

Consultation Response

Refining our Competition Law Regime

March 2026



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Competition Law sub-committee welcomes the opportunity to consider and respond to the UK Government consultation: Refining Our Competition Law Regime. The sub-committee has the following comments to put forward for consideration.

General Remarks

We note that the Government proposes to reform the competition law regime with the aim of improving the efficiency, timeliness, and predictability of decision-making in mergers and markets. We further note that the stated aim of this change is to make the regime more effective through delivering “*better*”¹ outcomes for consumers and wider business.

Whilst we support these aims in principle, we believe that further clarity needs to be provided as to what the Government believes that “*better*” actually means in this context before appropriate analysis can be applied to the means by which the Government proposes to achieve this.

With this in mind, we believe that wider consultation on the issues that have arisen within this consultation needs to take place before any substantive changes are made to the current regime. This is especially true given the importance that is attached to the competition law regime in terms of protecting consumers and wider business.

Specific Questions

[Enhancing Accountability for CMA Decision-Making Mergers and Markets](#)

[Question 1 - What impact do you think the proposed reform would have on the consistency and predictability of decision-making in merger and markets cases?](#)

¹ See pages 1,11,19,20,33 - Refining our Competition Law Regime

We note the proposals to reform the competition regime by aligning decision-making in mergers and markets with the approach found in the regulation of digital markets under the Digital Markets, Competition and Consumers Act 2024. Under the current regime, the Competition and Markets Authority (**CMA**) Board and CMA Panel play a crucial role in the decision making in merger and market cases. However under these proposals to align with the digital markets regime, key decisions currently reserved for Panel-led Inquiry Groups would be taken by either the CMA Board, new committees of the Board (the Mergers Board Committee and a Markets Board Committee) or by decision making sub-committees appointed by these two new committees. In effect, this will bring the full process of decision making on market and mergers under the auspices of the CMA Board. These changes are made alongside the Secretary of State retaining an ability to appoint expert decision makers within these new sub-committees of the Board.

Whilst we support the stated aims of improving efficiency, timeliness and predictability in mergers and markets, we have concerns with these proposals.

Firstly, we believe that this will concentrate significantly more power in the CMA Board and its executive. We believe this raises independence issues within the organisation in terms of its decision-making on mergers and market investigations that have a material impact on industry and on parties looking to merge. Whilst we acknowledge that the Secretary of State's involvement in the appointment of expert decision makers within the newly formed committees will imply a greater level of political accountability on the CMA's performance by making the body more accountable to the Minister, we believe that this will also give the body unprecedented powers that could result in a loss in the necessary "checks and balances" on agency decision making. For so long as the substantive test set down by Parliament is an objective one concerning the effect on competition rather than a more subjective "public interest" test, we believe that the prioritisation of political accountability over the independence of a quasi-judicial decision-maker should be avoided in any system that respects the rule of law and a separation of powers, and is consistent with the CMA's self-description as "*an independent, non-ministerial department*"².

In support of our concerns, we point to the lack of detail from the consultation document in terms of the exact procedure that will be adopted by the Secretary of State in appointing those experts that will sit on the newly formed committees of the CMA Board. Whilst reference is made to the "*the Panel being replaced by a pool of non-CMA staff experts*"³ and that "*some members of the pool may also be members of the Members Board Committee or Markets Board Committee*"⁴, no details are provided on the selection process, the time and resources that such experts will be able to give to their role, where these experts will be selected from

² See Responsibilities - Competition and Markets Authority - GOV.UK

³ Refining Cur Competition Law Regime, page 17, para 26

⁴ Ibid

and what steps would be taken to ensure their independence from the CMA's Board. Furthermore, as they are described as “experts”, we question whether their role is to be that of an advisor or a decision-maker. We would therefore welcome further clarity on these points.

In the event that the Government intends to proceed with these proposals, we believe that consideration should be given to possible safeguards that might protect against any political interference in the decision making process of merger and market investigations, and thus allow for an effective review of substantive decisions taken. Short of replacing the current judicial review of CMA decisions with a full merits-based appeal mechanism, consideration could instead be given to the introduction of a new independent merits based review by a new ombudsman or independent auditor who would be responsible for reviewing the decisions of the CMA's newly introduced panels or sub-committees. Other procedural safeguards could include extending greater access to file and formal hearing rights to interested parties.

