



Department
for Business
Innovation & Skills

**OPTIONS TO REFINE THE UK
COMPETITION REGIME**

A consultation

MAY 2016

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Options to refine the UK competition regime

This consultation is seeking your views on whether the government should take action through a Bill in this Parliamentary session to improve further the UK's competition regime. We would like to hear whether you think that, two years after the current regime was put in place, there are refinements which can be made to reduce the burden on businesses and to encourage faster decisions which remain robust.

Issued: 25 May 2016

Respond by: 24 June 2016

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1. Foreword from the Secretary of State

Effective competition is central to ensuring a well-functioning economy. Competition supports productivity and growth and ensures that the UK is competitive in a global market. This is why the government plans to introduce a Bill to open up markets, boost competition, give consumers more power and choice and make economic regulators work better.

Well-functioning markets matter to all of us. They allow businesses to compete and generate income and employment. They drive innovation and efficiency in processes, technology and service. And they deliver a good deal for consumers, improving choice and driving down prices.

That was the overarching theme of “A better deal: boosting competition to bring down bills for families and firms”, which I launched alongside the Chancellor in November last year. The proposals I am putting forward in this consultation are designed to support the kind of change this government is pressing for in markets.

For competition to flourish and markets to operate at their best, we need effective enforcement. It is important that government supports and challenges our competition authorities to help them to promote high-quality markets that work in the best interests of families and firms.

The UK’s competition regime is rightly considered one of the world’s best. Its independence and professionalism are often cited as reasons why firms feel confident investing in the UK. Since 2010, the government has reformed the competition and consumer landscapes to ensure that the authorities can foster better competition and robustly protect consumers.

The major changes made to the competition regime in 2013 and over the last few years have placed competition and consumers at the heart of government thinking and policy making. This consultation and the planned Bill are not about undoing those changes. They are about looking for further improvements to ensure that the regime is as effective and efficient as possible.

I believe that we should explore every opportunity to reduce the burdens of the regime on businesses. Decisions can be reached more quickly – removing the uncertainty in the system and getting faster outcomes for consumers and businesses.

The options on which I am seeking your views will help to achieve real benefits for businesses and consumers while retaining the independence of the UK’s competition regime of which we are rightly proud.

2. Introduction

“Fixing the foundations: Creating a more prosperous nation”¹ highlighted the role that competition can play in improving productivity in the UK. Building on that, the government published “A better deal: Boosting competition to bring down bills for families and firms”² which set out the government’s plans for creating competitive markets that support economic growth and deliver more choice and lower prices for consumers.

Competition authorities with the right powers are integral to driving effective competition and ensuring that markets work well for consumers and businesses. The Competition and Markets Authority (CMA) and the Competition Appeal Tribunal (CAT) are key components of that regime. The changes to the competition regime, brought into effect in 2014, have had a positive impact and have been largely successful in realising the benefits of a streamlined system. This consultation sets out ways that the government can enable them to perform their roles even better.

Some of the measures on which we are consulting may require primary legislation – we will aim to include these in a Bill in this Parliamentary session. Other measures may require secondary legislation and some may involve changes in practice and procedure. We are interested in your views on all three types of change and whether we have got the correct mix.

Alongside this work, we will continue our work to implement the full range of measures in “A better deal”, to deliver benefits to consumers as quickly as possible.

¹ www.gov.uk/government/publications/fixing-the-foundations-creating-a-more-prosperous-nation

² www.gov.uk/government/publications/a-better-deal-boosting-competition-to-bring-down-bills-for-families-and-firms

3. How to respond

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

You can reply to this consultation online at:

<https://bisgovuk.citizenspace.com/ccp/competition-regime>.

The consultation response form is available electronically on the consultation page:

www.gov.uk/government/consultations/uk-competition-regime-options-for-further-reform.

The form can be submitted online/by email or by letter to:

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A list of those organisations and individuals consulted is in [Annex B](#). We would welcome suggestions of others who may wish to be involved in this consultation process.

4. Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). There is also a statutory Code of Practice issued under section 45 of the FOIA with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

If you want information, including personal data, that you provide to be treated in confidence, please explain to us what information you would like to be treated as confidential and why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

5. Help with queries

Questions about the policy issues raised in the document can be addressed to:

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The consultation principles are in [Annex A](#).

6. Changes to the competition regime

Introduction

1. The government believes that the UK's competition regime works well. It is well-regarded domestically and internationally. Major changes to the competition regime were considered in 2011 and were introduced through the Enterprise and Regulatory Reform Act 2013 (ERRA). The changes came into force in April 2014 and included:
 - creating the CMA to replace the Office of Fair Trading (OFT) and the Competition Commission, giving the regime greater coherence in competition practice and a more streamlined approach to decision making;
 - introducing shorter statutory time limits for all stages of merger and market studies (phase 1) and investigations (phase 2), and expanding the CMA's information gathering powers at phase 1;
 - setting a statutory time limit of 6 months for the CMA to implement phase 2 remedies;
 - establishing new powers for the CMA to require parties to appoint and remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies;
 - the power to impose financial penalties (up to a maximum of 5% of aggregate group worldwide turnover of the enterprises concerned) where integration measures have been taken in breach of CMA orders; and
 - removal of the 'dishonesty' element from the criminal cartel offence
2. Further to the above changes, the Small Business, Enterprise and Employment Act 2015 introduced a power for the CMA to comment on government proposals which the CMA believes could adversely affect competition. The Consumer Rights Act 2015 (CRA) introduced a power for the CMA to approve voluntary redress schemes for settlement of private actions for damages following breaches of competition law. The Scotland Act 2016 provides the Scottish government with the power, in certain circumstances and working with the Secretary of State for Business, Innovation and Skills, to request that the CMA opens a market investigation into markets.
3. In its first two years, the CMA has achieved a number of notable successes. It has:
 - continued to deliver direct benefits to consumers in excess of ten times its cost to the taxpayer, delivering over £1 billion of direct financial benefit;
 - concluded market studies and market investigations which affect millions of people across the UK, introducing changes to improve competition in the private motor insurance, payday lending, private healthcare and residential property

management sectors, and opened new ones in markets (energy, banking, and legal services) with a combined annual turnover of over £80 billion;

- reviewed more than 140 mergers, in 29 of which it found competition concerns, actively using its improved power to accept undertakings in lieu, saving money and time for businesses and taxpayers;
 - sped up its review of non-complex phase 1 merger cases, completing 74% of such investigations within 35 working days;
 - conducted redeterminations and appeals of regulatory decisions for services vital to consumers across the UK, for example two appeals brought against Ofgem's decisions in relation to distribution network operators' charges, involving £1.5 billion of revenue and affecting 25.9 million consumers;
 - completed a range of competition and consumer enforcement investigations leading to changes in business practices and substantial fines, including imposing £45 million in fines for illegal behaviour which was designed to stifle competition at the expense of the NHS and, ultimately, taxpayers;
 - introduced stronger procedural safeguards for fairness and rigour in competition enforcement casework under the Competition Act 1998 (CA98) through the 'case decision group' system embedded in the CMA rules;
 - worked on introducing improvements in the number and pace of competition enforcement cases: in 2015-16, infringement decisions were issued in just over 17 months in one CMA-launched civil case and just over 12 months in another; and there has been a recent increase in cases, with ten new CA98 cases opened since November 2015;
 - produced simple, easy-to-use guidance for small businesses on how to comply with – and benefit from – competition law;
 - published guidance in respect of the CMA's power to approve redress schemes in competition cases, which is intended to complement and amplify public enforcement efforts and provide those harmed with direct compensation without the need to take a private action through the courts;
 - set up the UK Competition Network (UKCN) to improve cooperation among sector regulators in the light of new concurrency legislation, resulting in increasing use of their competition powers; and
 - tackled unfair online reviews, used by 27 million adults in the UK to inform their purchases. The CMA followed up a call for information by conducting a series of consumer law enforcement cases to ensure compliance and prevent competition distortions.
4. After two years of the CMA, we think it is right to consider whether there are additional improvements which can be made to build on the success of the regime. We are therefore keen to consult on options to refine the functioning of the regime to help it tackle anti-competitive behaviour, competition issues in markets, and

competition concerns raised by mergers, in order to deliver quicker competition outcomes to the benefit of consumers, business, and ultimately the economy.

