of penalties against trade associations and the possibility of exploring some form of statutory protection for complainants against retaliation in anti-trust cases, though for timing reasons the latter may need to be considered outside of the timescale for the proposed Better Markets Bill.

2. Proposed markets and mergers changes

Refining phase 2 decision-taking arrangements – background

- 2.1 The CMA believes the proposals in the Consultation need to be assessed by reference to their potential impact on the overall end-to-end process for intervention in markets and mergers cases, taking account of the following criteria referred to in paragraph 1.19.
- 2.2 A defining feature of the current two phase legal structure is the requirement for a different decision taker at the in-depth investigative stage (phase 2) – a

so called 'fresh pair of eyes' distinct from the 'phase 1' decision taker. The UK two phase structure is held in high regard internationally and has been supported by external stakeholders, including at the time of the ERRA regime changes. Key reasons for such support were that a change in decision taker helps ensure that there is an effective mechanism for a robust and objective review of the evidence before sound and well-reasoned decisions are reached on the potential competition problems and any remedies required to address them, and that it also guards against the risk of confirmation bias when an in-depth review is conducted into an issue identified by the phase 1 decision taker. We consider that the evidence base for this has not altered since the CMA's formation and therefore that any changes proposed now should not undermine the core principles of independent, rigorous and evidence-based decision-taking at phase 2 on which the two phase system is founded.

- 2.3 Currently decisions at phase 2 in merger and market cases are taken by an inquiry group of (generally) four or five panel members drawn from a pool of 32 (eight inquiry chairs and 24 other members), who are appointed to the panel by the Secretary of State. Panel members also consider regulatory references and appeals, and act as members of groups taking infringement and fining decisions in Competition Act cases ('case decision groups'). The CMA also uses its panel members in other capacities; for example, to advise on criminal prosecution decisions and to act as its Procedural Officer where its dedicated officer is not available. Panel members are statutory office holders whose duration and terms of appointment are a matter for the Secretary of State. They are not CMA staff or members of the Civil Service. They are expected to maintain the same high standards as all public office holders.²
- 2.4 The current panel membership includes a variety of professional backgrounds including experienced: competition lawyers; economists; accountants; and business people. They include a number of members based in Scotland and outside the South East of the UK. Many work for the CMA on a part-time basis as required, and combine their CMA membership with performing other roles. The experience and perspective they bring to decision-taking from their roles outside of the CMA and political sphere is valued and trusted by businesses. Panel members are paid modest fees compared to what they might expect to earn elsewhere and bearing in mind the variable work load. Most work only as and when demand requires, but a small group known as inquiry chairs (currently eight in total) are contracted to work between three and four days a week.

² See the [code of conduct for CMA panel members](#).

- 2.5 Inquiry groups take their decisions on behalf of the CMA, but must do so independently of the CMA Board³ and the Secretary of State. The selection and appointment of panel members to particular groups is for the CMA Chair, who has delegated this function to one of the inquiry chairs (who is known as the CMA Panel Chair) to underline the independence of decision-taking by groups from the CMA Board. Once appointed to groups, panel members can only be removed by the Panel Chair in very limited circumstances.⁴
- 2.6 The CMA considers that the use of panel members in phase 2 merger and market investigations has a number of particular benefits, including the following:
- Independent decision-taking that benefits from the external experience of the panel members, reducing the risk of confirmation bias.
 - Value for money – the part time nature and prestige of the work has enabled the CMA (and its predecessor bodies) to attract high quality candidates (including leading academics) willing to perform a role in the public interest for relatively modest reward.
 - A significant level of flexibility, with a ‘pool’ of experienced and expert resource which can be utilised when required, but is not a financial burden in periods when demand is reduced.
- 2.7 There are, however, costs to this system compared to for example a system in which CMA staff took phase 2 decisions. First, it requires the CMA to train and maintain relationships with 32 people who are not fully integrated into the day-to-day operation of the CMA, involved in setting its overall objectives or priorities, or taking its overall resource-allocation decisions.
- 2.8 Second, the introduction of new decision takers at any stage of an inquiry adds to the overall time investigations take, since they must get up to speed and will inevitably wish to understand, and in some cases challenge, views on theories of harm or evidence collection formed during earlier stages of the investigation. That said, this is a matter inherent in any system that involves a new group of decision takers, rather than being particular to the panel system.
- 2.9 Finally, the legal requirement that decision-taking at phase 2 is independent from the CMA Board has the potential to create communication and wider accountability challenges in a context in which the CMA Board remains responsible for both the CMA’s overall performance and for operational

³ See paragraph 49 of schedule 4 to ERRAs.

⁴ See paragraph 41 of schedule 4 to ERRAs.

decisions such as prioritisation of resource allocation across the whole range of CMA functions.