Furthermore, the proposed changes from the current quasi-judicial merger control and market investigation regimes to an administrative system does raise important questions around whether the competition law regime should return to a merits-based analysis for appealing merger and market decisions. Currently, CMA market and merger decisions can only be challenged by way of judicial review on grounds requiring proof of illegality, irrationality, procedural impropriety in the process. However, this means that the substance of the decision cannot be revisited (as recently confirmed in section 103(6) of the Digital Markets, Competition and Consumer Act 2024⁵).

Given that these proposals will concentrate accountability and decision making within the CMA's Board, we believe that a wider debate needs to take place as to whether a merits-based appeal process should be introduced to provide the necessary check on the CMA in terms of the decisions that it takes.

Question 2 - Would the proposed reform for greater accountability for the CMA Board for merger and markets decision-making be something you would welcome?

Please see our response to Question 1.

Question 3 - Do you support the proposed membership requirements for the mergers and markets sub-committees/committees?

We have no comments to make other than those made in our response to Question 1.

⁵ Digital Markets, Competition and Consumers Act 2024



Markets Work and Markets Remedies

Enhancing the CMAs Markets Work

Question 4 - Q4. Do you agree the existing market study and market investigation model should be replaced with a new single-phase market review tool?

We note the Government proposes to replace the existing Market Study and Market Investigation process with a new single-phase market review tool. This aims to reduce the length of time markets are under review and is designed to address concerns that market studies and investigations have been underutilised since their inception⁶. Whilst the proposals look to retain certain procedural safeguards in the market review tool procedure (which includes evidential thresholds, statutory consultation requirements and parties' rights of defence), the Government is proposing to reduce the statutory timeframe for a market review to a "statutory time-limit" of 24 months⁷ - although the consultation makes it clear that the Government expects reviews to conclude "more quickly" and "in most cases" take "between 18-24 months". We note that the current period allows for a 3-year period as a maximum.

We have mixed views on these proposals. We do see certain benefits in reducing the statutory timeframe for a market review. This may reduce regulatory uncertainty for business, allow for quicker intervention where competition problems exist, and may also allow for faster remedy design and implementation at the front end of a review. The identification of potential remedies earlier in the process may also focus the parties' minds on anti-competitive practices and thus improve the likelihood of a satisfactory outcome for those involved in a planned merger.

However, we believe that it is crucial that sufficient time is allowed for detailed information requests of market participants in any such reviews, combined with wider consumer and industry engagement to ensure that a thorough market review analysis takes place. We believe it is also imperative that time is given for sufficient evidence gathering to avoid the risk of mis-diagnosing competition issues within a particular market. Such evidence gathering needs to include detailed economic modelling of a market alongside data gathering on wider consumer effects. We question whether this can be achieved within the time-frames outlined in the proposals.

We also have concerns that these proposals appear to attribute higher value to the speed of decision-making, over the importance of a thorough analysis. It is therefore our view that the focus needs to be on the end result and not the speed

⁶ Refining our Competition Law Regime, paragraph 41.

⁷ Refining our Competition Law Regime, paragraph 49.



in which an analysis of a market takes place. This is especially true considering that the consultation document itself acknowledges that *“markets work must not be rushed and that pace should not come at the expense of robust analysis, procedural safeguards and rights of defence”*⁸.

Question 5 - Do you agree the statutory time-limit for market reviews should be 24 months, with a possibility to extend by a maximum of 6 months?

Please see our response to Question 4.

Question 6 - Do you agree there should be a single legal test for single-phase market reviews?

We consider that the principle of a single legal test for single-phase market reviews is a sound one, however, the reasons for the Government’s selection of the test being proposed lack’s clarity. No detailed explanation is provided as to why the analysis should shift towards a test focusing on the impact on consumers, at the expense of the alternative current test of an adverse effect on competition. This is not a cosmetic change. The change from a “two-test” model to a single legal test is significant and so we believe the underlying rationale for moving to this single model needs to be clearly set-out and debated with a clear understanding of why the relevant test has been selected.

