

Van Bael & Bellis

Consultation response to the UK Government's proposed reforms to the UK competition regime – “Refining our competition regime”

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

Q1. What impact do you think the proposed reform would have on the consistency and predictability of decision-making in merger and markets cases? Please explain your views.

The proposed reform may marginally enhance the consistency and predictability of decision-making in merger and markets cases, by integrating it more closely within the executive hierarchy of the CMA and creating more continuity in the make-up of decision-making groups. This would, however, be at the cost of the loss of the ‘fresh pair of eyes’ ensured by the panel model, which is a key safeguard of the current regime against both confirmation bias and external interference in the decision-making process. It is not clear to us that this is justified, especially since panel members already benefit from the support of full-time case teams, who will in turn draw on the expertise of senior staff such as the Chief Economist (as well as on extensive CMA guidance) when reaching their decisions. As such, decision-making is already broadly aligned with wider CMA policy, for which the CMA Board is accountable.

Q2. Would the proposed reform for greater accountability for the CMA Board for merger and markets decision-making be something you would welcome? Please explain your views.

No

The proposed reform would represent a major change in phase 2 decision-making for merger and markets cases. The current panel system is a well-established model that provides a robust, independent check on case teams to reduce the risk of confirmation bias, while insulating decision-making from external influence. The consultation document provides insufficient evidence of the grounds for making such a significant change. While the CMA's senior leadership and Board are rightly accountable to Parliament and Ministers, given that the CMA is a non-ministerial Government department, it does not follow from this that the same individuals must be personally involved in decision-making on individual cases to ensure that accountability.

Providing for operational separation of functions to ensure the political accountability of leadership for policy and organizational performance, while maintaining independent, evidence-based decision-making in individual cases, is far from unusual by international standards. Even if the UK system were an outlier, this would not in itself be a reason to change it. It is notable in this context that the fact that the CMA's voluntary notification merger control system - characterised as it is by uncertain and vague jurisdictional thresholds - is unique, has not led to the Government abandoning it in favour of a

mandatory filing regime with clearer thresholds more in line with international best practice. The CMA phase 2 decision-making system is not especially challenging to explain to merging parties, who generally value the fact that decisions are made by experienced and independent experts who they may view as peers, in a process that is distinct from that at phase 1.

The future operation of the proposed structure is unclear, with potential decision-making potentially being carried out by the Mergers Board Committee, one of its sub-committees or even by the Board itself. Similarly, the executive member of the decision-making group could include the Chief Executive or Executive Director for Mergers, or an Executive Director responsible for a different function, such as consumer enforcement. The size of the group is also not specified. In addition, the non-staff members of the group may be a mix of non-executive members of the Board, or independent experts, or a combination of these categories, with the only proviso being they must make up at least half of the group. The precise composition of the group is likely to have a critical impact on how the decision-making process plays out. It is also unclear how senior executive staff will have the capacity to engage meaningfully on cases, especially in markets cases, which last longer and cover far more issues than a merger review. It is also unclear from the consultation document how the group will operate during the inquiry process, including the extent to which they will engage with merging parties. As well as being difficult to explain to merging parties (and arguably more difficult to explain than the current model), this model would increase uncertainty and reduce the predictability of the process.

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

No

As noted above, we have concerns about the lack of clarity over how the proposed structure will operate in practice. We also have concerns over the effectiveness of the proposed structure as a genuine check on case teams or the CMA executive. The description of the model as 'CMA Board-led' indicates that the intention is that the Board (or its executive representatives) should take the lead on decision-making, with the non-staff members being included to contribute their 'diverse and expert views' – but not to provide meaningful challenge to the views of the Board/executive representatives. We acknowledge that the Government's intention to require a two thirds majority for a decision (which is not stated in the consultation document but has subsequently been stated by DBT officials) would enable non-staff members to block a decision in certain circumstances. That said, while non-staff members would make up at least 50% of a group, it seems unlikely in practice that those members would be able – or even willing – to sway sufficient executive members to lead to a two thirds majority in their favour.

It would therefore be preferable to specify that the decision-making group must comprise at least five people, of which only one may be an executive member of the Board, with the remaining four being independent experts or non-executive Board members. This would ensure that Board executives are present when decisions are made, and able to make a material contribution to the decision-making process, while preserving a material independent component. This proposed structure would also have

less impact on executive capacity, as each phase 2 case would only require the involvement of one executive Board member.