5. This consultation considers these issues and puts forward options to address them. Some of the issues are technical and procedural; others focus on ways to improve the way that the regime affects consumers and businesses.

Markets and mergers

Background

6. The CMA has powers under the Enterprise Act 2002 (EA02) to assess possible competition issues in markets and arising from anticipated and completed mergers. As stated above, changes to these powers were made in 2013, coming into force in April 2014 alongside the creation of the CMA.
7. Following two years of the new powers being in force, the government believes that it should consider whether there is room to make further improvements in order to reduce the burden on business of the regime and to ensure that the CMA can deliver robust decisions even more quickly.

Markets

8. EA02 sets out a markets regime which allows the CMA to conduct evidence-gathering exercises, market studies and investigations in markets where there may be competition problems. It also allows the CMA to make recommendations following studies and investigations, and impose remedies following investigations.
9. The regime was amended in ERRA to create explicit time limits for the conduct of market studies and the imposition of remedies following a market investigation. It reduced the time limits for market investigations to 18 months, with scope for an extension of up to six months where the CMA considers there to be a “special reason” to do so³.
10. EA02 also allows the CMA to:
 - investigate practices across markets;
 - investigate public interest issues alongside competition issues;
 - use formal information-gathering powers at both phase 1 (market studies) and phase 2 (market investigations);
 - impose civil financial penalties for failure to comply with information gathering requests (at phases 1 and 2);
 - allow the CMA to impose remedies following market investigations which require parties to appoint and remunerate an independent third party to monitor or implement remedies and to deal with disputes;
 - require parties to publish certain non-price information without also being required to publish price information; and
 - require parties to reverse any action that has already occurred before interim measures have been put in place (after a market investigation report has been published but before final remedies have been implemented).

³ Section 137(2A), Enterprise Act 2002

11. A recent report by the National Audit Office (NAO) found that:

“The competition regime is placing a marked emphasis on market investigations, with implications for the regime as a whole. The CMA’s ability to investigate an entire market can have big effects; for instance, a 2009 market investigation by the Competition Commission resulted in BAA selling Edinburgh, Stansted and Gatwick airports. The CMA is currently investing 16% of its front-line competition resources in two high-profile market investigations into energy and retail banking, and businesses are also incurring substantial unmeasured costs. There is major public and parliamentary interest, with a parliamentary hearing already dedicated to the retail banking inquiry. The ability of the CMA to present a credible market analysis and formulate effective remedies if appropriate will have a significant effect on its reputation (paragraphs 2.24 to 2.29).”⁴

12. The government supports the CMA’s work on the energy and banking markets and stands ready to act quickly on its recommendations. However, both investigations have raised questions about whether the 2013 changes have been successful in the aim of shortening the timetable for market investigations.
13. In both investigations, the CMA has used the permitted extension to the statutory timetable to allow for more evidence to be gathered and for consideration of new possible remedies. This has meant that the phase 2 investigations, in these cases the most burdensome phase of the process for parties, have not been noticeably quicker than cases under the pre-2014 regime.
14. The government recognises that the new statutory timescales for phase 1 and remedies implementation in markets cases should reduce the overall length of cases. Nevertheless, the government believes that market investigations need to be as swift as possible while still being thorough and robust.
15. As well as the time taken to undertake the investigations, the government believes that it is right to consider if further changes are needed to ensure that the CMA has access to sufficient evidence and that this is used to reach robust decisions quickly.
16. The government acknowledges the CMA’s commitment, made in its Annual Plan, to review the way that it assesses markets once the two current investigations have completed. However, the government believes it is appropriate to consider whether it is possible to make improvements to the overall framework now, which can support this review.

Mergers

17. EA02 (as amended by ERRA) also set out the rules for the CMA’s ability to assess mergers. Under the EA02, the CMA can:
- investigate mergers which could restrict competition;

⁴ www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf

- investigate defined public interest issues alongside competition issues;
 - use formal information gathering powers at all stages of the CMA's merger review process;
 - impose civil financial penalties for failure to comply with investigatory powers;
 - agree or impose interim measures;
 - impose financial penalties on parties failing to comply with interim measures of up to 5 per cent of turnover; and
 - suspend an investigation for up to three weeks at the start of phase 2 if the parties request it and the CMA considers abandonment of the merger to be a possibility.
18. The NAO's recent report praised the way that the merger regime has operated since the 2013 reforms. The NAO said:
- “The CMA has taken an innovative approach to merger control, potentially improving its effectiveness in promoting well-functioning markets. It has made all of its initial merger decisions within its statutory deadline of 40 working days. Stakeholders were positive about the quality and continuity of the CMA's merger teams, and told us that they valued having early discussions with decision-makers. The CMA is expanding the practice of clearing cases with remedies in phase 1 without the need to go for a more detailed and resource-intensive phase 2 review, and is making efficiency gains from using some of the same people on both phase 1 and phase 2 investigations. It has also developed case law, in particular winning three significant recent legal challenges in this area (paragraphs 2.19 to 2.22).”⁵
19. Most stakeholders have welcomed the changes made to the phase 1 merger assessment process, particularly the ability to have an early meaningful discussion about key issues and also the reformed phase 1 remedies process which gives parties greater certainty of the competition concerns that need to be addressed. However, they have flagged that the CMA's phase 1 information requests impose substantial burdens on businesses.
20. The CMA has also made improvements to its phase 2 process to make the end-to-end review process more efficient. This includes using phase 1 staff on phase 2 assessments, where appropriate, so that they can transfer knowledge. The recent NAO report examined the five most recent phase 2 merger cases as at the end of October 2015. In three of these, between 29% and 44% of staff involved in the phase 1 investigation were also involved in the phase 2 investigation. To reduce the risk of confirmation bias and maintain independence, the key decision-makers at phase 2 are different, with independent inquiry groups made up of panel members taking decisions at phase 2 rather than CMA staff. However, stakeholders and the NAO have reported that the phase 2 investigation and the approach of separating the decision-makers makes the system costly to businesses.

⁵ www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf

Proposals for change

Refining the phase 2 decision-making arrangements

21. Under the current regime, CMA decisions on phase 2 investigations and regulatory appeals (in relation to price controls, terms of licences or other regulatory arrangements) are taken by independent inquiry groups of panel members.
22. Panel members are appointed by the Secretary of State for a period of no longer than 8 years. There are currently 32 panel members; at present, 8 of these are appointed to enable them to chair inquiries (“panel inquiry chairs”), and one of these acts as the panel chair, overseeing the whole panel and appointing the panel inquiry chair and other members for each investigation. The panel inquiry chair heads each individual inquiry and other panel members make up the rest of an inquiry group. Each inquiry group has at least 3 panel members.
23. In line with paragraph 49 of Schedule 4 of ERRA, inquiry groups must act independently of the CMA Board. However, in accordance with the Act, information is allowed to flow between the Board and the inquiry panel to ensure overall accountability of the system. This allows the Board to be kept informed about resourcing, efficiency, the application of CMA policy and the staff processes that support the work of the panel.
24. Responses to the government’s previous consultation on changes to the competition regime recognised the strengths of the panel system, including:
 - A ‘fresh pair of eyes’ taking decisions, compared to that at phase 1, avoiding confirmation bias;
 - Input from experienced and well-respected individuals in relevant disciplines, particularly law, accountancy and economics;
 - Commercial acumen / business experience, which may be particularly useful in understanding the commercial drivers behind a merger/market behaviour; and
 - sufficient diversity in panel members to ensure that active members are based across the UK.
25. Now that the CMA has been established and the 2013 reforms have bedded in, the government believes that there is merit in reviewing the role and operation of the panel and inquiry group system in both its markets and mergers work. The government notes that the current regime has been in place for a relatively short space of time in one organisation. However, we consider there is merit to review its operation after two years to see if we can build on the strengths of the current system while ensuring that decisions made by the CMA are swift and robust and the analysis presented in support of those decisions is sound.
26. When the government consulted on wide-ranging changes to the competition regime in 2011-2012 it decided to retain the two-phase assessment of markets and mergers. However, the response was inconclusive about the best approach to achieve this to deliver the most effective and efficient competition regime. Some respondents felt

that inquiry groups should have an investigatory as well as decision-making role, while others preferred a more adjudicatory approach.