As part of this debate, we believe it is important to distinguish between:

- A competition harm which is structural and relates to distortions in the competitive process itself, which includes barriers to entry, market concentration, foreclosure strategies, or reduced rivalry. These harms are typically forward-looking and systemic, affecting the functioning of the market over time; and
- A consumer harm which is outcomes-based and focuses on the observable effects to a market, which includes higher prices, reduced quality, or diminished choice. These harms can be short-term, situational, or symptomatic, and may arise from a range of factors not necessarily linked to a breakdown in competition.

⁸ See page 21, para 44 - Refining our Competition Regime



While competition and consumer harms are of course related, we believe that they are not interchangeable and therefore any change to a single model will likely prove problematic. If nothing else, a narrow focus on consumer outcomes is liable to allocate insufficient scrutiny to “upstream” adverse effects that do not directly result in consumer harm but that are nonetheless economically harmful.

Ultimately, we consider that competition harm is generally understood as the cause, whereas consumer harm is often considered the effect. We have concerns that a regime that prioritises outcomes over underlying market structure risks conflating the two.

Question 7 - If so, should this be the adverse effect on consumers test?

Further to our response to question 6, we believe that a shift to a purely consumer-focused test may introduce several other risks that require careful consideration. These include:

- **Short-termism in regulatory intervention:** the consumer harm may become transient or cyclical (for example, driven by supply shocks, inflationary pressures, or sector-specific disruptions). Intervening on the basis of short-term consumer outcomes risks misdiagnosing structural issues and imposing remedies where markets may self-correct.
- **Weakening of the competition law framework:** in the UK, it is understood that “consumer welfare” broadly encompasses price, quality, choice, and innovation, and that the protection of the competitive process is seen as the primary means of achieving those benefits. Moving to a consumer harm standard risks decoupling intervention from competition principles, thereby blurring the boundaries between competition policy and broader economic or social regulation.
- **Regulatory overreach into non-competition issues:** a consumer-focused test may expand the CMA’s remit (and/or its policy focus) into areas such as price levels driven by macroeconomic conditions, distributional concerns and / or fairness or equity consideration. Whilst important, these issues are not always rooted in competition failures and so we believe there is a material risk that the CMA could be drawn into quasi-industrial policy or price regulation functions, which it is ill-qualified to regulate and which may be more appropriately addressed by government or sector-specific regulators.
- **Reduce legal certainty and predictability:** structural competition assessments, while complex, are grounded in established economic frameworks. By contrast, consumer harm is inherently broader and more subjective. A shift to the latter analysis may increase discretion in decision-making, reduce predictability for businesses or create uncertainty as to the threshold for intervention, in direct opposition to the stated aims of the proposals.
- **Risk of inconsistent or interventionist outcomes:** without a clear anchor in competition harm, similar market conditions could give rise to different regulatory responses depending on how consumer effects are interpreted. We



believe that this risks undermining the consistency and coherence of the regime.

For these reasons, we consider that any move towards a single legal test focusing on an adverse effect on the consumer requires significantly more justification and clarity than provided in the consultation document. In particular, we would welcome further detail on how “*consumer harm*” will be defined, how it will be linked to underlying competition concerns and what safeguards will exist to prevent over-expansion of the CMA’s role beyond its core competition mandate.

Without this, we are unconvinced by the proposals to move to a single test tool that focuses on the impact to consumers.

CMA Market Remedies

Question 8 - Q8. Do you agree the CMA should consider sunset clauses when designing remedies?

We do not object in principle to the use of sunset clauses in the design of market remedies and believe that such mechanisms offer the potential to deal with the changing nature of market conditions.

In support of this, we believe it is crucial that remedies remain relevant to technological innovation, the entry or exit of firms in a given market or changes in consumer behaviour. Without this, we believe that there is a risk that certain remedies may become outdated or ineffective after a period of time. Accordingly, there is a strong and compelling need for remedies to flex with changing market conditions.