- 2.10 ERRA seeks to deal with this latter set of potential challenges in a number of ways. First, it allows for the CMA Board to give information to inquiry groups and, in turn, for groups to provide information to the Board. Secondly, it provides for at least one panel member to sit on the Board. Thirdly, it allows for the CMA Board to set rules for groups and give guidance to them as to their application.⁵ Finally, it allows for the delegation of many CMA decisions to committees (which panellists can be members of) and staff.
- 2.11 More broadly, the CMA has taken various operational steps to address these potential issues. First, by developing training, seminars and other mechanisms to ensure panel members have an awareness of the CMA's wider operations. Second, through the appointment of a cohesive group of inquiry chairs (see paragraph 2.4 above). Third, through improving the handover between phase 1 and phase 2 decision takers, and developing the CMA's experience of working on cases end-to-end. Measures in this context include: allowing for a degree of staff transfer from phase 1 to phase 2; ensuring phase 2 information gathering takes full account of information gathered at phase 1, to reduce the burdens on business of repeated requests; scoping theories of harm at phase 1 so that they can be picked up rather than reinvented at phase 2; publishing phase 1 decisions quickly; and ensuring any discussions on undertakings in lieu at phase 1 inform consideration of remedies issues at phase 2.
- 2.12 Nonetheless, we consider it is important that the CMA continues to seek ways to further integrate panel members with the wider organisation, to the extent necessary to deliver more streamlined and efficient investigation and decision-taking. This includes continuing to work towards higher levels of interaction between inquiry chairs, executives and staff from across the CMA; involving panel members in regular training events and seminars; and ensuring groups are aware of resourcing and reputational risks that their inquiries can raise.
- 2.13 With this background in mind, we set out below our response to the particular questions posed in the Consultation regarding potential refinements to the role of the panel, its constitution and its relationship with the CMA Board. While we do not consider that any radical changes are required, there may be certain refinements that are beneficial – although, as highlighted below, it is not always the case that legislative change is required to deliver these. We

⁵ See paragraphs 51 and 52 of schedule 4 to ERRA.

welcome the opportunity to engage with government and external stakeholders on these issues.

Refinements to speed up phase 2 investigations

- 2.14 We consider any refinements to the current arrangements need to be assessed by reference to the criteria in paragraph 2.1 above.

Streamlining of inquiry group role

- 2.15 As already noted, the CMA agrees that it is important for inquiry groups to be clearly focused on the key decisions they have to take. Some of these are clearly set out in statute: for example, in a merger investigation – is there a relevant merger situation? If so, is there a competition problem, and how should any such problem be solved? In practice this will, for example, require groups to have some involvement in identifying the evidence they would regard as key to determining these questions. As such it creates a second tier of (non-statutory) questions for groups to decide. It is clearly unhelpful for groups to be distracted by tasks which can appropriately be delegated to staff, although groups already delegate significantly (for example in matters such as drafting and issuing requests for information). Nonetheless there may be benefit in exploring whether there is further scope for appropriate delegation in respect of some of these subsidiary decisions. The CMA does not consider however that this requires statutory change and believes further clarification would more appropriately be achieved via internal guidance with greater flexibility to be developed over time. For example, and as noted at paragraph 2.11 above, the CMA is already starting to benefit from efficiencies in running both phase 1 and phase 2 as part of an integrated organisation albeit with fresh decision takers. However, the CMA is still developing its experience and we consider that further experience and reviews of our current market investigations in due course should lead to additional learnings to enhance streamlining and efficiency including as regards the optimal roles of staff and groups.

Improving inquiry group engagement with/accountability to the CMA Board

- 2.16 We welcome the opportunity to consider whether and how it may be possible to improve inquiry groups' accountability to the Board. We consider that accountability in this context means communication and engagement between groups (in particular inquiry chairs), the CMA Board and staff on matters of process and use of resource, and a shared sense of understanding and responsibility for the key role of the CMA Board in ensuring that the CMA

produces coherent, consistent, robust, high quality and timely decisions that provide value for money.

- 2.17 In practice, we do not consider that legislation is needed here, and consider the current statutory framework provides sufficient flexibility to ensure appropriate levels of accountability without compromising independent decision-taking.
- 2.18 As discussed below, we consider the current ability to extend market investigations should be removed. We consider that such a change – alongside the suggested two-tracks for market investigations and other internal improvements to practices and procedures – will provide greater certainty to external parties and the CMA alike and create further incentives to streamline processes while maintaining quality and robustness of decisions.

Changes to the constitution/terms of appointment for the CMA panel

Panel size and time commitment

- 2.19 As highlighted at paragraph 2.2 above, we consider that the current panel system provides a beneficial mix of experience and expertise and a ‘fresh pair of eyes’ which aids robust decision-taking and helps guard against any risk of confirmation bias. The panel is also cost effective and works flexibly around the natural peaks and troughs of CMA work, facilitated by having more time committed inquiry chairs alongside a larger, more flexible pool of other members. We consider that it is important that these benefits are maintained under any revisions to the panel system.
- 2.20 We also consider it important that the panel arrangements continue to allow the CMA considerable flexibility in appointing panels with the optimal collection of skills and experience for particular cases to take account of varying work load, and the possibility that there may be occasions where members are unavailable to act in a group (for example: conflicts issues; ill health; holidays; and external personal commitments).
- 2.21 Nonetheless, we welcome the opportunity to explore with government whether and how any improvements could be made to the constitution of the panel, while still retaining the core benefits of the independent phase 2 decision-taking under the current regime. The CMA notes that the Consultation provides a number of possible options for changes to the panel constitution and, as described above, we have considered these against the criteria set out in paragraph 2.1 above. Our views on the specific options in the Consultation are as follows.

