Linklaters

Department for Business & Trade: Refining our Competition Regime

Linklaters Response

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

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

In our view, consistent and predictable decision-making in merger and markets cases requires two things: (a) clarity on how the relevant legal tests will be applied and (b) evidence-led decisions on whether those tests are met. In principle, if both requirements are met, it should not matter whether the decision-makers are the same. That said, we recognise the case for a single set of decision-makers making predictability and consistency easier to achieve. However, this only holds if those decision-makers have the time to engage fully with the relevant evidence base. We are concerned that this would not be possible under the proposed reforms.

Panel members require significant time and effort to fully understand the markets relevant to their decisions. Panels need to analyse vast reams of legal and economic analysis. It is a deeply time-consuming exercise. Most Panel members engage fully and diligently in this process. In practice, however, it can be challenging for even a dedicated Panel to obtain sufficient understanding of the evidence in the relatively short timetable of a Phase 2 process. In our view, the key CMA decision-makers proposed by this reform are simply unlikely to have the time to contribute to delivering truly evidence-led decisions.

Our understanding is that the proposal is for Phase 2 merger / key markets decisions to be made by, among others, senior and executive directors via committees of the Board – a Mergers Board Committee and Markets Board Committee – and sub-committees appointed by those committees. Given the intention to align approach with the digital markets regime, we assume this will involve the CMA Chair, CEO and relevant executive director. While inherently dependent on deal flow and the nature of matters subject to CMA review, we assume that playing a decision-making role on (a number of) parallel Phase 2 merger and market reviews would represent a significant time commitment for individuals who are very busy with the significant number of responsibilities they already hold. We note that these individuals also sit on the Digital Markets Board Committee.

We generally support day-to-day decisions on case management being taken by the case team and think this is a helpful administrative proposal, in terms of efficiency of process and pace. However, we query whether the burden on senior leadership's time (recognised in the consultation) could lead to either or both of "over-reliance" on the case team in terms of the substantive decisions to be made, or more politicised decisions, as detailed below in this response. In practice, the proposed reform runs the risk of cutting across the key driver of the proposal as detailed in the consultation – improving accountability – by significantly increasing the number of *de facto* decision makers for these sorts of cases.

As further detailed in response to Question 2, we consider a larger role for CMA leadership (ultimately appointed by government) risks increasing the importance of political appointees in fundamental CMA decision-making processes, which is itself unhelpful for predictability.

More generally, it can only be viewed as having a negative impact on the independence of decision makers. If this proposal is pursued, it must be accompanied by a bolstering of merging parties' commensurate rights of defence to ensure the UK is not out of step with other peer regimes.

2 Would the proposed reform for greater accountability for the CMA Board for merger and markets decision-making be something you would welcome? [Yes / No / Not sure] Please explain your views.

Not sure. We understand the goal of ensuring that those ultimately responsible to Parliament for the most significant merger and markets decisions are directly involved in those decisions. At the outset, it is important to note that under the current system, while senior CMA stakeholders are not decision makers in Phase 2 cases, Panel-led Inquiry Groups do not operate in a vacuum. Decisions of the Panel are made with the support of the case team, informed by the Chief Economist and the Legal Service, and based on the CMA's guidance documents. While our experience is that each merger case is assessed by the Panel based on the relevant evidence, it is also clear that intervention rates at the CMA have increased and decreased over time. It is therefore not obvious to us that direct accountability for individual decisions is necessary to ensure decisions are taken in line with overall CMA policy at the time.

More critically, the *quid pro quo* of this proposal - a significantly reduced role for "non-CMA staff experts" - has the potential to degrade the quality and independence of CMA decision-making (absent additional procedural safeguards).

First, the consultation rightly recognises the significant benefit of "*external perspectives and diversity of thought*" contributed by the existing Panel regime. We note that the proposal is to replace the Panel with a pool of non-CMA staff experts, but there is little detail in the consultation on how members of the pool will contribute to decision-making process, beyond that an unspecified number will be members of sub-committees and *may* be members of the Mergers Board Committee or Markets Board Committee.

Second, the Panel process serves not only to bring external perspectives and diversity of thought, but critically, to have a set of decision makers at Phase 2 approaching the case with a "fresh pair of eyes". This provides a very important safeguard against the risk of confirmation bias.

We understand in principle, the proposed CMA board sub-committee (with at least 50% non-executive members as well as non-CMA staff experts playing an "independent" role) would replicate *some* of the aforementioned upsides of the Panel regime. However, ultimately, the proposal would result in the loss of a fully independent decision-making body for these decisions.