As a result, requiring them to fall away automatically may well support this need by ensuring a dedicated CMA reconsideration and re-evaluation of market conditions and continued appropriateness of the remedy in question. However, if the CMA is to be required to re-evaluate remedies that are due to expire, this will require the body to have available (and to allocate) resources to engage in this process meaningfully, to avoid the risk that important remedies expiring due to a lack of resources within the authority.

Question 9 - Do you agree the CMA should review market remedies at least once every 10 years?

We do not object to this idea in principle (either on its own or in combination with the use of sunset clauses). However, we would suggest giving due consideration to an assumption that, should a remedy be continued after the initial 10 years, the review period should be reduced to a shorter period, for example, every 5 years.

Similar to our point made in reply to Question 8 above, we believe that consideration must also be given to how periodic reviews will be resourced within the CMA, who is best placed to undertake the reviews and where the necessary staffing pool can be drawn from. We do not believe that sufficient detail has been



provided in the consultation document and would therefore welcome further information on this point.

Question 10 - Should the CMA be able to delay reviews beyond 10 years in exceptional circumstances, providing it publishes its reasons for doing so?

We do not object to this proposal where that power will be subject to effective judicial review, and the circumstances are genuinely “exceptional”. However, given the risk of judicial deference to the exercise of regulatory discretion, we consider that the definition of what is “exceptional” should be set out clearly in legislation.

Concurrency

Question 11 - Should sector regulators be able to oversee market remedies imposed or accepted by the CMA?

We note that the CMA is the UK’s principal competition regulatory authority, sharing responsibilities with certain sector regulators.

However, we note from the proposals that the Government is looking to make two changes to this concurrency framework, namely:

- i. to permit sector regulators to oversee market remedies in their sectors; and
- ii. to implement more consultative references to recommend a market investigation following a market study.

We are generally supportive of these provisions and consider that sector regulators are well placed to perform these functions given their specialist knowledge in their respective areas.

However, a key consideration needs to be whether sector regulators have both the capacity and resourcing available to meet these functions.

For example, we are aware that certain regulators within the financial services market are increasingly being asked to assume a wide range of regulatory functions including economic regulation, prudential regulation and economic crime regulation as well as monitoring anti-competitive practices. Therefore, we believe that further consultation is required with sector regulators to understand if a risk of overload exists and whether they are able to manage such additional functions as part of their regulatory remit.

If the proposals are to proceed, we believe that there also need to be clear boundaries between the remit of the CMA and sector regulators. This will help to avoid any confusion as to how each of these bodies will interpret and apply certain remedies. We consider that clear allocation criteria will need to be introduced so as to avoid the fragmentation or dilution of the effective enforcement of these rules. Furthermore, we believe that robust handover arrangements will also be required to ensure that this proposal is implemented with minimal disruption. Further consultation with sector regulators would also assist on these points.



Question 12 - Do you support the proposed consultative approach, where the CMA must consider undertaking a single-phase review following a request from sector regulators?

We do not consider that a sufficiently strong case has been made for removing the duty on the CMA to undertake a market analysis (i.e. the new market review which replaces a market investigation) where the relevant market is referred to the CMA by a concurrent regulator. We do not in particular understand why the Government considers that it is appropriate that the CMA should be entitled to apply prioritisation principles in circumstances where a sectoral regulator considers that intervention may be necessary but lacks the powers to do so itself. This is especially considering that Parliament often identifies certain sectors as requiring particular scrutiny.

Question 13 - We welcome any other views or evidence on improving the concurrency framework.

Please see our response to Questions 11 and 12 above.

Mergers

Increasing Predictability in Merger Control

The “Share Supply Test”

Question 14 - Should share of supply be revised to a closed list of criteria, for both the share of supply and hybrid jurisdictional tests?

Please see our response to question 17 below.

Question 15 - Do you support the proposed criteria for inclusion?

Please see our response to question 17 below.

Question 16 - Are there any additional criteria that should be included?

We have no comments to make.

Question 17 - Would the proposed reform for the share of supply test improve predictability for businesses?