- *Smaller panel with greater time commitment*

- 2.22 Identifying the optimal panel size requires a trade-off between various considerations, with both a large and smaller pool of panellists bringing some benefits and disadvantages.
- 2.23 We recognise that too large a pool of panellists can cause inefficiencies. Depending on the number of members appointed to inquiries, and the overall phase 2 workload, there is the potential for some members to only act on one or two inquiries during their term of appointment. While a larger pool does in principle allow for flexibility as described in paragraphs 2.19 and 2.20 above and the CMA does not incur a cost for inactive members, it may mean that these members are less experienced in respect of CMA processes and phase 2 decision-taking generally.
- 2.24 The Consultation proposal of a 12 member panel, working on a near full-time basis, would likely produce some benefits in encouraging more effective cohesion among panel members and between them and senior staff, and would ensure that each panellist gained more regular and frequent case experience. However, we consider that these benefits would be outweighed by a likely reduction in the diversity and experience of members available in practice to join the panel. In our view it is likely that the attractiveness and practicability of panel membership would be decreased (owing to the higher level of time commitment required) and that this would lead to a narrower diversity of experience and backgrounds compared to the current mix of specialist professional experience alongside those with commercial acumen and current or recent external experience. For example, high-level analysis of recent inquiry chair appointments shows that it has been difficult to recruit members in particular from business backgrounds to these posts.
- 2.25 In view of the foregoing the CMA considers that a slightly smaller panel overall, with adequate diversity and flexibility, could bring benefits in terms of cohesion and efficiency while avoiding the problems of too small a full-time panel (including the associated difficulties of dealing with a highly variable workload). We note that no legislation is required to set the size of the panel. In broad terms, we consider that there is scope in practice to decrease both the number of inquiry chairs and the wider pool of members while retaining the basic composition and structure. By way of illustration, a reduction to five or six inquiry chairs, alongside a wider pool of approximately 16 members, might provide the appropriate balance of the various factors outlined above. We welcome the opportunity to discuss the exact size and format of a smaller overall panel with government.

- *Ad hoc appointment of experts to inquiry groups*

2.26 The CMA considers that its ability to use external experts to advise on investigations is important. However, appointing them as decision takers on an ad hoc basis would raise a number of challenges. First, it would involve appointing members who are not familiar with the CMA and who would not develop experience from case to case, which may cause delay. Second, it would not encourage the cohesiveness of the overall group of panel members. Third, we note that experts are often more likely to have particular conflicts of interest from their external activities or previous expressions of views on issues that can be hard to manage. We also note that attracting suitable experts for individual cases may prove expensive. The CMA considers that experts should not therefore be appointed as decision takers on an ad hoc basis.

- *Mixed panels including CMA staff*

2.27 While CMA staff are used alongside panel members as joint decision takers in antitrust cases, we consider that such a change would not be required for markets and mergers cases if the size of the panel was reduced by only a modest extent as described in broad terms at paragraph 2.25 above. Moreover, there may be practical or other challenges to consider with using very senior staff as decision-takers in phase 2 markets and mergers investigations, for example the resource and other implications to the CMA of such an approach. Such a panel would still provide sufficient flexibility for the CMA to establish inquiry groups for markets and mergers cases and still also use panel members in other areas of CMA work as set out above.

Appropriate experience of panel members

2.28 The CMA agrees with the points made in the Consultation that selecting the right individuals with the relevant skills and up-to-date knowledge, experience, and expertise in relevant areas – such as competition and public law, government, public policy, e-commerce, business, and economic analysis – are key to the effectiveness of the panel system. It also requires the selection process to be sufficiently strong to ensure that panellists have the leadership, team working, decision-taking and chairing skills that are needed to allow for effective working with other panellists and the staff advising them on a matter. One of the key benefits of the panel system is that it brings a diversity and breadth of experience from differing fields. We consider that members should have the right expertise and experience in their particular field – whether law, economics, business and so on – and be able to apply their knowledge flexibly to a variety of sectors or markets, as well as having the right skills to

make sound, robust, and timely decisions. We do not, however, consider that the current requirements for specific sectors to be represented on the panel are necessary. Specific sectoral expertise can be achieved through staff working with the group. We also consider that the panel should be sufficiently diverse in its membership in terms of the geographic location, gender and ethnicity of members appointed. We therefore agree with BIS' proposed change in this area, but note that it does not require legislation (save in respect of current requirements that the panel includes certain specialisms).⁶

Length of appointment

- 2.29 We agree with government that it is important to ensure that the length of periods of appointment should be set at a level which is optimal for attracting high calibre candidates, enabling the regime to benefit from the development of panel members' skills over time, and allowing for sufficient frequency of turnover of membership.
- 2.30 We therefore consider members should either be appointed for a sufficiently long period in order for the optimal effectiveness of the system (perhaps the eight years noted in the Consultation) or that appointments are made for a shorter period (perhaps the four years mentioned in the Consultation) with the possibility of re-appointment for a further period of the same length. The CMA considers that the additional flexibility of the latter arrangement would be preferable, though we recognise that is subject to ensuring that decisions on reappointment are not based on – and are seen not to be based on – the palatability of decisions taken by those members to either the CMA Board or government. A practical option government may wish to consider in this respect is for extensions to be decided upon by an appointments committee who can take advice from, but remain independent of, the government or CMA. We note also that the overview of any re-appointment process by the Commissioner for Public Appointments could provide comfort in this area.

