Department of Business and Trade – consultation on Refining Our Competition Regime

A submission by Frontier Economics

31 March 2026

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1. Frontier Economics is an economic consultancy that regularly advises clients on both national and European competition matters, including a significant number of cases before the UK Competition and Markets Authority (**CMA**).

2. Delivering on the Government's growth mission depends on businesses and investors having confidence in both the UK economy and institutions, as well as on a regulatory framework that is fit for purpose. Competition policy – with the CMA as the lead authority – is central to ensuring that markets function well and deliver benefits to consumers. In recent years, the CMA has taken a proactive approach to updating its guidance and practice, with a view to improving efficiency and ensuring that outcomes are delivered in a timely and proportionate way. We have broadly welcomed these developments, including the CMA's revised approach to remedies, efficiencies and markets work, while noting some important qualifications.

3. Against this background, we welcome the Department of Business & Trade (**DBT**) consultation on refining the competition regime as a further step towards ensuring the CMA has the powers and processes it needs to operate effectively. Frontier supports the objective of enhancing pace, predictability and proportionality, and we agree with many of the proposed refinements. However, the effectiveness of the reforms will depend on careful implementation, particularly in relation to decision-making safeguards, the calibration of evidential standards under the proposed market review tool, and the operation of the revised concurrency framework.

4. In particular, we consider that a key cornerstone of a predictable, proportionate and efficient competition regime – which is paramount to supporting economic growth – is ability to act independently. This principle underpinned the establishment of the CMA's predecessor bodies – the Office of Fair Trading (**OFT**) and the Competition Commission (**CC**) – as independent regulators, and we consider this model has served the UK well. We therefore have some reservations about the proposed changes to the CMA's decision-making processes and the reforms to the Panel system.

5. We agree that greater consistency and efficiency in decision making would be beneficial, and note that the CMA's direction of travel in this area has been welcomed by the business community. However, this should not come at the expense of the system's independence. The Government and the CMA should remain alert to reforms that could, over time, give

rise under-enforcement. Sustainable economic growth is ultimately driven by dynamic firms operating in competitive markets, and a short-term reduction in regulatory burden should not come at the expense of the competitive process that underpins long-term productivity and innovation.

6. In this response we set out:

   a. Our views on the **proposed changes to enhance the CMA's decision-making** in mergers and markets, including the role for the Secretary of State in reviewing CMA's guidance (responsive to **Q1-Q3** and **Q22-Q23**);

   b. Our views on the **proposed changes to the mergers regime** (responsive to **Q13-Q21** and **Q24-Q25**);

   c. Our views on the **proposed changes to markets work and markets remedies** (responsive to **Q4-Q12**).

7. We have referred to the CMA's response to the Consultation where appropriate throughout the document.

1 Our views on proposed changes to the CMA's decision-making in mergers and markets

Reform to the independent panel system for Phase 2 mergers and Market Investigations

8. The Government is proposing to replace Panel-led Inquiry Groups with decision-making involving sub-committees of the Board, appointed by a Mergers Board Committee (and a Markets Board Committee for in-depth market reviews, discussed below).

9. According to the consultation, this revised approach would:

   a. ensure that those ultimately accountable to Parliament (i.e. the CMA executive and Board) are directly involved in the most significant mergers and markets decisions, improving predictability and consistency, as well as reinforcing institutional accountability;

   b. closely align decision-making in mergers and markets with the approach in digital markets, delivering greater accountability, pace and predictability, along with operational consistency.

10. This would be a material change to current CMA practice – potentially more significant than the creation of the CMA in 2014. While it may deliver benefits, it is important that the risks are properly understood and that alternative options are considered.