Moreover, from a practical perspective, if the members of the sub-committee are heavily reliant on the case team in practice, as we anticipate will likely be the case by necessity (see the response to Question 1), independence would be diminished further. We strongly encourage government to consider in further detail the "in principle" and practical implications of its proposal, beyond the lens of accountability.

If government intends to further explore this proposal, the corresponding question of what additional checks and balances on CMA decision-making are needed will require very careful consideration. We therefore consider it imperative that further work on this proposed reform fully considers the following questions:

1. **Access to file process**: There is at present no general right of “access to file” in CMA proceedings. The CMA’s obligations are instead limited to disclosing the "gist" of its case — a standard confirmed by the Competition Appeal Tribunal (**CAT**) to be acutely context sensitive and subject to a wide margin of appreciation. In effect, this means that the CMA unilaterally determines what information is deemed relevant, significantly curtailing the ability of affected parties to interrogate, correct, or challenge the reliability and accuracy of the evidence relied on by the CMA. The introduction of a formal right of access to file in the limited number of cases reserved for a Phase 2 market or merger review could serve as a vital corrective measure, promoting efficiency and transparency, reducing the risk of confirmation bias, and reinforcing the robustness and fairness of the decision-making process. In our view it could provide a very meaningful safeguard, should the independent Panel system be replaced with a Board committee and sub-committee model.

2. **Enhanced role for a procedural officer:** We note the potential for an enhanced role for a procedural officer to strengthen procedural safeguards under the new framework. Currently, the procedural officer's role in mergers and markets cases is limited to confidentiality issues and is advisory only - in contrast to CA98 cases where the procedural officer acts as decision-maker on a broader range of matters including timetabling, access to documents on file and also chairs the oral hearing. A hearing officer with genuine independence and the power to rule on procedural matters (including access to file, timetabling, and fairness of process) could provide a meaningful additional check. To this end, we suggest the procedural officer role in mergers and markets cases should be upgraded to match the CA98 model.

3. **Sub-committee governance:** If government opts to proceed with the proposed reform, structural safeguards must be included in the membership requirements for the proposed sub-committees to guard against confirmation bias. This could include for example a requirement that any sub-committee chair must be an independent expert, and that each appointed sub-committee must include a minimum number of independent experts. This could be further strengthened by providing for the sub-committee to have access to a pool of advisers (i.e. staff lawyers, economists) who are independent of the case team.

4. **Appropriate appeal standard**: The consultation proposes to retain appeal on a limited judicial review standard. We think this is worthy of much more thought from government, for a number of reasons.

    a. Without a “fresh pair of eyes” at Phase 2, and no chance of a review of the merits of the decision on appeal, there is limited mechanism to address (potential) “wrong” decisions – which is problematic irrespective of whether you are motivated by concerns about false positives or false negatives. In practice, the CMA has very seldom been overturned on “substance” in JR.

    b. More critically, even in the more limited instances where the parties have won on appeal, the outcome is remittal of the case back to the CMA (where the same decision-makers have, on the whole, reached the same substantive outcome). While viewed in isolation, the judicial process for merits appeals cases takes longer than cases reviewed on a JR standard; the former enables the CAT to resolve the matter itself with greater flexibility. Indeed, the timeline for merits-based review on an end-to-end basis — meaning until final resolution following a successful appeal — may be shorter compared to judicial review. Remittals

back to the CMA, following successful JR appeals can therefore prolong, instead of speed up, the final resolution of those cases. Against that backdrop, we disagree with the government's characterisation that judicial review involves more limited "time, costs and uncertainty".

c. Finally, the consultation does not engage with the fact that we have a highly specialised and knowledgeable body in the CAT. There is no reason that the CAT cannot get involved with the substantive review, and it need not meaningfully undermine pace.

The adoption of the above checks and balances would ensure the UK regime is in line with the global regulators the CMA considers as its "peers". Perhaps the most important benchmarks for this exercise, the European Commission and the US Department of Justice and Federal Trade Commission, have materially different approaches here. In respect of judicial review of merger decisions in the EU, while recognising the margin of discretion afforded to the Commission on economic matters, the EU courts carefully scrutinise Commission decisions and have been willing to challenge the accuracy, reliability and adequacy of the Commission's evidence and analysis. For the US, the prosecutorial model means the regulators ultimately need to persuade a court to agree with its proposals. In both jurisdictions, the parties get extensive access to the regulator's file through access to file in the EU, and discovery where cases are litigated in the US. Parties therefore have the opportunity to fully challenge the regulator's case. Given the focus on investor confidence, as detailed in the proposal and the government's industrial strategy more generally, this context is key. Our clients are used to, and anticipate, such processes. They afford them the opportunity to "make their case" and are therefore reflective of their right to a fair hearing. A regime which does not feature the necessary checks and balances and therefore has at least a perceived impact on the right to a fair hearing may, conversely, undermine investor confidence in the UK.