27. Under the current regime a distinct panel has to be assembled for every market and merger phase two investigation. The panels have both an investigatory as well as decision-making role. We are aware that identifying panel members with appropriate expertise and availability to ensure that the investigation can be started and conducted swiftly can be problematic. Moreover, having the panel revisit all the issues and evidence from scratch can lead to unnecessary duplication.
28. The CMA has introduced certain internal changes to improve the appointment process and ensure that members can get up to speed quickly. However, the government is keen to seek views on whether any legislative changes could be made to the regime to ensure that panels work as effectively and efficiently as possible. We are keen to ensure that the benefits of merging the processes of the OFT and the Competition Commission under the CMA are passed on to businesses and consumers through quicker decision-making and outcomes.
29. The government considers that there are a range of possible changes to the current arrangements which might help to achieve an even better functioning of the market and merger regimes, for example increasing inquiry groups' interaction with and accountability to the CMA Board – ensuring the policy intention of paragraph 49 of Schedule 4 of ERRA is delivered in practice.
30. The government also notes that the UK panel system is somewhat different to the decision-making models used in other jurisdictions with merger control, where there is no separation between the phase 1 and 2 decision-maker. In principle, alternatives to the panel / inquiry group system itself could be considered for certain competition assessments in the UK regime, including markets and merger investigations. These 'single decision-maker' approaches would be a significant departure for the UK regime, and have their own costs and benefits. The government will keep under review the case for alternative decision-making structures as the regime matures.
31. The government also notes the previous support for the current two-stage structure of decision-making. It welcomes views on whether this is still the most appropriate approach or whether alternative approaches may maintain independence but increase the speed of the regime for its users. For the purpose of this consultation, we have focused our options on two broad themes:
 - Refinements to the existing process to speed up phase 2 investigations; and
 - Improvements to the constitution of the CMA panel.

Refinements to the existing panel system to speed up phase 2 investigations

32. Under this option, the government would retain the use of inquiry groups drawn from independent panel members in phase 2 merger and market assessments, but is seeking your views on a number of potential changes that could speed up their decision-making process. The aim of the changes would be to streamline and focus the working of the inquiry groups on their key statutory decisions. Some of these

changes may require legislation while it may be possible for others to be effected without it.

Streamlining of inquiry group role

33. The government considers that the key role of the inquiry group should be to decide on the substance of the case:
- assessing the relevant evidence and legal and economic arguments to establish whether there is an adverse effect on competition (AEC) / substantial lessening of competition (SLC) in markets and mergers cases respectively; and
 - what the appropriate remedy is where an AEC or SLC has been established.
34. The government considers that it is important that the decision-making group is focussed on the overall governance and direction of an inquiry and its key decision-making role and is not distracted by taking responsibility for the more day-to-day aspects of an investigation, such as directing specific information requests or dealing with confidentiality issues. In order to make best use of group input and ensure that their efforts are focused where they are of most use, the government therefore considers there may be merit in clarifying in legislation, or CMA rules, which decisions in a phase 2 inquiry groups must reserve to themselves, and which elements they may delegate to CMA staff.

Improving inquiry group accountability to the CMA Board

35. The efficiency of panel inquiry groups' decisions and the conduct of phase 2 investigations could be improved by clarifying the accountability of phase 2 groups and staff to the CMA Board. As stated above, the government continues to believe that substantive decisions of panel inquiry groups should be free from influence of government and of the CMA Board.
36. The CMA Board is ultimately responsible for the allocation and use of CMA resources as a whole. The government believes that the CMA Board should be able to ensure that phase 2 investigations deliver decisions to the right time frame and that public resources are used appropriately. Under Schedule 4 of ERRA, the CMA Board is currently able to make rules of procedure and issue guidance on the operation of inquiry groups in merger and market investigations. However, the government proposes to amend Schedule 4 of ERRA to ensure that the CMA Board and its delegates can also question significant resource allocation matters in individual phase 2 investigations. These powers will not extend to decisions about whether there is a competition problem or on the remedies in any given case. Under these powers, phase 2 groups could be required to provide regular updates to the Board on the progress of investigations or update the Board where a change to the investigation is proposed which is likely to have a significant impact on resources or timing. Where an inquiry group seeks to extend the period permitted for a market investigation, agreement from the Board would be required. The aim of these changes would be to address concerns of process and resource allocation at an early stage in the course of an investigation.

Improvements to the constitution of the CMA panel

37. The government believes that the current panel system works, but could be improved and that we should be aiming to ensure that the quality of membership is as high as possible and reflects the diverse and changing markets and economic structure of the UK, as well as the need to ensure decisions are taken as swiftly and robustly as possible. The need to appoint new panel members in 2017 and 2018 provides an opportunity to consider whether the panel is the right size and whether it has the right mix of expertise and experience.

Panel size and time commitment

38. Currently the CMA panel consists of 32 panel members – 8 of whom have committed to act as such for a significant period of each week (7 being inquiry chairs and 1 the overall panel and inquiry chair). Members are deployed when they are available. The CMA has reported that there could be difficulties in identifying sufficient appropriately skilled panel members available to form particular inquiry groups, although all panel members have been used on at least one investigation in the last financial year. Panel members may find it difficult to commit the necessary time required for particular inquiries due to other commitments. Others, due to past or present work commitments, need to recuse themselves from groups due to conflicts of interest. This can, in practice, result in a relatively small number of panel members being over-worked and the CMA may be missing out on alternative approaches to problems due to the narrow field from which they can, in practice, select.
39. The government therefore considers that it would be worth exploring whether it should significantly reduce the overall size of the CMA Panel to twelve members and to 'professionalise' the panel by requesting that they agree to make themselves available for a specified minimum number of hours or days each year. The number of hours or days would be determined on appointment by operational need. This should allow the CMA to be more confident that, although selecting from a smaller pool, it should always have sufficient resources to undertake its key work.
40. A variant of this option is to also allow for the ad hoc appointment of experts that are not on the core panel to an inquiry group if demand or expertise requires additional resource. This approach could have the benefit of greater flexibility in appointing experts with specific expertise where an investigation required it and allowing the CMA to take forward investigations in exceptional circumstances where there was insufficient capacity for an inquiry group to be formed from the core panel. In this scenario, an inquiry group might consist of one or two members from the core panel and two or three ad hoc members. In this option, it would be for the Board to identify whether additional resource was necessary and identify the type of expertise that would be required. It is possible that additional members could be drawn in from other regulators.
41. Another potential option in this context is for inquiry groups to comprise a mix of independent panel members and senior CMA staff (provided they were not involved with the case at phase 1), a model broadly similar to that for case decision groups which the CMA is developing in CA98 cases. This could allow for the CMA decision making group to benefit directly from, for example, expert economic or legal knowledge and experience of particular senior CMA staff. The government considers

that any concerns about reduced independence of the resulting inquiry group could be mitigated by ensuring that the relevant CMA staff were not involved with phase 1 and a requirement that panel members comprised a majority of the group (save in exceptional circumstances).

Appropriate experience of panel members

42. Alongside consideration of the number of panel members, the government believes that it is important to ensure that the panel includes a broad range of experience that covers, among other things, understanding of the impact of CMA decisions on businesses and consumers and of new and developing technologies. The government believes, therefore, it would be desirable to introduce more clarity into the criteria applied when selecting members of the panel, potentially by requiring in statute that, when appointing Panel members, the secretary of State should ensure that the panel contains an appropriate mix of skills and experience that includes:
- business experience;
 - consumer experience, including behavioural insights;
 - competition law;
 - competition economics; and
 - relevant sectoral experience as determined by the Secretary of State
43. The government is also keen to explore whether changes to the overall expertise of the panel members may remove the need to designate particular experts with particular specialisms. Removing such designations for each member may allow panels to be constituted more quickly.

Length of appointment

44. The government believes that shorter appointment periods for panel members could realise a number of benefits while avoiding legislating a way that creates an undesirable degree of inflexibility in the appointment and deployment of panel members, or might deter high-quality candidates seeking appointment to the panel.
45. The government considers that shorter appointments could allow for the panel to be refreshed more regularly and enable the membership to remain aware of developing business models, technologies and practices. The government also believes that a shorter appointment period would allow scope for better performance management of the panel membership by the Chair of the CMA, or perhaps the CMA Board. This would need to be weighed against the cost of additional appointment processes and the time it takes for panel members to gain familiarity with the system. The government proposes to reduce the standard period of appointment for panel members from up to eight years to up to four years. The government would also allow for Panel members to be reappointed for up to a further four years where appropriate (and perhaps for a further short period where circumstances warranted), although the government notes that it will be necessary to ensure that the ability to reappoint panel members would not call into question their impartiality or independence from Ministerial control.