While we agree with incorporating a degree of flexibility in the composition of groups, such that the non-staff contingent could be made up solely of pool experts, with no non-executives present, its operational effectiveness could be enhanced by ensuring that such non-staff members are in a clear majority, rather than only half of the group.

Chapter 2. Markets Work and Market Remedies

i. Enhancing the CMA's markets work

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

Yes

We agree that the current split between market studies and market investigations should be replaced with a new single-phase market review tool. This is primarily because the market study tool has expanded beyond its original purpose as a desktop based 'quick look' at issues arising in a market, which would form the basis for a decision on the most appropriate next steps for remedying any concerns identified (namely consumer or competition enforcement, advice to Government, a full market investigation or no further action). If a single phase model is adopted, it is important that the CMA retains the flexibility to decide on an alternative course of action, or no action at all, rather than continuing by default to a full review, whether during the initial period or during a preparatory phase, before the decision to initiate a market review is taken. It is also important that there remains sufficient time to undertake a proper analysis of the often complex and nuanced issues presented by a markets case before proceeding to the remedies phase.

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

Yes

This is an appropriate period for identifying and remedying concerns.

Q6. Do you agree there should be a single legal test for single-phase market reviews? Please explain why.

No

Given the potentially wider lens needed in the early stages of a review, which may identify that the more appropriate course of action is for example legislative change or consumer enforcement proceedings, it is more appropriate for the CMA's jurisdiction to be drawn more widely at that point. Indeed, that appears to be envisaged by the consultation document, which indicates that a provisional adverse effect 'on *competition or consumers*' would be a sufficient basis for a move to the remedies phase. A narrower focus on competition should be retained at the point when the CMA is determining remedies.

Q7. If so, should this be the adverse effect on consumers test? Please explain why.

No

The requirement that the CMA identifies an adverse effect on competition is an important constraint on its powers to impose remedies at the end of a market investigation. While this may preclude intervention in certain cases, namely where consumers are adversely affected but no competition issue can be discerned, that is an appropriate and proportionate outcome in a regime in which the CMA has extensive remedy powers – including structural separation – yet is subject to limited additional legal or political constraints in how it exercises them. Otherwise, the CMA would have *carte blanche* to intervene wherever it saw fit, on the basis of a vague and more subjective test. This is particularly important, given the legitimate role of markets work as a conduit for addressing political concerns over the operation of markets, through transparent and evidence-based proceedings.

ii. CMA Market Remedies

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

Yes

While it is important to consider the adverse consequences of remedies remaining in force long after they are needed, the CMA should be best placed to consider the desirability of a sunset clause on a case by case basis.

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

Yes

This is appropriate, provided that shorter periods can be stipulated for faster moving markets, particularly if it is expected that remedies will have a material impact in a shorter period.

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

Yes

The CMA should retain this option, for example for slower-moving markets where change is likely to take longer to materialise.

iii. Concurrency

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

Yes

The sectoral regulator is likely to have better awareness of day-to-day developments in the markets concerned and more regular interaction with key market participants.

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

Yes

Since sectoral regulators lack full market remedies powers, it is appropriate that they will remain able to undertake an initial review themselves, to determine whether such an intervention is needed and to help formulate their request to the CMA. The CMA should be required to consider such a request, in the interests of good administration, while reserving the ability to decline to take it forward for a full market review, for example on the basis that it has more pressing priorities.

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

The CMA should give active consideration to taking over competition enforcement cases from sectoral regulators, where there is evidence of lack of enforcement or where this would assist with progressing investigations more rapidly. This would be a more proportionate alternative to the 'nuclear option' of issuing a sectoral regulator order under section 52 of the Enterprise and Regulatory Reform Act 2013 and, as such, would be more likely to have a meaningful positive impact on the use of competition enforcement powers by sectoral regulators.

Chapter 3. Mergers

i. Increasing predictability in merger control

Q14. Should share of supply be revised to a closed list of criteria, for both the share of supply and hybrid jurisdictional tests? Please explain why.

Yes

While the share of supply and hybrid tests would remain highly uncertain and subjective following the proposed change, requiring the CMA to use a criterion set out in statute would marginally reduce the uncertainty.

Q15. Do you support the proposed criteria for inclusion? Please explain why.

No

It is unclear how 'price' can be applied in practice to determine share of supply with any certainty, since a party cannot have a share of a price. Similarly, it is nigh on impossible for a party to ascertain its share of workers employed. As a result, we would suggest limiting the criteria to value, cost, quantity and capacity. This should give the CMA ample scope to assess jurisdiction according to a broad range of metrics.