11. We agree with the Government that policies that support growth and innovation should be of primary concern. To achieve this, it is important that the competitive process works well, including through the oversight of a well-functioning and authoritative CMA. In our view, an effective institutional design should enable timely, evidence-based decisions, incorporate safeguards against confirmation bias, and preserve institutional independence. Independence, in particular, has been the foundation of the UK's Competition policy for 25 years. The first principle identified to deliver a "world class competition regime" was that decisions should be taken by a "strong, pro-active and independent" competition authority.[1]

12. We first consider the potential benefits. We agree that, in the current system, there is a risk that variations in panel composition can lead to inconsistent outcomes in Phase 2 merger and market investigations. As appeals to the Competition Appeal Tribunal are limited to procedural grounds rather than the merits, there is no appeal-based mechanism to ensure to consistency in the CMA's substantive decision-making over time. The Government's proposal to introduce a Board sub-committee could help mitigate this risk by promoting greater consistency and providing stronger institutional continuity in decision-making.

13. There are, however, a number of risks that should be taken into account when considering whether to proceed with the Government's proposals, adopt a modified version of the proposed approach, or explore alternative institutional designs. By way of context, the current mergers regime involves executive-led decision-making at Phase 1, Panel-led decision-making at Phase 2, and judicial review by the Competition Appeal Tribunal. The table below compares this framework with that envisaged under the Government's proposals.

Table 1 Decision-making at different phases of a CMA merger review under the current system and the Government's proposal

	Phase 1	Phase 2	Appeal
Nature of assessment	*Substantive*	*Substantive*	*Procedural*
Current system	CMA	Independent panel	CAT
Government proposal	CMA	CMA Board sub-committee *(incl. some independent members)*	CAT

Source: *Frontier analysis*
Note: *Blue-highlighted cells represent decision which are made by CMA staff, Exec or Board.*

[1] See Department of Trade an Industry White Paper from July 2001: https://assets.publishing.service.gov.uk/media/5a75991240f0b67b3d5c7be5/5233.pdf

14. By replacing the independent Phase 2 stage with a Board sub-committee, the proposal would concentrate substantive assessment within the CMA itself, without introducing any merits-based avenue of appeal. This gives rise to both practical considerations, including the capacity of decision-makers, and broader concerns regarding the potential for confirmation bias and the implications for institutional independence.

15. On the first issue, a similar model is currently applied in the CMA's digital cases, which have proven resource-intensive even at the Board-committee level.[2] This suggests that careful consideration is needed as to whether Board-level committees would have sufficient capacity to oversee multiple merger and market cases in parallel, while maintaining an appropriate level of scrutiny of the evidence, and whether this is consistent with the 4P framework. In particular, there is a risk that decisions may not be taken in a timely manner, or that decision-makers may not have sufficient time to engage fully with the evidence and rigorously test the case team's analysis. This, in turn, could increase the risk of confirmation bias, whereby the CMA's "house view" developed over the course of Phase 1 and Phase 2 is not subject to effective challenge by the ultimate decision makers.

16. On the issue of independence, while accountability is an important objective, there is a risk that closer alignment with political oversight could create a perception of reduced institutional separation in individual case decisions, even where formal independence is preserved.

17. These risks could, to some extent, be mitigated within the framework of the Government's proposals. For example, the Government could ensure sufficient expert representation on the sub-committee to ensure both independence and bandwidth. The current proposal that at least 50% of the sub-committee is made up of non-executive members could be strengthened by requiring that this quota include a majority of independent experts, that is, individuals with a similar profile to current panel members. Combined with retaining a requirement for a qualified majority for adverse findings, this would help ensure that decisions cannot be taken without the agreement of independent members. It would also support more effective challenge to the CMA's "house view" developed over the course of an investigation by introducing a genuine "fresh pair of eyes". We note that the CMA itself has emphasised the importance of such safeguards in its response to the Consultation.[3]

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2 The investigations have taken several months to designate Google as having Strategic Market Status (**SMS**) in general search, and Apple designated for its mobile platform. Commentators have noted on the slow pace of these investigations (see for example: 'Disappointing, disproportionate and unwarranted': Google slams CMA decision - UKTN).