46. In order to realise the full effect of the expected benefits of changing the role of panel inquiry groups, the government acknowledges that it will be necessary to be careful to ensure that their removal does not increase costs or lead to a greater number of appeals.
47. The government acknowledges that there might be concern that under this model the decision-makers were not sufficiently independent of the CMA Board, or its policies, to guarantee that in contested cases, the overall process would ensure that parties would receive a fair hearing by an independent and impartial tribunal. Under the current system these rights are safeguarded because of the independence and impartiality of the panel on the one hand and the right of the parties to apply for inquiry group decisions to be reviewed by the CAT. If the government was to amend the system we believe that it would be possible to ensure sufficient routes of appeal at a suitable standard of review to meet our international obligations.

Q 1 – In light of the fact that the CMA has been in operation for over two years, is the government right to consider changes to the way that the CMA panels and decision making processes work?

Q 2 – If yes, on which areas considered in this consultation should the government focus its efforts?

Q 3 – Do you have any further comments on the UK’s approach to decision making in market and merger investigations?

Timeliness of markets considerations

48. The CMA has conducted two high-profile, large-scale market investigations since its inception in 2014. In both cases, the inquiry groups conducting the investigations have made use of their power to extend the statutory timescale. As a result, there is no evidence that market investigations are currently taking noticeably less time to complete than under the pre-2014 regime.
49. The government notes that the new statutory timescales for phase 1 and the implementation of remedies should reduce the time taken for the end-to-end process for market investigations. We also note that the CMA’s two market investigations to date are complex, given the size and nature of the markets and the impact of possible remedies on consumers, businesses and the economy. However, the government introduced the changes in 2013 in order to reduce business burden and uncertainty and to ensure results are secured for consumer in a timely way and we think it is right to consider whether further refinements to the system would help achieve the government’s objectives.
50. The government believes that there are three options to address this problem:
- option 1 – reduce the statutory timetable from 18 months to 12 months and retain the six month permitted extension but require approval from the CMA Board to allow the CMA group to use the extension, as set out above;
 - option 2 – retain the current 18 month statutory time limit and remove the right to extend the timescale; and

- option 3 – retain the current 18 month statutory time limit and allow the CMA Board to determine the timeline of a market investigation linked to its scope.
51. Option 1 would help to reduce the base time for market investigations and would provide a faster outcome and greater certainty for businesses and consumers. To allow CMA decision-makers to react to unforeseen circumstances, the ability to extend the statutory timescale could be retained. The government is clear that we believe that this power should only be exercised for truly special reasons. It is normal to want to use all the time available to reach a decision and assess the possible remedies, and there are legal risks in not doing so. This is why the government is also proposing to give the CMA Board greater powers to scrutinise and challenge the use of extensions in market investigations by the CMA groups to ensure that they are only used for truly special reasons.
 52. The government considers that option 2 would give complete certainty about the length of an investigation and would remove any perverse incentives associated with the right to extend. However, it could result in all market investigations taking the full 18 months, even where they could be concluded more quickly.
 53. Option 3 would create greater accountability for the CMA Board and should ensure that market investigation timelines are tailored to the complexity of the market under investigation. The government would expect to see a process where the Board assumes the shortest possible timetable and only moves towards the statutory maximum in extreme cases. However, it would increase the role of the Board in setting the scope of the investigation and may, therefore, impinge on the independence of the inquiry groups.
 54. In relation to all these options, the government recognises that timescale changes may have an impact on the scope and depth of investigation that it will be possible to carry out at phase 2, which may not be desirable for carrying out a full diagnosis and proposing remedies. It is also recognised that the practical result may be that more work has to be done at phase 1 or before phase 1 begins, which may mean the overall length and burden of investigations may not change significantly.
 55. The government would also welcome views on whether the powers of the CMA should be modified to allow it to revisit remedies imposed following market investigations where they are shown not to be working, subject to a public consultation on the need to do so. The CMA can currently reconsider remedies where there is a material change in circumstances. The government believes that there is merit in considering whether we could design a proportionate way to allow the CMA to vary remedies based on a targeted reconsideration of certain aspects of a previous market investigation, without the need for a full, new market investigation.

Q 4 – Which, if any, of the options for reducing the end-to-end time taken for market investigations should the government pursue?

Q 5 – Please provide any comments on the current system or government’s proposed approach to amending it.

Q 6 – Should the government amend the powers of the CMA to allow it to revisit remedies imposed following market investigations where they are shown not to be working?

Streamlining merger assessments

56. The government believes that the reforms to the merger assessment process introduced in 2014 have had a broadly positive impact, including helping to ensure that merger assessments are conducted more quickly. Now that they have been in use for two years, the government believes that there is merit in considering whether the processes could be further streamlined. The government is keen that the CMA seeks to minimise the burden on business imposed by pre-phase 1 scrutiny and phases 1 and 2 of the assessment. The government is keen to see a more targeted approach to pre-phase 1 information requests and encourages the CMA to facilitate a smoother transition from phase 1 to phase 2 to avoid duplication of information requests and speed up the end-to-end process.
57. The government does not believe that this requires legislative change. We believe, instead, that many of these improvements can be achieved through procedural changes by the CMA, though we believe they are worth considering here in case there are other legislative options the government should take forward. In this section, the government seeks views on which changes could deliver improvements.

Notified mergers

58. Business representatives believe that the new notification process and merger notification form has led to an increased information burden on business. They consider that this is a side effect of the new mandatory timetable which means that the CMA needs more information than previously to conduct a phase 1 assessment within the statutory time limit.
59. Businesses are concerned that, with the deadlines and the desire to prevent cases entering phase 2, the CMA requests significant amounts of information at phase 1 – using its extensive information-gathering powers. Business representatives are also keen that the CMA reviews its practice to consider how frequently the various categories of information are actually required, so that they can consider the proportionality of the requests. The CMA conducted a targeted review of its merger assessment process, which included feedback from the top 20 user law firms. The review was based on a representative sample of cases investigated by the CMA since April 2014. The CMA's analysis yielded a range of practical recommendations for incremental changes to the use of the Merger Notice and pre-notification processes. It is anticipated that these incremental changes will result in the period prior to the initiation of a formal investigation being used more effectively and potentially shorten it further where appropriate and desired by the notifying parties to a merger. The information requested at the outset will also be more targeted, building on the experience the CMA has gathered during the first two years of its existence

and the use of the merger notice form. The CMA will be implementing the recommended changes by September 2016.⁶

Non-notified mergers

60. The CMA also has a responsibility to keep merger activity under review and can investigate mergers that have not been notified to it. Not having a mandatory notification system for all mergers is a key benefit of the UK regime and ensures that the burden on businesses is proportionate and targeted. However, the CMA ensures that non-notified mergers that have the potential to cause competition issues are considered, when necessary. To do this, the CMA obtains information about anticipated and completed mergers from a range of sources, including from third parties. Where the CMA learns of a merger that it thinks might harm competition, the CMA can open an investigation on its own initiative. This prevents businesses having to notify unnecessarily but does result in a degree of uncertainty in the system.
61. At times, the CMA may contact the businesses in order to establish whether the thresholds that trigger its jurisdiction are met and to obtain information about the merger. To do this the CMA will send the acquiring party or parties an enquiry letter (an informal enquiry is normally made on the basis of section 5 of the EA02). In making a decision whether to send an enquiry letter, the CMA will consider whether the merger in question is one in which there is a reasonable prospect that its duty to refer may be met.
62. The extent of information requested by the CMA in its enquiry letter will vary depending on the circumstances of the merger in question. If citing section 5 of the EA02 in the letter (which it usually does) the CMA can enforce statutory deadlines for a response and use civil sanctions (fines) if the respondent does not respond in time.
63. If the response to the enquiry letter contains all the information that the CMA needs to begin its investigation (including both jurisdictional and substantive information), the CMA reviews the merger in the same way as if it had been notified, and its 40 working day statutory timetable will begin from the working day after it confirms receipt of the necessary information.