Timeframes for phase 2 investigations

Markets

- 2.31 As noted in its 2016-17 Annual Plan, the CMA is committed to achieving robust outcomes more quickly across its tools. We therefore welcome the opportunity to consider how market investigations can be carried out as swiftly

⁶ See paragraph 35 of schedule 4 to ERRRA

as possible, and whether changing statutory timetables is the best way to achieve this.

2.32 We think it is important to recall at the outset a number of contextual points and potential implications of the possibility of shorter statutory timescales:

- First, we note that the current statutory timescales for phase 2 market investigations have only been in operation for just over two years. During that time the CMA has undertaken only two full market investigations (energy and banking), both of which are representative of the historic framework (ie they are not cases in which the CMA has considered phase 1 and phase 2 in an integrated organisation).
- Second, based on our experience to date, and that of the CC before us, we consider that while some market investigations could be carried out to shorter statutory timescales (though there will likely be limitations in this respect given investigation process elements such as consultation on provisional findings and potential remedies), it is unlikely that particularly complex and wide-ranging investigations such as the current energy market investigation could be completed in 12 months, and would be very challenging in 18 months.
- Third, while it may be possible to deliver faster investigations if the scope of a reference is limited, this will not always be appropriate and may limit the opportunity for meaningful market change (we note, for example, that had the Banking investigation narrowed its initial scope to that of business current accounts this would have distorted our analysis and in turn ruled out a number of remedies).
- When considering the time limits for market investigations, we think it is crucial to look at the end-to-end length of cases including any pre-market study work, the phase 1 market study, and any remedies implementation period (as well as potential appeals), rather than looking at the phase 2 market investigation in isolation. The different parts of the process are linked, and introducing shorter timescales at phase 2 may in practice result in additional work needing to be carried out at phase 1, or the period prior to phase 1, in a ‘waterbed’ effect. For example, if references were narrower in scope in order to allow shorter phase 2 timescales to be met, that might require greater confidence about which theories of harm were likely to be problematic before a reference was made. This might in turn require more work at or prior to phase 1, such that any time saving made at phase 2 was to a large extent negated by the earlier stages in the process taking longer and being more burdensome. There is also the possibility that shifting the ‘burdens’ between phases could create a false

economy whereby phase 2 can be achieved in shorter timescales, but that in turn leads to a risk of less robust and/or unfair final decisions, given the potential constraint on rigorous evidential analysis, leading to a higher likelihood of challenge, and ultimately remittal.

- It is also worth noting that the context of markets and mergers cases and the way in which parties engage with the CMA are different (see paragraph 1.10 above). In practice, this may have an impact on the way in which parties engage with CMA investigations and the speed with which the CMA can proceed.

2.33 In terms of carrying out market investigations as quickly as possible, the CMA considers that there may be measures short of reducing statutory timescales that would assist, while maintaining the CMA's ability to reach high quality robust decisions. As already noted, the CMA will be reviewing its processes following the energy and banking market investigations. We expect that these reviews will provide valuable lessons which will enable us to improve and streamline our internal practices and procedures to increase speed where possible. The CMA will also be considering further whether and how it can streamline and speed up its work at the earlier stages of markets cases, with a view to reducing the overall length of cases.

2.34 Additional clarity on the roles of inquiry groups and staff may also have a beneficial impact in this respect. Moreover, we would expect the measures the CMA is already developing and introducing (see for example paragraph 2.11 above) to enhance timeliness of both markets and mergers investigations, and we expect to have additional streamlining measures once we have completed the review of our market investigation processes that we have committed to undertaking once the current market investigations are completed.

2.35 However, we agree that it is important to also consider whether shorter statutory timescales for market investigations would be an appropriate method of ensuring that markets cases are concluded as quickly as possible. In this context – considering the points noted at paragraph 2.32 above and the process improvements described above in the round – we consider there is some scope for shorter overall timescales and would support the Consultation proposal that the overall duration for market investigations is no more than 18 months. Within that, we would propose the introduction of a two-tier system under which some market investigations would be carried out within 12 months and others within 18 months, depending on the complexity and scope of the investigation. Under such a model, the CMA Board would designate the

type of case, scope of reference and deadline for completion when deciding to refer a market for phase 2 investigation, as one of the following:

- **‘Type A’ market investigation, 12 month deadline** – this would cover more straightforward / less complex investigations or markets, or investigations that were more limited in scope (for example in terms of theories of harm referred initially, or parts of a market referred).
- **‘Type B’ market investigation, 18 month deadline** – this would be suitable for more intricate / complex cases or markets, or investigations that were at the wider end of the spectrum in terms of scope (for example in relation to a cross-market reference, or where the practices of potential concern affected a whole market or engaged a number of theories of harm).