3 CMA response to consultation on Refining Out Competition Regime, paragraph 10.

18. However, a more robust way of addressing these risks would be to introduce a full merits appeal, consistent with other areas UK and EU competition law. This would provide businesses with a route to challenge the CMA's substantive assessment, more clearly positioning the CMA as a first-instance decision maker.

19. Such an approach would also align the UK more closely with other jurisdictions, where a merits-based review is available at least at some stage of the process, as set out in Table 2. In jurisdictions where decision-making is more centralised within the authority (such as the European Commission or Bundeskartellamt), this is typically accompanied by a more intensive standard of judicial scrutiny. By contrast, the proposed UK model would combine more centralised decision-making with a judicial review standard, thereby increasing the importance of internal governance safeguards.

Table 2 Decision-making at different stages of merger control investigations at comparator regulators

Jurisdiction	Phase 1	Phase 2	Appeal
UK (current system)	CMA	Independent panel	Judicial Review at the CAT
UK (government proposals)	CMA	CMA Board sub-committee *(incl. some independent members)*	Judicial Review at the CAT
EU	European Commission	European Commission	Appeal on a broad basis (including errors of assessment)
US	DOJ/FTC	Independent judiciary	Full merits appeal

Source: Frontier Economics analysis

20. The CMA has indicated that more far-reaching or fundamental changes are not necessary, which we understand may extend to amendments to the standard for appeal.[4] We recognise the CMA has concerns regarding the potential resource burden and delays of full merits appeals. However, if the Government proceeds with a material change to the decision-making model for in-depth investigations, it may wish, in due course, to consider whether the existing appeals framework, including the standard of review and procedural

[4] CMA response to Consultation on Refining Our Competition Regime, paragraph 5.

aspects such as access to file, remains appropriate in light of the revised institutional structure.

21. Finally, we note that the CMA has introduced a number of changes to its processes in recent years, to which the Government now proposes to add a significant change in a core decision-making process. The Government should give careful consideration to submissions it receives on reforms to the panel system, and whether it would be beneficial to consult more broadly on alternative institutional models observed in other jurisdictions. One benefit of this "wait and see" approach to decision-making is that it would allow recent internal reforms to demonstrate their practical impact before further structural changes are implemented.

Extend the powers available to the CMA under its digital markets function to its wider competition and consumer protection functions

22. The Government is proposing to extend certain powers currently available to the CMA under its digital markets function to the CMA's wider consumer and competition functions. For example, when issuing an information notice, the CMA would be able to:

    a. require persons to obtain or generate information relating to algorithms, including requiring businesses to produce simulated outputs or data not already held.

    b. require persons to vary their usual conduct, for example, by altering how services or digital content are presented to users, in order to better understand algorithmic behaviour.

    c. require persons to perform a specified demonstration or test, enabling CMA experts to observe how an algorithm operates under specified conditions.

23. We consider that these proposals are, in general, useful. Businesses that rely on algorithmic systems should be able to explain the outcomes that those systems produce. To ensure powers remain effective over time, the CMA should clarify whether the term "algorithms" encompasses all AI models and related decision-making system.[5]

24. Nevertheless, the use of these powers should be subject to appropriate safeguards. They have been developed in the context of digital markets, where the firms concerned typically have the expertise and resources to respond, notwithstanding that such requests can still be burdensome. Extending these powers more broadly raises the risk that they could be applied in circumstances where the costs imposed on businesses outweigh the benefits. The CMA should therefore apply a clear proportionality assessment on a case-by-case

[5] We note here some potential overlaps with concerns the CMA has set out in relation to agentic AI: https://www.gov.uk/government/publications/agentic-ai-and-consumers/agentic-ai-and-consumers

basis before using these powers outside digital markets, and publish guidance setting out when and how it expects to do so.

Role for the Secretary of State in reviewing guidance

25. The Government is also proposing to give the Secretary of State a formal role in a relation to a wider range of key CMA guidance documents. For example, the CMA may be required to consult the Secretary of State or obtain approval before publishing updates to the Merger Assessment Guidelines.