Options for reducing the information burden of notified and non-notified mergers

64. To address the concerns about the burden of information requests, the government intends to work with the CMA to develop guidance on the type of information which the CMA should request and the frequency with which it should request it. The CMA is taking steps to address the issue by clarifying its guidance notes and making changes to the merger notice so that companies understand better why they are being asked for certain information. We are keen that businesses and other interested parties work with the CMA to ensure that they improve the situation. To that effect, the CMA will launch a public consultation on the proposed amendments to the merger notice in due course.

⁶ www.gov.uk/government/publications/review-of-use-of-the-cmas-merger-notice-and-initial-enforcement-orders

65. The government believes that the guidance will allow businesses better to understand the information which they should provide if they are considering a merger or if they are faced with an enquiry letter from the CMA. More information on the CMA's proposed changes to guidance can be found on its website.⁷
66. While the government believes that this issue can be addressed without legislation, there are legislative options which the government could pursue. The government could legislate to restrict the frequency and type of information request which the CMA could make in advance of and during a phase 1 assessment. This could include creating a restricted statutory list of documentation which the CMA could request and ensuring that it can only approach businesses for information on a limited number of occasions. The government believes that, although this approach will create certainty for business, it could unduly limit the CMA's ability to gather information and could lead to more cases being referred to phase 2 due to a lack of information about the possible impact.
67. The second legislative option would involve amending primary legislation to create a new obligation that all CMA information requests must be proportionate, considering the impact on business. The obligation would include a requirement to review their requests periodically and report to Ministers on how the information is used. Specifically, this would require the CMA to follow up on all Section 5 information requests when considering whether to call in a merger so as to ensure that businesses understand where they are in the process and update them on whether CMA is likely to call in the merger and consider it under the formal process. The government notes that the CMA is under a general duty to act fairly and reasonably, but the government believes that enshrining this in statute could help the CMA better to understand the impact of its requests on business. This approach, with accompanying guidance, may provide sufficient clarity for businesses in advance of information requests or during merger assessments.
68. The government considers that the guidance options should allow for quick and flexible updates to the rules and be easy for the CMA to implement quickly. However, we are keen to seek views on whether further legislative changes would be beneficial to support these changes.

Hold-separate orders or initial enforcement orders (IEOs)

69. Under the merger regime the CMA can issue hold-separate orders (or initial enforcement orders, IEOs) which prevent the merging parties from (further) integrating an acquired business. It has the power to require parties to unwind steps towards integration where such steps would render possible remedial action unnecessarily difficult.
70. Stakeholders have flagged that these can be intrusive and can create serious practical challenges for completed deals. In addition, they are unpredictable under the current voluntary merger control regime because it is difficult for parties to know whether the CMA will choose to investigate a non-notified deal (and therefore, in

⁷ www.gov.uk/government/news/cma-outlines-further-improvements-to-merger-process

most cases, issue a hold-separate order). However, the CMA has, so far, not ordered merging parties to unwind integration steps at phase 1.

71. As far as hold-separate orders are concerned, the current merger control regime was designed to compensate for some of the perceived shortcomings of the voluntary nature of the regime, in particular the risk of potentially harmful transactions proceeding with limited options to impose effective remedies at a late stage. In recognition of the concerns raised, the CMA has started revoking IEOs at an early stage of the phase 1 investigation where it has become clear that the risk of remedial action being rendered too difficult is either sufficiently low or actions have been taken to mitigate it. It now routinely revokes IEOs at an early stage in the vast majority of cases.
72. Businesses are, though, keen that the CMA undertakes reasonable enquiries as to whether a deal is likely to raise competition concerns before imposing hold-separate orders. In addition, the CMA should discuss its terms with the company unless there is a clear risk of irreversible pre-emptive action being taken. The CMA recently undertook a review of the use of its power to impose IEOs in phase 1 merger assessments. It obtained views from over 20 law firms and reviewed the IEOs issued and derogations imposed in a representative sample of cases since April 2014.
73. As a result of that review, the CMA is currently implementing a set of recommendations to improve its use of IEOs. These steps include publication of a guidance note on the CMA's approach to derogations, based on the experience of the CMA so far, to give businesses more certainty on what actions the CMA may exempt from the scope of the IEOs and ensure a better understanding of the CMA's approach to derogations. The process for granting derogations will also be standardised and streamlined further.
74. In addition, the CMA is considering whether an objective set of circumstances can be defined in which the risk of not imposing IEOs is minimal and, as such, imposing IEOs may be disproportionate. As with the merger notice and pre-notification processes set out above, these incremental changes are expected to be implemented by September 2016.

Q 7 – Is the government right to believe that there is no legislative change required in relation to the CMA's merger assessment powers?

Q 8 – If no, please set out where you believe that the government should seek to legislate and why.

Changes to CMA powers to support more effective enforcement

Background

75. The government believes that effective enforcement of the UK's antitrust and competition laws is important to ensure a fair, effective and competitive economy. CA98 and EA02 set out the UK's competition legal framework covering antitrust provisions (including cartels), mergers, markets and the criminal cartel offence. The legislation also gives the CMA powers to investigate and take enforcement action against possible breaches of those laws.
76. Chapter 1 of CA98 prohibits anti-competitive agreements between businesses which prevent, restrict or distort competition. Chapter 2 of CA98 makes it unlawful for a business to abuse its dominant position in a market to the detriment of consumers or other businesses. Both CA98 and EA02 provide the CMA with certain powers to request information and to enter premises in order to support their enforcement functions.
77. In order to act as a deterrent to anti-competitive behaviour, the CMA has access to a number of enforcement powers. The Courts can impose criminal sanctions against those found guilty of the cartel offence under EA02, while in antitrust cases the CMA can impose fines of up to 10% of a business' global turnover. The government has also recently consulted on whether to provide the CMA with new powers to impose fines for certain breaches of consumer law⁸.
78. The CMA relies on being provided with accurate information to ensure that it can carry out its functions effectively. Under powers in CA98 and EA02, it is a criminal offence to provide false or misleading information. Conviction can result in an unlimited fine and/or imprisonment for up to two years. This prohibition can have an important deterrent effect. However, the CMA does not have powers to investigate breach of these provisions and has found that the resources required to pursue a criminal prosecution are considerable and a potentially disproportionate mechanism in relation to lesser breaches. This may diminish the deterrent effect of the offence.
79. The CMA also relies on information being provided to it promptly in response to requests. Thus for certain other actions which impede its investigations, such as failures to comply with formal information notices, the CMA may impose a fixed or a daily administrative penalty. Currently, the CMA may only impose a daily penalty for a breach of formal obligations under CA98 and EA02 after the final decision to impose an administrative penalty is issued and only if the party has not at that stage complied with the requirement. In practice, a daily penalty is, in most cases, unlikely ever to be imposed. For example, Party A does not comply with a formal information request or misses a deadline without a reasonable excuse and the CMA issues a provisional decision stating that it intends to issue a daily penalty from the day of the final decision. Party A has the opportunity to make representations during this period. It is highly likely that in the period between the issue of the CMA's provisional

⁸ www.gov.uk/government/news/government-to-tackle-the-small-print

decision and any final decision that the Party will provide the outstanding information. Therefore, a daily penalty for the original non-compliance could not be imposed.

80. The government changed the law through the CRA to make it easier for consumers and businesses to seek redress for harm caused by breaches of CA98. The aim of the provisions was, in part, to provide a greater deterrent to antitrust violations. For this to be successful, the government believes that it is important that there is a strong flow of CMA enforcement cases. The NAO highlighted concerns in this area in its recent report.
81. One of the highest profile areas of responsibility for the CMA is prosecution of the criminal cartel offence. An individual may commit the cartel offence under EA02 if he or she agrees with one or more other persons to make or implement certain prohibited cartel arrangements in relation to two or more undertakings, namely price fixing, market sharing, bid-rigging, and limiting output.
82. In England, Wales, and Northern Ireland, prosecution for the cartel offence may only be brought by the CMA or the Serious Fraud Office, or with the consent of the CMA. In practice, all prosecutions for the EA02 cartel offence have so far been undertaken by the CMA or its predecessor, the OFT. There have been no prosecutions in Scotland, which would be brought by the Crown Office and Procurator Fiscal Service.
83. The cartel offence is triable either way, with the maximum penalty on conviction on indictment being five years imprisonment and/or an unlimited fine.
84. In common with major competition authorities in other countries, the CMA operates a leniency regime under which businesses which breach competition law can gain immunity from, or a reduction in, fines for breach of antitrust laws. Under its leniency policy, the CMA can also issue individuals with 'no action letters' under section 190(4) EA02⁹. The purpose of the leniency regime overall is to help with the detection, investigation and prosecution of cartels, which are invariably conducted in secret and tend to generate very little in the way of probative documentary evidence.
85. A 'no-action letter' in relation to a criminal cartel provides an individual with immunity from prosecution for the cartel offence in respect of the cartel activity described in the letter. They can only be issued by the CMA and an individual may be able to obtain one either when:
 - the business employing the individual has been granted immunity from financial penalties, or lenient treatment, under the CA98, or
 - the individual has directly approached the CMA for a no-action letter.