Q16. Are there any additional criteria that should be included? Please explain why.

No

The list should be kept as short as possible, since a longer list would create greater uncertainty over which metric the CMA would choose to use in an individual case, as well as how such metrics might be interpreted in practice.

Q17. Would the proposed reform for the share of supply test improve predictability for businesses? Please explain why.

Not sure

Although there could be a very marginal improvement in predictability, the CMA would retain wide discretion to assert jurisdiction using a wide range of metrics. The proposed reform would not, for example, have prevented the CMA from asserting jurisdiction in *Roche/Spark* (number of workers employed), *Meta/Giphy* (quantity) or *Sabre/Farelogix* (quantity), all of which are viewed as involving a highly expansive application of the CMA's merger jurisdiction.

Q18. Should the material influence and de-facto control tests be revised to a closed list of statutory factors? Please explain why.

Not sure

While potentially having some benefit in terms of predictability, inserting a statutory list of factors would not address the central problem with material influence, namely its lack of a solid definitional basis. This means that, unlike for control or decisive influence, application of the material influence test is inherently uncertain, regardless of the specificity of the list of factors that may be taken into account. In addition, some of the proposed tests, such as access to confidential strategic information or commercial, financial, or consultancy arrangements would remain very broad. If the Government is set on retaining material influence as a threshold for when a merger arises, it would be preferable to have a more detailed statutory definition of precisely what is meant by material influence, given that the current wording, i.e. the ability 'materially to influence' the policy of a person, provides very limited assistance. The CMA's guidance on this point – namely, that material influence is the ability materially to influence the commercial policy of the target enterprise – is circular and is therefore of limited practical value.

In contrast, it is unclear why any additional statutory specification of de-facto control is needed, given that this is more straightforward to determine in individual cases.

Q19. Do you support the factors proposed for inclusion? Please explain why.

No

The factors should be narrowed to make it clear that commercial agreements or other arrangements will only confer material influence in exceptional circumstances. Access to confidential information should not in itself be sufficient to confer material influence.

Q20. Are there any additional factors that should be included? Please explain why.

No

The list should be kept as short as possible, since a longer list would create greater uncertainty over which factor the CMA would choose to use in an individual case, as well as how such factors might be interpreted in practice.

Q21. Would the proposed reform for the material influence test improve predictability for businesses? Please explain why.

No

As noted above, the proposed reform would not address the central issue with material influence, namely its inherent vagueness and unpredictability.

ii. Providing more time to agree remedies at Phase 1

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

Yes

The issues raised by a Phase 1 review can be complex and providing additional time to craft remedies is thus appropriate, particularly in an environment where the CMA is prepared to consider more complex behavioural remedies.

Chapter 4. Further cross-cutting changes

i. Stronger investigative powers for algorithms

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

Yes

This would be a logical extension of the CMA's powers, provided that the power is used proportionately. The digital regulatory regime applies to a small number of large tech platforms that have been designated as having SMS status, or are potential candidates for designation. Given the implications of designation and resulting conduct requirements and interventions, and the importance of algorithms for this analysis, extensive testing of an algorithm may be justified and proportionate. This may not be the case in a competition or consumer enforcement action. The CMA should also be cautious about requiring parties to vary their usual conduct, given the potential adverse effects, including on consumers.

ii. The Secretary of State's role in CMA guidance

Q24. Should the Secretary of State have a formal role in a wider range of key guidance documents? Which ones, and please explain why.

No

We see no need to expand the list of guidance for which the Secretary of State has a formal approval role. While approval may be an appropriate safeguard in limited circumstances, notably CMA policy

regarding the imposition of penalties, there is no justification for this to extend across all CMA guidance. As an expert competition and consumer enforcement body, the CMA is best placed to formulate and develop its guidance on a wide range of issues, including (for example) market definition, merger assessment and vertical agreements, especially given that such guidance is often based on developments in the CMA's own cases. In contrast, the Secretary of State and his officials lack day to day experience of such matters.

Adding an approval step would, at best, add nothing in such circumstances. At worst, it would introduce delay and open up the Secretary of State to further rounds of lobbying, thereby politicising what should be an evidence-based and technical process.

iii. Excluding the Christmas period from statutory time limits

Q25. Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits? Please explain why.

Yes

This is appropriate and in the interests of parties and the CMA.

Q26. If so, what length should the pause be?

We would propose a period of five working days.

**Van Bael & Bellis
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