We do not believe that these proposals will materially improve predictability for business (or those advising them). The reason for this is that the CMA will retain the discretion over the remaining “closed” elements of the share supply test, which in themselves are so wide ranging that businesses will still need to approach them on the basis that if the CMA wishes to take jurisdiction, it will likely be able to do so. The current wide jurisdictional test is a counter to the voluntary nature of merger control in the UK. The parties can choose not to notify a merger, but the CMA has the right to assert jurisdiction and to carry out an investigation.



If there is a perceived lack of predictability in the current regime (and we acknowledge that there is significant fluidity in the current share of supply test), we believe there should be a fully informed debate on whether the current voluntary regime should be replaced, or retained with a more limited, strictly defined share of supply test. That debate should also take into account the potential benefits of giving or retaining a wide CMA “net” at the jurisdiction stage - ultimately the aim is to allow the CMA to scrutinise potentially damaging mergers (with sufficient safeguards in place in line with our comments above).

The “Material Influence Test”

Question 18 - Should the material influence and de-facto control tests be revised to a closed list of statutory factors?

Please see our comments in response to Question 17 & 21.

Question 19 - Do you support the factors proposed for inclusion?

Please see our comments in response to Question 17 & 21.

Question 20 - Are there any additional factors that should be included?

Please see our comments in response to Question 17 & 21.

Question 21 - Would the proposed reform for the material influence test improve predictability for businesses?

As with the “Share of Supply” test, we do not consider that the Government’s proposal will increase certainty for businesses given the discretion that the CMA will continue to enjoy on the interpretation and application of the elements of any “closed list”, which in any event largely replicate what the CMA does in practice (as per its published guidance⁹). In particular the suggested factors that a “closed” list might include (“shareholding or voting rights in combination with other factors”, “appointment rights”, rights over “strategic decisions”, access to “confidential strategic information” or “Commercial, financial, or consultancy arrangements”) are all so ambiguous and capable of broad interpretation as to entirely undermine the suggestion that the list is “closed” in any real sense at all.

Providing more time to agree remedies at Phase 1

Question 22 - Should the timeframe for submitting and considering Phase 1 remedies be extended from up to ten to up to twenty working days?

We see the benefits in this proposal where it will allow greater, meaningful engagement between the CMA and the parties (that is to say, it will allow for a genuine dialogue on what remedies could address the competitive harm identified).

⁹ Guidance on CMA market reviews, market studies, market investigations and the monitoring and review of market remedies

Further Cross-Cutting Changes

Stronger Investigative Powers for Algorithms

Question 23 – Should the CMA be granted enhanced powers to investigate algorithms in its competition and consumer protection functions?

We can see the potential benefit of this, though query whether this should be addressed now or only once learnings can be taken from the digital markets regime (and associated implementation of the Digital Markets, Competition and Consumer Act 2024). We believe that business should be protected from overly burdensome investigations and so careful consideration should be given to how best to strike a balance with such enhanced powers.

The Secretary of State's Role in CMA Guidance

Question 24 – Should the Secretary of State have a formal role in a wider range of key guidance documents?

We do not believe that the Secretary of State should have a formal role in a wider range of key guidance issued on the competition law regime as there is a real risk this could call into question the independence and objectivity of the competition regime and lead to undue executive pressure. However, if the decision is taken for the Secretary of State to have a role, we believe that this should be considered on a case-by-case basis to ensure an effective separation of powers rather than assumed to be needed in all cases.

We also question whether it is appropriate for the Secretary of State to have oversight in market reviews where there may be a clear political agenda and corresponding risk of a conflict of interest in any such reviews (for example, in the transport, energy, defence and the healthcare markets).

Excluding the Christmas Period from Statutory Time Limits

Question 25 – Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits?

Question 26 – If so, what length should the pause be?

Yes, we do see the benefit of this as company and regulatory resources will be stretched at this time and there needs to be a recognition of this.

We suggest a pause beginning with 23 December and ending with 2 January (dates inclusive), noting that in any case 2 January is a bank holiday in Scotland.



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