Proposals

86. The government proposes introducing one new fining power for the CMA and amending the process and basis for one further set of fines.

⁹ A leniency regime also applies to civil enforcement of cartels. The CMA has published guidance on Leniency and no-action applications in cartel cases (OFT1495, adopted by the CMA Board).

87. The new fining power relates to the enforceability of undertakings and commitments made by parties to bring to a close investigations under CA98 or EA02. Under the current law, the CMA cannot impose fines for breaches of these commitments or undertakings, though in similar cases, the European Commission can issue such fines. To enforce them, the CMA must apply to the High Court for an Enforcement Order. If the parties subsequently do not comply with that Order they may be subject to a finding of contempt of court. Although this is a significant penalty, with imprisonment and an unlimited fine available to the High Court, it is a lengthy process to get to that stage, during which time the original competition breach may continue, harming businesses and consumers.
88. The government proposes to allow the CMA to issue fines, on the civil standard of proof, for breaches of commitments and undertakings. The government believes that this will increase the deterrent effect and will help to improve enforcement where breaches of CA98 and EA02 requirements do occur. This will help to ensure that the benefits accruing to consumers and businesses of the CMA's enforcement activity will be realised more quickly.
89. The government further proposes to supplement the mechanisms for taking action against parties who provide false or misleading information. The government believes that the process for pursuing enforcement action can be disproportionate, making it difficult and time-consuming to secure a conviction, potentially leaving an enforcement gap. The government proposes, therefore, to legislate to allow for a more proportionate alternative, to sit alongside the criminal regime, to be used in less serious cases. The alternative route would allow for administrative penalties to be imposed where the CMA was satisfied, according to the civil standard of proof, that it had been knowingly or recklessly misled. The CMA would need to decide which route to pursue and would not be able to pursue breaches through both routes. The level of the fine would be in keeping with the CMA's other administrative fining levels. The government believes that this would create a greater deterrent to parties considering providing false or misleading information. The government would ensure that sufficient rights to appeal were put in place so as to ensure that the fining powers are exercised fairly and proportionately. The CMA would also be given specific powers to enable them to investigate whether they have been misled.

Q 9 – Do you agree with the government's proposal to allow for a parallel fining power on the civil standard of proof for parties who provide false or misleading information?

90. The government also considers that this is the right time to consider the level of fines that the CMA can impose in order to ensure that there is a sufficient deterrent for breaches of requirements in antitrust, merger and market investigations. The CMA can currently issue fines of up to £30,000 for fixed fines and up to £15,000 per day for a daily fine. Other jurisdictions can issue much larger fines or take a different approach to how they are calculated. For example, the European Commission and the French competition authorities can issue fines of 1% of average daily turnover for daily penalties and 5% of worldwide turnover for fixed penalties. The German competition authority can issue a €100,000 maximum penalty for failure to comply with a merger information request

91. The government would welcome views on whether there is merit in increasing the level of fines which the CMA can impose in order to increase the deterrent effect. We would also like views on whether we should change the point from which the CMA can impose a daily fine. There are two options which, taken separately or together, could achieve this aim:
- option 1 – Increase the maximum penalty that the CMA can award from the current levels of £30,000 for a fixed fine and £15,000 for a daily fine or allow the penalty to be calculated by reference to turnover; and
 - option 2 – allow the CMA to impose a daily penalty by reference to an earlier date – the date it considers a person had no reasonable excuse for not complying with its request.
92. The government welcomes views on whether option 1 is necessary and whether option 2 would provide the CMA with an effective deterrent to allow it to enforce more robustly. The government would also appreciate views on whether the two options should be introduced together.

Q 10 – Which, if any, of the options for amending the level of fine that the CMA can impose for breaches of requirements in merger and markets investigations should the government pursue?

Q11 – If fines should be increased, what do you think would be an appropriate approach and level?

93. Regarding the criminal cartel offence, there is rarely a clear ‘money trail’ from an identifiable victim or victims to the cartelists. As a result, such cases can by their nature be difficult to discover, investigate or prosecute without information from those involved in the cartel.
94. As set out above, the CMA relies on cooperation from cartel suspects to increase its chances of a successful conviction under the criminal cartel offence. However, not all individual suspects will be eligible for ‘no action letters’ and immunity from prosecution as they may not be the first person providing information to the CMA. They might still wish to help the CMA’s investigation by, for example, giving evidence against co-defendants. Such agreements with these ‘assisting offenders’ have historically operated in the criminal justice system under the common law. However sections 71 to 75 of the Serious Organised Crime and Police Act 2005 (SOCPA) established a statutory framework for regulating them. The CMA is not a ‘designated prosecutor’ for the purposes of SOCPA and consequently neither it nor the suspect can benefit from the increased safeguards and transparency of the process as designed by the terms of SOCPA, including the right to refer a case back to court for a review of a sentence (section 74 SOCPA) given to an assisting offender.
95. The government considers that the safeguards and transparency offered by SOCPA could beneficially be extended to the CMA, further enhancing its ability to prosecute criminal cartel activity.

96. The government therefore proposes to amend SOCPA to designate the CMA as a specified prosecutor under section 71(4).
97. Designation of the CMA as a SOCPA prosecutor will not change the no-action letter regime applicable to the criminal cartel offence, nor will SOCPA immunities be granted in respect of the criminal cartel offence. However, SOCPA designation of the CMA will mean that the CMA could enter into agreements with assisting offenders under sections 72 to 74 of SOCPA in respect of the criminal cartel offence.

Q 12 – Is the government right to seek to designate the CMA as a prosecutor under SOCPA for criminal cartel cases?

98. Stakeholders are also keen to see the CMA make more infringement decisions. The CMA also recognises that there is work to be done to increase the number and speed of its competition enforcement cases (while maintaining rigour and fairness). The government believes that this would increase the effectiveness of the regime for private actions for damages.
99. The government and the CMA believe that these concerns can be addressed through non-legislative changes. The CMA is considering how best to do that, including looking at its governance and decision-making, and access to file practices and procedures, for example making greater use of confidentiality rings. The government will ask the CMA to set out how it will address these issues during 2017.

Appeals to the Payment Systems Regulator

100. The Payment Systems Regulator (PSR) was launched on 1 April 2015 as the economic regulator of the UK payments industry. The PSR has three objectives, as set out in the Financial Services (Banking Reform) Act 2013 (FSBRA): to promote competition, to promote innovation and to ensure that payment systems work in the interests of those that use them.
101. FSBRA gives the PSR a number of powers in pursuit of those objectives. These include powers to issue directions to participants in regulated payment systems, to impose financial penalties for non-compliance, and powers to require the granting of access to a regulated payment system.
102. Under FSBRA, some of the PSR's decisions are appealable to the CAT, while others are appealable to the CMA. The following PSR decisions are appealable to the CMA:
- a PSR decision to require the granting of access to a regulated payment system;
 - a PSR decision to vary an agreement relating to a regulated payment system;
 - and
 - a PSR decision to require the disposal of an interest in the operator of a regulated payment system or an infrastructure provider to a regulated payment system.
103. FSBRA states that appeals against PSR decisions that can be appealed to the CAT are governed by the CAT's own rules, including rules on the period within which an

appeal may be brought. However, there is currently no statutory time limit on the making of appeals to the CMA against the above decisions.