26. CMA Guidance is technical in nature and is periodically updated to reflect developments in case law and decisional practice. While it is important that such guidance remains aligned with broader Government priorities, introducing formal approval requirement could reduce the CMA's ability to update guidance in a timely manner and may thereby create uncertainty regarding future practice, with potential implications for investment decisions. We note that the CMA has raised similar concerns in its response to the Consultation.[6]

27. The Government should therefore retain a consultation requirement, while limiting the Secretary of State's role to high-level policy considerations.

2 Our views on proposed changes to the CMA's mergers regime

Providing more time to agree remedies at the end of Phase 1 merger reviews

28. The Government proposes to extend the statutory period for the CMA to consider Phase 1 remedies following a finding of a Significant Lessening of Competition (**SLC**) from up to 10 working days to up to 20 working days. The objective of the proposals is to provide more time for the parties and the CMA to agree suitable remedies at Phase 1, thereby reducing the likelihood of an unnecessary Phase 2 referral.

29. We consider this to be a sensible proposal, particularly when combined with the CMA's updated remedies guidance, which indicates a greater willingness to engage with a broader range of remedies at Phase 1. This should support the growth agenda by increasing deal certainty and reducing the risk of costly and unnecessary Phase 2 investigations.

30. We also welcome the proposal to pause statutory time limits over the Christmas period, when businesses are often operating with reduced resources. We agree with the CMA's

[6] CMA response to Consultation on Refining Our Competition Regime, answer to Q23.

proposal that the pause period should run from 24 December to the first working day after 1 January.[7]

Increasing predictability in merger control through clearer criteria for shares of supply, material influence and de facto control

31. The Government is proposing to remove the CMA's ability to rely on "some other criterion, of whatever nature" when assessing shares of supply, and instead limit the assessment to a defined set of criteria, namely value, cost, price, quantity, capacity and number of workers employed. It also proposes to introduce a closed list of factors relevant to assessing material influence and de facto control.[8]

32. We welcome the intention to provide greater clarity, which should support the growth agenda. The current flexibility of the regime has been valuable, particularly in enabling the CMA to assess issues in emerging and digital markets. In practice, however, the CMA has generally relied on metrics such as value, quantity, capacity or headcount when applying the share of supply test. Restricting the test to these criteria may therefore not materially reduce the CMA's practical flexibility. That said, the legislation should retain a delegated power to amend the list of criteria in exceptional circumstances, whilst making it clear that any departure from the core metrics would be limited to specific and well-justified cases.

33. in relation to the criteria for control, we welcome the additional clarity. At the same time, it remains important that the CMA is able to consider the broader factual context when assessing control. The proposed criteria appear to retain sufficient flexibility, for example through references to "other rights", to allow the CMA to continue applying a holistic approach where appropriate.

3 Our views on proposed changes to the CMA's markets work and remedies

Introduction of a single market review tool

34. The Government is proposing to replace the existing market study and market investigation regime with a new single-phase market review tool. The proposed process would typically take between 18 and 24 months, and in some cases considerably less.

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7 CMA response to Consultation on Refining Our Competition regime, answer to Q25.

8 Shareholding or voting rights thresholds (for example, at least 15%), or any shareholding or voting rights in combination with other factors; board representation or appointment rights; special voting rights or veto rights over strategic decisions; access to confidential strategic information; commercial, financial, or consultancy arrangements.

35. As noted in our response to the CMA's revised Market Guidance, these investigations are wide-ranging and can require significant time and resources from market participants, particularly given the CMA's ability to impose intrusive remedies without a finding of fault. While the regime provides powerful tools to enhance economic performance, it can also be costly and may deter investment while investigations are ongoing. Based on our experience across a range of cases, including on the ongoing veterinary services investigation, there is scope to improve the efficiency of the CMA's casework once opened.