2.36 In order to provide further certainty for business and to ensure clarity for the CMA, we suggest that the current statutory provision permitting the CMA to extend a market investigation be removed and that a statutory provision should be introduced to ensure that once a case had been referred on a Type A or Type B basis that could not be changed. We note that the CMA consults and gathers information from external stakeholders and that the possibility for unexpected issues to arise also cannot be ruled out, and that the inability to extend an investigation may make it more difficult to deal with such issues. However, we consider that the benefits of greater clarity and certainty on timing outweigh this risk, and that it can be mitigated to some extent by disciplined scoping of issues and investigative steps.

Mergers

2.37 While not proposed by the Consultation the CMA notes that if legislation is contemplated in relation to the timeliness of market investigations, the scope for similar changes in relation to merger procedures could also be considered, given the similarity in the current statutory structure. However, it is important to recognise that the ex-ante nature of merger control and the fact that the making of a merger proposal is a matter for the parties mean that there are important differences between merger and market cases that the legislative structure needs to accommodate.

2.38 The CMA is not currently convinced that the introduction of new statutory time limits in merger cases is required. It is developing a variety of new processes to expedite the end-to-end process, and believes there is more scope for improvement without legislative change. Moreover, there are risks with varying the current processes. For example the in-depth analysis conducted at phase 2 can throw up or emphasise issues that were not seen as

significant at phase 1; moreover, there is already a general duty of expedition on the CMA, both at phase 1 and 2, in considering merger references. The importance of the CMA having sufficient time at both phase 1 and 2 to ensure that its decision-taking is fair and that the reasoning is robust and defensible against judicial review by the CAT is also an important consideration. Finally, we note that the CMA has completed some phase 2 investigations in less than 6 months, as did its predecessor body, the CC. Consequently we do not propose any changes to the current time limits for merger investigations and consider that the current scope for an eight week extension should be retained.

Remittals

- 2.39 Finally on timescales, the CMA notes that there is one area of its mergers and markets work which is not currently subject to time limits imposed by statute: its consideration of issues remitted to it by the CAT or an appeal court following a review of a decision in connection with a merger or market investigation reference under section 120 or 179 of the Enterprise Act 2002. Such remittals have recently been made in the Iri-Aztec⁷ and Eurotunnel⁸ merger cases and the private healthcare market investigation.⁹ In such cases the CMA must reconsider and make a new decision in accordance with the ruling of the CAT or other court.
- 2.40 We consider that it is important such reconsideration is conducted as swiftly as possible with a view to the importance of ensuring certainty for all involved. In this context, we suggest that the government introduce a statutory 'long stop' timescale for the length of a remittal. For mergers, we suggest this be set at six months and for markets, 12 months. In addition, we consider there should be an explicit power for the CAT to impose a shorter timetable by directions in a particular case, having heard the CMA's representations on timescale. This would create additional certainty for businesses as to the timescale in which the CMA would consider a case, and would likely in practice ensure that remittals were considered appropriately quickly.

Streamlining phase 1 merger assessments

- 2.41 As recognised in the Consultation, the CMA has published a range of guidance on the way it reviews merger control including Jurisdiction and Procedure, Substantive Assessment and Quick Guides to Merger Control for

⁷ *A.C. Nielsen Company Limited v Competition and Markets Authority and Information Resources Inc.* [2014] CAT 8.

⁸ *Groupe Eurotunnel S.A. v Competition and Markets Authority* [2013] CAT 30.

⁹ *AXA PPP Healthcare Limited v Competition and Markets Authority and others* [2014] CAT 23.

business.¹⁰ The CMA has also revisited the way in which it carries out Mergers Intelligence activity with a view to reducing the number of cases which should not require any merger notification.

- 2.42 In addition, following the reforms to the merger control regime in 2013, the CMA updated much of the existing OFT and CC guidance in relation to merger control. It also introduced a number of new features to the operation of the system consequent on the statutory changes including the Merger Notice, a form to file merger notifications, an Initial Enforcement Order template, and a Remedies Notice form. Each of these forms has led to certain efficiencies in the area.
- 2.43 The CMA has also introduced reforms and measures in the past 24 months to enhance the timeliness and effectiveness of its merger control activity and to ensure that the costs to the regime and business are proportionate. These include more senior oversight at key stages of cases, such as information gathering, and KPIs on pre-notification and the time spent on the statutory clock to review a merger investigation. The CMA has also consulted with a range of external stakeholders to assess how the Merger Notice and Initial Enforcement Orders (IEOs) are working and published a report on its findings in March 2016.¹¹ A number of changes to the way pre-notification, the Merger Notice and IEOs work have been recommended and approved by the CMA Board and will be introduced by the end of September 2016.¹² This work has led to significant streamlining of merger assessments and the CMA is committed to continuing its work in this area.
- 2.44 Also, as described above and stated in the CMA's 2016-17 Annual Plan, we will continue to review and monitor our internal procedures to ensure that they are efficient and remove any unnecessary burdens on business. In particular, we have committed to reviewing our policy and procedure in relation to accepting undertakings in lieu, and to consulting on revised guidance if there is a case for change on our application of any exception to the duty to refer mergers to phase 2. In light of this, the CMA agrees with government that

¹⁰ See the [CMA's mergers guidance](#).