104. The absence of a statutory time limit on appeals to the CMA against the above PSR decisions creates uncertainty for affected firms and for the payments industry as a whole, as it is unclear for how long such decisions remain at risk of being overturned if successfully appealed.
105. As such the government proposes amending FSBRA to introduce a statutory time limit on when appeals to the CMA against PSR decisions can be brought. The government proposes to set this limit at two months. This will give appellants a meaningful opportunity to assess the PSR decision and to prepare an appeal. This aligns with the deadline for appeals to the CAT against PSR decisions, and with equivalent appeals regimes in other sectors (for example, appeals to the CMA against price control decisions by the telecoms regulator).

Q13 - Do you agree that the government should introduce a statutory time limit of two months for appeals against PSR decisions that are heard by the CMA?

Changes to the functions and jurisdiction of the Competition Appeal Tribunal

Background

106. The Competition Appeal Tribunal (CAT) was created in 2003 as the UK's competition appellate body for competition cases in the UK. Its functions include the power to hear and decide appeals against decisions taken by the CMA and the economic regulators under the CA98 and certain other legislation, for example decisions made by OFCOM under the Communications Act 2003. It also has responsibility for handling claims for damages for breaches of competition law (brought both on an individual or collective basis), applications for injunctions and approving collective settlements.
107. The CAT is highly respected by consumer organisations and businesses. In 2015, the government further enhanced the role of the CAT by increasing its powers and establishing it as the principal court to hear claims for damages (including opt-in and opt-out collective damages claims and the establishment of a new fast track procedure for claims by SMEs) for infringements of competition law. This is already showing signs of improving access to redress for consumers and businesses (with 9 civil actions having been lodged with the CAT since the coming into force of the CRA in October 2015, three of which have involved the new fast track procedure) and will, over time, reduce the burden on the High Court, freeing up its resources for other work.
108. The following section considers changes which could be made to the rules, functions and jurisdiction of the CAT. The government believes that the changes proposed below will create greater certainty, allow for faster conclusion of cases and confirm the CAT as the principal court for consideration of competition matters.
109. The changes to private actions for damages following breaches of competition law, brought in in October 2015, sought to make it easier for individuals and businesses to play an active role in competition enforcement and to establish the CAT as the primary court for competition issues.
110. Working with the CAT, the government has identified a number of areas where improvements can be made to the CAT's jurisdiction to further ensure swift and effective access to redress. In the main, these changes are designed to speed up the process and to provide greater clarity for the parties involved.

The CAT and the Competition Service

111. On the creation of the CAT, it was decided that, in order to allow the CAT to concentrate on its judicial role, it should be supported by an administrative body – the Competition Service (CS). In practice, the CAT and the CS function as a single integrated organisation sharing the same staff (who multi-task across a range of case-related and administrative tasks) and other resources. In light of this, the Cabinet Office's Triennial Review, published in November 2014, suggested that the additional expense of maintaining the accounting and bureaucratic arrangements

involved in keeping the CS as a separate administrative body was no longer justifiable.

112. The government believes that the arguments in favour of retaining a separate administrative body for the CAT are no longer valid. The recent triennial review of the two bodies shows that they work very closely together and that there could be cost and efficiency savings in abolishing the CS and transferring its functions to the CAT. For example, only one set of accounts would need to be sent to the Comptroller and Auditor General, rather than two sets as is currently the case. Therefore, in line with government policy to rationalise the number of public bodies, the government proposes to merger the CAT and the CS.

Q 14 – Do you agree that the Competition Service should be abolished and that the CAT should assume its functions?

The CAT's jurisdiction to hear claims for damages in respect of infringements of competition law

113. As stated above, changes brought in under the CRA sought to establish the CAT as the principal court for hearing claims for damages arising from breaches of competition rules. The CAT can hear damages claims based on infringements of CA98 and Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU) which establish treaty obligations in respect of competition. However, under the current legislative framework, it cannot hear claims for damages based on infringement of the parallel provisions of the European Economic Area (EEA) Agreement (Articles 53(1) and 54).
114. Many decisions taken by the European Commission in respect of infringement of European competition law now cover both breaches of the TFEU and the EEA Agreement. Often there is a complete overlap but sometimes a decision finds distinct breaches of the EEA Agreement. One example of this was the recent air freight cartel damages case recently before the High Court. If the High Court had wished to transfer those proceedings to the CAT or a claimant wished to start an action in the CAT arising from a cartel infringing both the EEA and the TFEU, the CAT would not currently have jurisdiction over all aspects of the claim. The CAT would be limited to dealing with the allegations linked to breaches of the TFEU.
115. In practice, that would mean that a claimant in such a case would either need to bring the whole case at the High Court or would need to apply to the CAT and the High Court to hear different elements of the same case. In either scenario this would hinder the effectiveness of the enhanced private action regime created by the CRA and create complexity, leading to considerable delay and expense for claimants.
116. The government believes that this anomaly should be corrected and so we propose to amend the CAT's jurisdiction to allow it to hear claims for damages arising from infringement of the EEA Agreement. The government believes that this will ensure that the operation of the enhanced system of private actions in respect of infringements of UK and European competition is not unduly hampered by a purely technical point affecting the claimant's choice of venue in the legal system for such actions. We estimate that this will affect approximately 5 to 10 cases each year.

Whilst that is a relatively small number each case is likely to constitute a significant piece of litigation

Q 15 – Do you agree that the jurisdiction of the CAT should be extended to allow it to hear cases (or elements of cases) which relate to breaches of articles 53 and 54 of the EEA agreement as well as breaches of UK competition law and Articles 101 and 102 of TFEU?

The CAT and judicial review applications

117. Under CA98, the CAT can only hear appeals concerning administrative decisions that are listed in sections 46 and 47. In general terms, those decisions concern a finding of infringement of one or both of the CA98 prohibitions regarding anticompetitive agreements and conduct (and the equivalent prohibitions in Articles 101 and 102 TFEU), the imposition of a penalty, the imposition or refusal to grant interim measures and decisions concerning commitments. In other words the list of appealable decisions is focussed on the substantive outcomes to investigations.
118. However, from time to time, there could be challenges that arise in the course of an investigation to the way that investigation is being conducted, for example, a refusal by the investigating authority to allow the subject of the investigation access to see key documents. These are essentially process and fairness challenges that can currently only be contested by a judicial review application to the High Court (although parties may seek to make such challenges through internal CMA processes, including recourse to the CMA's Procedural Officer¹⁰).
119. Given that such applications will arise in the specialised context of competition law and policy, it would make sense for the CAT to be able to hear and decide such cases. It is also likely that the CAT could hear and dispose of such challenges faster than the High Court, where it can take time for a case to come on for hearing – with the consequent delay and disruption to the conduct of the ongoing investigation. In this regard it is worth noting that the CAT already has the power to hear judicial review applications relating to such “process challenges” in relation to the CMA's exercise of its powers under the EA02 during the conduct of merger and market inquiries and has generally determined such matters swiftly (see for example, *Sports Direct International PLC v Competition Commission* [2009] which concerned access to documents during an investigation).
120. The CAT has a track record of dealing with judicial review applications relating to cases under EA02. The government proposes to extend this right to allow the CAT also to hear judicial review applications in respect of matters arising in the conduct of ongoing CA98 cases (which at present are heard by the Administrative Court). We believe that allowing the CAT to hear CA98 judicial review applications will allow for faster resolution of complaints during the course of the CA98 investigation and allow it to be brought much more quickly to a final decision. We expect that it will help to reduce the time taken on such judicial reviews from over a year to three to six months.

¹⁰ See the CMA's web pages www.gov.uk/guidance/procedural-officer-raising-procedural-issues-in-cma-cases.

Q 16 – Is the government right to allow the CAT to hear judicial review applications in respect of matters arising in the conduct of ongoing CA98 cases?

Declaratory judgments

121. Often in civil cases where the parties want to clarify whether their particular situation or obligations are affected by competition law, without waiting until there is a claim for damages (e.g. for supply agreements, so that the parties can work out their relations going forward), they will seek a declaratory judgment from the court. In many cases where a party seeks an injunction, it may also want a declaration as to the legal position. At present the CAT's jurisdiction in civil cases covers an award of damages and the grant of an injunction, but does not expressly enable the grant of a declaration, even if that is sought in conjunction with one of those other remedies. If the parties only want a declaration, they are confined to the High Court. The government views this as an anomaly which needs to be addressed in order to avoid undermining the effectiveness of the enhanced system of private actions created by the CRA and therefore proposes to equip the CAT with the express power to give declaratory judgments.
122. The government proposes to give the CAT an express power to give declaratory judgments in private actions for damages, thereby correcting an anomalous situation which could in future hamper the effective operation of the enhanced system of private actions introduced by the CRA.