36. We agree that a single tool has the potential to introduce efficiencies. This would allow the CMA to tailor the scope and depth of an investigation to the issues identified, and to adjust its approach as evidence is gathered. In practice, however, the proposals envisage a set of outcomes that broadly mirrors the current system. As such, many of the anticipated efficiencies may depend more on procedural reforms already introduced, such as enhanced stakeholder engagement, greater use of expert advisors and clearer roadmaps and KPIs.

37. A key challenge in delivering these efficiencies will be calibrating the appropriate evidential depth. If an investigation begins on a relatively light-touch basis, but later moves towards more intrusive remedies, the CMA may need to intensify evidence gathering mid-process. This could create friction and increase the risk of appeal. Early engagement and robust scoping will therefore be critical to ensure that the appropriate level of evidence is gathered from the outset.

Introduction of a single legal test of Adverse Effect on Consumers

38. The Government is proposing to introduce a single legal test of an Adverse Effect on Consumers, which is aligned to the current approach for market studies, replacing the existing distinction with market investigations, which apply a higher threshold of an Adverse Effect on Competition. The table below sets out the approaches the CMA currently applies across its markets toolbox.

Table 3 Overview of CMA markets tool

	Market review	Market study	Market investigation
Objective / legal test	Diagnose possible competition or consumer concerns	Assess if there is an **Adverse Effect on Consumers**	Assess if there is an **Adverse Effect on Competition**
Depth of assessment	Shorter, high-level assessment of market; no mandatory information gathering	**Detailed** assessment of market; statutory information gathering powers; statutory consultation requirement	**Rigorous** assessment of market; statutory information gathering powers; statutory

	Market review	Market study	Market investigation
	powers – evidence gathered voluntarily	on any proposed market investigation reference	consultation requirements
Possible outcomes	Advice to government and/or business; recommendations; undertakings; market investigation reference	**Advice** to government and/or business; **recommendations**; **undertakings**; market investigation **reference**	**CMA-imposed remedies** (orders); undertakings; recommendations

Source: Guidance on CMA market reviews, market studies, market investigations and the monitoring and review of market remedies, Table 1

39. A key issue is how this **single legal test will be applied in practice**. Under the current framework, there is a clear relationship between the applicable legal test and the CMA's powers to impose more intrusive remedies. While the CMA has indicated that the new test would not materially change its approach,[9] it will be important for the CMA to set out clearly the evidential threshold required before imposing more intrusive remedies under the new framework, and to reflect this explicitly in its guidance.

40. We have also considered **whether the change in legal test could lead to over- or under-enforcement**, given that Adverse Effects on Competition and Adverse Effects on Consumer do not fully overlap. As illustrated in the figure below, three broad categories of concern can be identified:

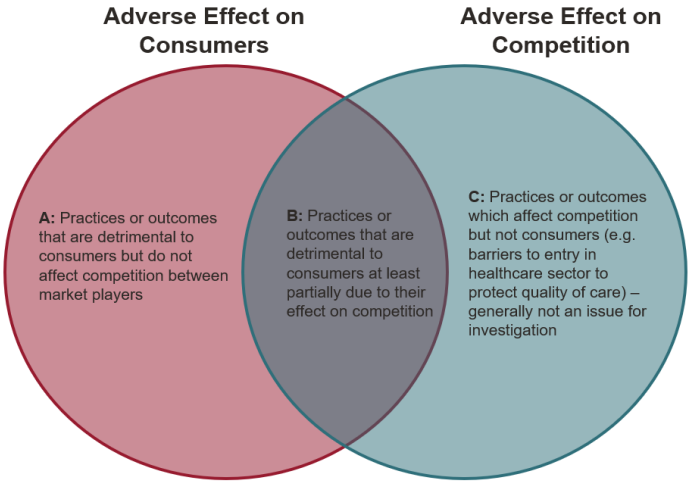
    a. **Adverse effects on consumers, but not on competition**: These may be practices or outcomes that are detrimental to consumers but do not affect competition between market players (e.g. forms of misleading claims). These would currently not be investigated as part of a market investigation, but may be within the scope of an in-depth review under the Government's proposals.

    b. **Adverse effects on both consumers and competition**: Practices or outcomes that are detrimental to consumers at least partially due to their effect on competition. The markets toolbox is most naturally suited to investigate and remedy these issues.

    c. **Adverse effects on competition, but not on consumers**: Constraints on competition that do not affect consumer outcomes – e.g. barriers to entry in regulated sectors which protect consumer outcomes. These should naturally not sit within the scope of a CMA review.