¹¹ See the CMA's [review of the use of the merger notice and initial enforcement orders](#).

¹² The refinements the CMA will be implementing following the review of the use of the Merger Notice and IEOs include: (i) a clearer, more targeted and flexible Merger Notice; (ii) incremental changes to the current pre-notification process to improve its effectiveness and better scope the investigation (such as – in appropriate cases – meeting with the merging parties at an earlier stage of the pre-notification discussions to better understand their business, and engaging with third parties in the pre-notification period); (iii) publishing a guidance note on the CMA's approach to derogations, giving businesses more certainty on what actions the CMA may exempt from the scope of the IEOs, and introducing incremental changes to the process of assessing and granting derogations, in order to reduce the response time to derogation requests; and (iv) considering whether an objective set of circumstances can be defined in which the risk of not imposing an IEO in a completed merger is minimal, such that it would not be proportionate to impose an IEO.

changes to the legislative framework for merger assessments are not necessary or appropriate at present.

3. Proposed changes to CMA powers to support more effective enforcement

Administrative fining powers in respect of false or misleading information

- 3.1 The CMA welcomes the proposal to allow for civil administrative fines relating to provision of false or misleading information. We consider that it is crucial to the proper, fair and rigorous exercise of the competition functions of the CMA that the information we receive is reliable, and that the provision to us of false or misleading information can be sanctioned effectively. Failure to comply can also result in the CMA incurring significant extra cost.
- 3.2 We consider that the possibility of administrative penalties for providing false or misleading information would act as an important complement to the possibility of criminal penalties¹³ in ensuring the provision of accurate and complete information to the CMA. While we consider the retention of a criminal sanction is important for an appropriate, serious case, the resources required to pursue a criminal prosecution are considerable and are potentially disproportionate in relation to some breaches. To date, no criminal prosecution in relation to the provision of false or misleading information to the competition authorities has been brought; we consider that the availability of civil sanctions as an alternative would play an important role in helping to reinforce the importance of providing truthful and accurate information to ensure that our decisions are properly evidence-based. We note that there is precedent for having both civil and criminal sanctions for misconduct in the existing provisions in relation to failure to comply with information requirements in merger and markets cases.¹⁴
- 3.3 Finally, we also welcome the proposal to provide the CMA with specific powers to investigate whether the criminal offences under the Enterprise Act 2002 (EA02) of providing the CMA with false or misleading information have been committed. We consider that such powers would also be useful in relation to the other criminal offences under the EA02.¹⁵ We would suggest that an appropriate power be broadly equivalent to, and possibly should be effected by an amendment to, the CMA's existing written information

¹³ Section 44 CA98 for antitrust cases, sections 117 and 180 EA02 for mergers and markets cases.

¹⁴ A failure to respond to an information request under section 109 EA02 (mergers) and 174 EA02 (markets) which may attract a civil administrative penalty could also constitute a criminal offence under section 110(5) / 174A(4) EA02 if the failure results from intentional alteration, suppression or destruction of a document.

¹⁵ Sections 42 and 43 of the CA98 (antitrust), sections 110(5) EA02 (mergers) and 174A(4) EA02 (markets).

gathering powers in antitrust, markets and mergers cases. Also, we consider that it would be useful to introduce such powers in respect of potential failures to comply with the investigatory powers that can be penalised by civil administrative penalties, to the extent that existing investigation powers under the Competition Act 1998 (CA98) and EA02 could not be used to for this purpose.

- 3.4 In order to ensure the competition regime as a whole works effectively, we would suggest that the government also provide concurrent regulators¹⁶ with the ability to utilise the powers as referred to in paragraphs 3.1 to 3.11 and 3.16 to 3.23 of this chapter of the CMA's response.

Administrative fining powers in respect of commitments and undertakings

- 3.5 The CMA welcomes this proposal. We consider that the ability to impose administrative penalties (fines) when parties breach commitments they have given the CMA to address competition and market problems identified in our investigations (whether under the CA98 or the EA02) would enable the CMA more quickly and effectively to ensure that the remedies put in place as a result of our cases are adhered to, as well as increasing ex ante incentives for businesses to avoid breaching relevant commitments and undertakings to the CMA in the first place. For example, in October 2014, the CMA found that two banks had failed to comply with aspects of undertakings they had entered into in 2002.¹⁷ In response the CMA issued directions to the parties concerned.

Level of administrative fines

- 3.6 The CMA supports the Consultation proposals to enhance the CMA's ability to impose fines to penalise and deter failure to comply with investigatory requirements, and considers that government should introduce the two options set out in the Consultation together.
- 3.7 We consider that in its markets, mergers and antitrust work it is crucial for the CMA to be able to gather accurate and complete information as quickly as possible, and to be able to prevent action which might prejudice the ability of our investigations to achieve positive market outcomes. In our opinion the ability to impose deterrent fines case by case for breaches of the CMA's formal investigatory powers plays a key role in incentivising compliance with relevant CMA powers. We consider that the current maximum levels of fines are insufficient to achieve these objectives in some cases; in particular, for

¹⁶ A list of concurrent regulators can be found on the [UK Competition Network's webpages](#).