Q 17 – Is the government right to give the CAT a power to give declaratory judgments in private actions for damages?

Warrants

123. Section 41 and Schedule 13 of ERRRA sought to provide the CAT with the power to issue warrants allowing the CMA to enter premises in the course of its investigations into breaches of competition law. However, the power provided by ERRRA does not give the government the power to make rules governing the supervision of the execution, variation or subsequent discharge of the warrants. This has meant that it has not been possible to craft a workable set of rules for the CAT to exercise powers in relation to warrants and the government now proposes to take the opportunity to change that situation
124. The government proposes to amend ERRRA to ensure that the government has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations. This will not affect the parallel ability of the High Court to issue and supervise warrants.

Q 18 – Is the government right to seek to amend ERRRA to ensure that the government has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations?

7. What happens next?

This consultation will run for four weeks. During that time, BIS officials will engage with interested parties, including consumer groups and business representative organisations, to ensure that a wide range of views is gathered.

After the consultation closes, the government intends to publish a response by autumn 2016 setting which, if any, of the options we intend to take forward.

Annex A: Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

www.gov.uk/government/publications/consultation-principles-guidance

Comments or complaints on the conduct of this consultation

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:

Angela Rabess
BIS Consultation Co-ordinator
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 1661
Email: angela.rabess@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead (see [part 5](#)).

Annex B: List of individuals/ organisations consulted

We shall be contacting as wide as possible range of organisations during the consultation period, including:

Ashurst LLP
Baker and MacKenzie
Bar Council of England and Wales
Brick Court Chambers
British Chambers of Commerce
British Institute of International and Comparative Law
British Private Equity and Venture Capital Association
Charles River Associates
Citizens Advice
Citizens Advice Scotland
City of London Law Society
Civil Aviation Authority
Clifford Chance
Competition Appeal Tribunal
Competition Law Association
Competition Law Forum
Competition and Markets Authority
Confederation of British Industry
Consumer Council for Northern Ireland
DLA Piper
Edwards Wildman Palmer UK LLP
ESRC Centre for Competition Policy
Federation of Small Businesses
Financial Conduct Authority
Financial Services Consumer Panel
Forum for Private Business
Freshfields Burckhaus Deringer LLP
Hausfeld & Co. LLP
Herbert Smith Freehills LLP

Hogan Lovells International LLP
Industrial Communities Alliance
Institute of Directors
King's College London
The Law Society
The Law Society of Scotland
Law Society of Northern Ireland
Linklaters
Local Government Association
London School of Economics
Matrix 19
Monckton Chambers
Monitor
National Council for Voluntary Organisations
Norton Rose Fulbright
Office of Communications (Ofcom)
Office of Gas and Electricity Markets (Ofgem)
Office of Rail and Road (ORR)
Oxera
Payment Systems Regulator
Senior European Experts Group
Slaughter and May
Solicitor's Regulation Authority
Trades Union Congress
UK Competitive Telecommunications Association
UK State Aid Law Association
University of East Anglia
University of Strathclyde
Utility Regulator for Northern Ireland (NIAUR)
Water Services Regulation Authority (Ofwat)
Which?
39 Essex
6KBW College Hill

Annex C: Response form

The consultation is available at: www.gov.uk/government/consultations/uk-competition-regime-options-for-further-reform.

The closing date for responses is **24 June 2016**.

Please return completed forms to:

Carl Davies
Consumer and Competition Policy Team
Department for Business, Innovation and Skills
Victoria 359
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 6220

Email: competition@bis.gsi.gov.uk

Please be aware that we intend to publish all responses to this consultation if required.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see page 8 of the consultation for further information.

If you want information, including personal data, that you provide to be treated in confidence, please explain to us what information you would like to be treated as confidential and why you regard the information as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential

Comments: [Click here to enter text.](#)

Questions

Name:

Organisation (if applicable):

Address:

	Respondent type
<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

Question 1 (paragraph 47)

In light of the fact that the CMA has been in operation for over 2 years, is the government right to consider changes to the way that the CMA panels and decision making processes work?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 2 (paragraph 47)

If yes, on which areas considered in this consultation should the government focus its intervention?

Refinements to the existing panel system	<input type="checkbox"/>
Streamlining of inquiry group role	<input type="checkbox"/>
Improving inquiry group accountability to the CMA Board	<input type="checkbox"/>
Improvements to the constitution of panels	<input type="checkbox"/>
Panel size and time commitment	<input type="checkbox"/>
Experience of panel members	<input type="checkbox"/>
Length of appointment	<input type="checkbox"/>

Question 3 (paragraph 47)

Do you have any further comments on the UK's approach to decision making in market and merger investigations?

Comments: [Click here to enter text.](#)

Question 4 (paragraph 55)

Which, if any, of the options for reducing the end-to-end time taken for market investigations should the government pursue?

Option1 – reduce the statutory timetable from 18 months to 12 months and retain the 6 month permitted extension	<input type="checkbox"/>
Option 2 – retain the current 18 month statutory time limit and remove the right to extend the timescale	<input type="checkbox"/>
Option 3 – retain the current 18 month statutory time limit and allow the CMA Board to determine the timeline of a market investigation linked to its scope	<input type="checkbox"/>
None of the above	<input type="checkbox"/>

Question 5 (paragraph 55)

Please provide any comments on the current system or government's proposed approach to amending it.

Comments: [Click here to enter text.](#)

Question 6 (paragraph 55)

Should the government amend the powers of the CMA to allow it to revisit remedies imposed following market investigations where they are shown not to be working?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 7 (paragraph 74)

Is the government right to believe that there is no legislative change required in relation to the CMA's merger assessment powers?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 8 (paragraph 74)

If no, please set out where you believe that the government should seek to legislate and why.

Comments: [Click here to enter text.](#)

Question 9 (paragraph 89)

Do you agree with the government's proposal to allow for a parallel fining power on the civil standard of proof for parties who provide false or misleading information?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 10 (paragraph 92)

Which, if any, of the options for amending the level of fine that the CMA's can impose for breaches of requirements in merger and markets investigations should the government pursue?

Option 1 – Increase the maximum penalty that the CMA can award from the current levels of £30,000 for a fixed fine and £15,000 for a daily fine or allow the penalty to be calculated by reference to turnover	<input type="checkbox"/>
Option 2 – allow the CMA to impose a daily penalty by reference to an earlier date – the date it considers a person had no reasonable excuse for not complying with its request.	<input type="checkbox"/>
None of the above	<input type="checkbox"/>

Question 11 (paragraph 92)

If fines should be increased, what do you think would be an appropriate approach and level?

Comments: [Click here to enter text.](#)

Question 12 (paragraph 97)

Is the government right to seek to designate the CMA as a prosecutor under SOCPA for criminal cartel cases?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 13 (paragraph 105)

Do you agree that the government should introduce a statutory time limit of two months for appeals against PSR decisions that are heard by the CMA?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 14 (paragraph 112)

Do you agree that the Competition Service should be abolished and that the CAT should assume its functions?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 15 (paragraph 116)

Do you agree that the jurisdiction of the CAT should be extended to allow it to hear cases (or elements of cases) which relate to breaches of articles 53 and 54 of the EEA agreement as well as breaches of UK competition law and Articles 101 and 102 of TFEU?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 16 (paragraph 120)

Is the government right to allow the CAT to hear Judicial Review applications in respect of matters arising in the conduct of ongoing CA98 cases?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 17 (paragraph 122)

Is the government right to give the CAT a power to give declaratory judgments in private actions for damages?

Yes No Not sure

Comments: [Click here to enter text.](#)

Question 18 (paragraph 124)

Is the government right to seek to amend ERRA to ensure that the government has a comprehensive power to make rules allowing the CAT to exercise judicial supervision of all aspects of warrants in competition investigations?

Yes No Not sure

Comments: [Click here to enter text.](#)

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

[Click here to enter text.](#)

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

Please acknowledge this reply

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

Yes

No



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BIS/16/253