9 CMA response to Consultation on Refining Our Competition Regime, response to Q6.

Figure 1 Overview of potential concerns in markets reviews



Source: Frontier Economics

41. There may be a limited risk of underenforcement if the CMA does not calibrate the depth of its investigation appropriately. In particular, the CMA should also establish a clear early-stage process to assess the likelihood of material competition concerns and align the scope of its evidence gathering accordingly. The strength of the current markets regime lies in its ability to support intrusive remedies with robust evidence of an Adverse Effect on Competition. If investigations do not reach that level of evidential depth, there is a risk that the severity of the issues may be understated.

42. Beyond this issue, we do not consider that the change in legal test is likely to result in systematic underenforcement. The CMA's framework remains sufficiently flexible to capture concerns that would previously have been identified as a relevant Adverse Effects of Competition where these give rise to consumer harm (i.e. issue group B above). By contrast competition concerns that do not affect consumer outcomes (i.e. issue group C above) would fall outside the scope of the new test, but for good reason given that consumer welfare is the foundational consideration underpinning competition law.

43. There is, however, a potential risk of over-enforcement. The shift to a consumer-focused test may blur the distinction between the CMA's competition and consumer protection functions, and could result in intervention where practices may be perceived to harm consumers but do not adversely affect competition (i.e. issue group A above). This blurring would reduce the transparency of the CMA's analytical framework and make it more difficult for businesses and stakeholders to make representations that speak directly to the CMA's theory of harm. The Government and the CMA should therefore consider carefully whether such consumer concerns are more appropriately addressed using the CMA's existing consumer protection tools.

44. Where the markets tool is the appropriate mechanism (i.e. issue group B), the CMA should also take a balanced approach by considering potential consumer benefits alongside harms. This could inform a broader framework for assessing consumer benefits in other areas of the CMA's work, including mergers.

Review of market remedies

45. The Government is proposing to place the CMA's current practice of including sunset clauses in remedies on a statutory footing and to require that all market remedies are reviewed at least once every 10 years. We broadly welcome this approach. However, the Government should take into account the administrative burden associated with reviewing remedies many years after their introduction, particularly when institutional memory may have diminished on the framework which underpinned the introduction of the remedy. The CMA should therefore consider refinements at the stage of defining remedies to reduce the need for resource-intensive reviews at a later stage.

Concurrency and the role of sector regulators

46. The Government is proposing to:

    a. clarify that sector regulators may assume responsibility for market remedies after they have been imposed or accepted by the CMA;

    b. require the CMA to consult sector regulators on the remedy design; and

    c. replace the ability of to make market investigation references with a more consultative model under the new framework.

47. We agree that, in general, these principles are appropriate. However, several risks should be considered as the framework is developed further:

    a. While greater CMA control may support prioritisation, it will be important to ensure that the revised framework does not weaken the practical leverage of sector regulators. Under the current system, the ability to make a formal market investigation reference provides a credible escalation mechanism to sectoral regulators. If this is replaced with a recommendation-only model, the CMA's response timeline and decision-making criteria should be sufficiently clear and transparent to preserve effectiveness.

    b. Where a sector regulator has already undertaken substantial diagnostic work, the CMA should ensure that its review process builds efficiently on that evidence base, rather than duplicating it. This will require close procedural coordination to deliver the intended efficiency gains.

48. Taken together, the Government's proposals point towards greater centralisation of decision-making within the CMA. While this may improve coherence, it will be important to ensure that sector-specific expertise continues to inform both the identification of issues and the design of remedies.