While not a matter for legislation, in due course, it should also be considered how checks and balances can be enhanced through the CMA's internal processes / guidance – e.g. by enhancing the existing devil's advocate process.

3 Do you support the proposed membership requirements for the mergers and markets sub-committees/committees? [Yes / No / Not sure] Please explain your views.

Not sure. Please see our responses to questions 1 and 2 above.

Chapter 2. Markets Work and Market Remedies

Enhancing the CMA's markets work

4 Do you agree the existing market study and market investigation model should be replaced with a new single-phase market review tool? [Yes / No / Not sure] Please explain why.

Yes. We are in favour of consolidating the current bifurcated regime into a unified, single-phase market review tool. The combined market study and investigation process can, in certain cases, extend to more than three years. This can generate considerable uncertainty

for affected businesses and defer competition benefits that might otherwise be realised sooner. The proposed reform is largely, therefore, a welcome rationalisation. The changes are well-aligned with the principles underpinning the CMA's "4Ps" framework – most notably the goals of pace (by reducing the length of reviews) and proportionality (by allowing the CMA to tailor its approach to the nature of the market and the potential remedies under consideration).

A particularly valuable aspect of the new tool is the earlier visibility it affords on the nature of potential remedies on the table. Where the CMA is considering more "intrusive remedies", such as price controls, it expects to consult on an updated provisional adverse effect decision and provisional remedies within six months of forming its initial provisional view.

- In our experience, the single most important factor for businesses involved in a market investigation is the potential scope of remedies that might be imposed. It is therefore essential to ensure that businesses can understand as early as possible what the potential remedies position is (intrusive or not). This should be built into the new process as early as possible: for example, where it is clear from the outset of a review that highly interventionist remedies are not on the table, that should be specified from the launch of the process, not only six months in.
- We also consider that the legislation or supporting guidance should state expressly that, where intrusive remedies have not been put to consultation within the relevant period, they cannot be imposed.
- We would also welcome clarity on what constitutes an "intrusive" remedy in this context – such as structural divestments and price regulation – as distinct from less interventionist measures such as transparency requirements.
- While this early-stage directional steer is a welcome feature, it must be recognised that the CMA will need to have gathered a robust evidential foundation before that point. The early phases of a review will be demanding for all participants. Critically, the CMA must have the resources necessary to fulfil these obligations within the prescribed timeframes: without adequate resourcing, the speed and efficiency gains that the new model is designed to deliver may not be fully achieved.

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? [Yes / No / Not sure] Please explain why.

Yes. We agree that a 24-month statutory cap (with an ability to extend by up to a maximum of six months, only in certain circumstances) is appropriate for single-phase market reviews. We support the proposed approach, provided the conditions permitting any extension are appropriately limited, given the impact that ongoing uncertainty and delay can have on sectors under review. While this would be the statutory maximum, it will be critical the CMA is clear at the outset about the timeframe on which it intends to complete its investigation and that deviations from that plan should only be available in exceptional circumstances.

6 Do you agree there should be a single legal test for single-phase market reviews? [Yes / No / Not sure] Please explain why.

Yes. We agree a single legal test is appropriate. The current markets model applies different thresholds and legal tests for market studies and market investigations. That approach was logically coherent within the current two-phase architecture: the market study threshold, focused on consumer harm, served as a filter, while the market investigation threshold directed more in-depth analysis (and the potential for remedies) towards competition – the CMA's principal area of expertise. Consolidating to a single process necessarily implies a single test, and we agree with that premise.

7 If so, should this be the adverse effect on consumers test? [Yes / No / Not sure] Please explain why.

No. Our view is that the appropriate single test is the adverse effect on competition test, not the adverse effect on consumers test.

- The CMA's markets function exists to identify and address failures of competition. The consultation suggests that an adverse effect on consumers test is more appropriate, as otherwise the CMA's ability to remedy harm could be restricted in cases where the causal link between consumer harm and harm to competition is not fully formed. We note, however, that the consultation does not identify any concrete examples of where the adverse effect on competition test has resulted in material harm not being remedied. Moreover, the CMA has been granted broad consumer enforcement powers that operate independently of any competition finding. These remain available to address consumer harms that fall outside the scope of the CMA's markets work. This provides a meaningful answer to any concern about an enforcement gap arising from the absence of a consumer-focused threshold in the markets regime.
- Further, the adverse effect on competition test is underpinned by a well-developed body of case law and has been consistently applied and scrutinised by the courts. It provides an established legal framework within which businesses and advisers can form reasoned views about the scope and likely outcome of any given review. The CMA's own 4Ps principle of predictability militates in favour of retaining the test with the stronger jurisprudential foundation.