¹⁷ See CMA press release (22 October 2014): [CMA issues two banks with directions on SME 'bundling' undertakings](#).

large companies, the current statutory maxima may be a ‘drop in the ocean’ that would not have a material deterrent effect. We would continue to assess case-by-case, by reference to the particular circumstances, whether and in what amount to impose a penalty, bearing in mind the need to ensure that penalties are sufficient to deter but not disproportionate.

- 3.8 As regards Consultation option 1,¹⁸ we consider that turnover-based maximum fine levels would be the most appropriate option. This would be in line with the approach in many other European and some other competition regimes, including the European Commission in respect of similar breaches. Such an approach allows more clearly for a fine to be set having regard to the size and financial position of the business in breach. If government is minded to take this approach, we would suggest that daily penalties could be up to 1% of average daily turnover in the previous year and that fixed penalties should be up to 5% of worldwide turnover in the previous year. There would need to be provision to allow for a different reference year – or an absolute figure – to be used in circumstances where a person had no turnover in the previous year.
- 3.9 If government considers it appropriate to retain maxima based on absolute numbers, we consider that it would be appropriate to increase the current maxima to a level that allows more flexibility to set penalties at a level that can deter both large and small companies and to ensure that there is scope for variation of the maxima to accommodate experience of its application over time.
- 3.10 As regards option 2 in the Consultation, we agree that it would be appropriate to enable the CMA to impose a daily penalty by reference to an earlier date than at present. The current position – in particular the maximum fixed fine of £30,000 – is sub-optimal in terms of creating incentives to comply swiftly and fully with formal CMA powers such as information requests primarily for the reasons set out in paragraph 79 of the Consultation. We also consider that permitting a daily penalty to be imposed from the date of the CMA’s provisional decision to impose a penalty (if a final decision is reached) would create more effective incentives than the current position, without unfairly increasing burdens on business, since those that comply with legal requirements will not face a fine at all. This approach would be broadly consistent with the European Commission’s guidance/practice, although there are slight differences between the CMA and European Commission processes.

¹⁸ At paragraph 91 of the Consultation.

3.11 We consider that introducing options 1 and 2 together will have the greatest beneficial impact in terms of incentivising timely compliance with investigatory requirements.

SOCPA

3.12 The CMA welcomes the proposal to make the CMA a designated prosecutor for the purposes of entering into agreements with assisting offenders under sections 72 to 74 of the Serious Organised Crime and Police Act 2005 (SOCPA), in respect of prosecutions for the criminal cartel offence under section 188 of the EA02, for the reasons set out in the Consultation. We consider that SOCPA designation will complement the CMA's existing no action letter regime under the EA02 and contribute to more effective enforcement against criminal cartels by providing a defendant who wishes to assist the prosecution but does not qualify for a no action letter with greater certainty regarding the applicable procedure and the benefit of the accompanying statutory safeguards.

3.13 We consider that designation would be appropriate given the serious and harmful nature of cartels and the fact that, in common with other white collar crimes, the cartel offence is very difficult to investigate and prosecute. Indeed, not only are cartels almost invariably conducted in secret, with very little written documentation (or documentation that is fragmentary and susceptible to interpretation), unlike most other white collar crimes, cartel cases cannot be built around an identifiable 'money trail' from the victim to the offender. In that context, witness evidence from an assisting offender may be of particular assistance for the effective prosecution of the offence.

Appeals in respect of the Payment Systems Regulator

3.14 The CMA welcomes the introduction of a statutory time limit for those appeals of decisions of the Payment Systems Regulator (PSR) which it would be for the CMA to consider. We agree that the time limit should be two months, to align with the time limit for appeals to the CAT against PSR decisions.

Other issues

3.15 We have identified a number of other potential changes to the competition landscape which could contribute to more efficient and effective CMA enforcement in addition to those identified by government in the Consultation.

Trade association fines

- 3.16 The CMA would like to explore the possibility of amendment to the CA98 to clarify that, where it fines associations of undertakings, their members are jointly liable for the fines in appropriate circumstances and that the penalty can take account of the turnover of the association's members as well as that of the association itself.
- 3.17 The conduct of trade associations has been an issue in a number of recent CMA Competition Act investigations – see the recent [ophthalmologists](#) and [property sales and lettings investigations](#). Such associations may have limited resources, but may have members with substantial turnover, and, to effectively deter anti-competitive conduct, it is important that the levels of fine that can be imposed and recovered where trade associations break the law take account of this. Such powers would be consistent with those of the European Commission,¹⁹ and indeed the recent European Commission consultation on empowering National Competition Authorities to enforce competition law effectively noted this as one of the areas where convergence across the EU could strengthen effective enforcement.

Protections for complainants in antitrust cases

- 3.18 The CMA's antitrust investigations stem from a variety of sources. These include leniency in cartel cases and own-initiative and intelligence led work in cartels and other cases. In civil enforcement cases, complaints are a key source of our investigations, and may come from a range of sources, including competitors of, or those trading with, the businesses about whom the concerns are raised. The CMA's ability to investigate effectively is enhanced by complainants coming forward and providing robust and verifiable evidence, and their effective cooperation in providing further input. As well as enabling us to pursue effectively those cases where we have material concerns, good quality evidence also enables us to better identify those cases which may have less merit, and thereby avoid risks of over-intervention and consequent burdens for the business in question.
- 3.19 Our understanding is that potential complainants may, however, be less likely to make a complaint if they are concerned about the implications of their identity as a complainant becoming known to the person against whom the allegation is made (for example, that person taking commercial 'retaliatory' action against the complainant). Complainants may be concerned that the person may identify them from the context of CMA inquiries, for example. We

¹⁹ Article 23(4) of regulation 1/2003.

note that this issue was also raised recently in the House of Lords Select Committee on the European Union report regarding Online Platforms and the Digital Single Market ('the House of Lords report').²⁰

3.20 Our guidance on procedures in antitrust cases²¹ recognises that complainants may therefore want to keep their identity confidential. The guidance sets out the approach that the CMA would expect to take in relation to the identity of complainants, in particular the following:

- While considering whether to pursue a complaint, the CMA will aim to keep the complainant's identity confidential.
- However, where the CMA decides provisionally that a business under investigation has infringed the law (ie at the Statement of Objections stage), it may have to reveal the identity of the complainant to the defendant for rights of defence / procedural fairness reasons.
- Before doing so, the CMA will discuss the matter with the complainant and give it an opportunity to make representations.²²

3.21 Nonetheless, we consider that there is a need to penalise, and deter, retaliation against complainants. We note that the illustrative aggravating factors in the CMA's published penalties guidance recognise explicitly that retaliatory behaviour will likely attract a penalty uplift. Given this, if it was satisfied there was sufficient evidence that a party under investigation had retaliated (or threatened to retaliate) against a complainant because that person had complained to the CMA, the CMA would take a dim view of this and treat it as an aggravating factor that would increase any penalty imposed for the infringement in question, if established. The CMA might also consider such conduct by a dominant undertaking to be abusive (for example, where it involved a 'refusal to supply' the complainant). We note also that the CMA's power to impose interim measures in an ongoing investigation to prevent significant damage or if it is in the public interest would in some cases enable the CMA to address the effects of retaliatory action against a complainant, such as imposition of adverse trade terms.²³

²⁰ EU Internal Market Sub-Committee (20 April 2016), [10th Report - Online Platforms and the Digital Single Market](#), paragraphs 139–141. We note that the Select Committee recommended that the CMA "introduce new measures to protect complainants in these markets" including "penalties upon online platforms that are found to have engaged in commercial retaliation."

²¹ [Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases \(CMA8\)](#).

²² We note that the CMA takes a different approach in relation to whistle-blowers under the CMA's specific informant reward policy in cartel cases – see the CMA's [informant rewards policy](#) for further details.

²³ Under section 35 of the Competition Act 1998.

- 3.22 Notwithstanding the potential measures to deter and penalise retaliation against complainants noted above, we are concerned that there is a risk that some commercially vulnerable stakeholders (particularly SMEs dealing with large enterprises) may be deterred from complaining to the CMA for fear of retaliation by the party complained about.
- 3.23 The CMA has recently taken steps to seek to mitigate this concern insofar as possible, and will shortly be clarifying on its webpages its policy of seeking to keep a complainant's identity confidential to the extent possible. However, in light of the potential impact on complaints, and as suggested in the House of Lords report, in order to provide further reassurance to potential complainants we would welcome discussing this matter, including any potential legislative measures which might be appropriate, in the fullness of time. We note that careful consideration would need to be given to whether and in what form any measures should be taken forward and, as such, for timing reasons it may be more appropriate for this issue to be taken forward through other legislative routes than the Better Markets Bill.

4. Changes to the functions and jurisdiction of the Competition Appeal Tribunal

- 4.1 The CMA does not consider that it is particularly well-placed to comment on all the areas in this part of the Consultation. However, we make a number of minor observations below.

Judicial review applications in respect of matters arising during CA98 investigations

- 4.2 We see no objection to the proposal for the CAT to have concurrent jurisdiction to hear CA98 procedural challenges that would otherwise be heard in the High Court or Court of Session, provided the jurisdiction is concurrent to accommodate cases where the issue is connected with others which are more appropriately heard there. However, from a practical efficiency perspective, we consider that there may be benefit in a single CAT chair rather than a panel hearing such applications. As well as the evident potential for time and resource savings, the nature of such procedural challenges are likely to be more suitable for a legally qualified CAT chair rather than requiring a range of different professional and other experiences.

Warrants

- 4.3 The CMA has not identified any specific concerns or issues with the CAT being provided with the power to issue warrants in respect of Competition Act

investigations. We understand that BIS intends for the High Court to retain its power to issue and supervise warrants and we would support this, bearing in mind the need for flexibility on timing, and that such investigations may in certain cases need to be coordinated with fraud or other criminal investigations.