It would not, in our view, be appropriate to equip the CMA with the power to impose far-reaching remedies merely based on an adverse effect on consumers finding. This is particularly where evidence of consumer detriment has in the past been drawn from relatively high-level observations on profitability which can be open to considerable debate.

Given (a) the CMA has consumer enforcement tools at its disposal to address concerns relating to consumer impact and (b) the maturity of the existing adverse effect on competition test, we do not support the move to an adverse effect on consumers test.

CMA Market Remedies

8 Do you agree the CMA should consider sunset clauses when designing remedies? [Yes / No / Not sure] Please explain why.

Yes. We welcome the proposal to include this obligation in legislation. The CMA has reaffirmed its commitment to impose sunset clauses by default, meaning remedies will fall away after a set period unless there is good reason for them to remain in place. The consultation recognises that sunset clauses may not be appropriate for all remedies and that

the CMA is best placed to determine whether they should be imposed. Where the CMA judges that sunset clauses are not appropriate, it will be required to set out its reasoning for improved transparency. In our view, such cases will be very few and far between. A remedy should not remain in force in the absence of a positive, ongoing justification for its continuation.

9 Do you agree the CMA should review market remedies at least once every 10 years? [Yes / No / Not sure] Please explain why.

Yes. In principle, we support a mandatory minimum review cycle and note that the CMA already has the power to vary, release or supplement undertakings pursuant to its new powers under the Digital Markets, Competition and Consumer Act 2024 (**DMCC**). The CMA's ongoing strategic review of 33 market remedies – to assess whether they should be removed or amended – demonstrates the real-world value of structured re-examination: it has already resulted in the removal of a number of remedies that are no longer fit for purpose.

In our view, a 10-year review cycle may in certain sectors be too long, and a preliminary review on a five-year cycle may be more appropriate. We note that some of the remedies that have been included in the CMA's strategic review including the Retail Banking Market Investigation Order are less than 10 years old.

Periodic review is the appropriate mechanism for ensuring that remedies remain both proportionate to the harm they address and free from unnecessary burdens on business or constraints on innovation. However, the scope of such reviews should be clearly set out as early as possible. For example, if they could lead to more intrusive requirements being introduced, that clearly has the potential to extend the period of uncertainty for businesses beyond the market review, which could have a significant detrimental impact on investment and innovation in the relevant sector. As we recommend for the market review process itself, where it is clear at the start of a review period that the CMA does not intend to introduce highly interventionist remedies as part of its monitoring, that should be clearly stated as early as possible, to help restore confidence in the market.

We also acknowledge that review exercises themselves consume resources and impose compliance costs on the businesses subject to them. The scale of that burden will vary considerably with the complexity and breadth of the remedy under review. The CMA should be mindful of this and ensure that reviews are calibrated to their purpose – that is, assessing whether the existing remedy remains warranted – rather than expanding into a wholesale re-examination of the underlying market. To the extent that reviews result in the removal or relaxation of ongoing compliance obligations, the net effect for affected businesses should generally be positive.

10 Should the CMA be able to delay reviews beyond 10 years in exceptional circumstances, providing it publishes its reasons for doing so? [Yes / No / Not sure] Please explain why.

Not sure. The CMA already has a duty to keep remedies under review and monitor their effectiveness. As above, in furtherance of that duty it also has the power to amend/revoke/supplement remedies. Our comments therefore focus on the review period specifically.

As noted above, there will be sectors that merit a more regular review cycle. For example, in fast-moving markets with low barriers to entry/expansion, the competition landscape can

vary considerably in a relatively short amount of time, which could warrant re-examination of remedies, e.g. on a five-year cycle. We believe this still aligns with the policy position underpinning the DMCC reforms, which include a two-year grace period on remedies to allow a sector to settle and businesses to adapt within a known framework.

On the other hand, we do not consider that a longer review period would be appropriate, even where this is only used in exceptional circumstances, due to the prolonged uncertainty that would inevitably cause. Moreover, a power to delay reviews beyond 10 years would risk undermining the very purpose of the mandatory 10-year review cycle. The policy objective underlying that cycle is to ensure that remedies are kept under regular review and do not persist indefinitely without scrutiny. If the CMA were permitted to depart from that cycle the result would be remedies remaining in place for an indeterminate period without review, which is precisely the outcome the mandatory cycle is designed to prevent. This provides a further reason why we do not consider that a power to delay reviews beyond 10 years would be appropriate.

Concurrency

11 Should sector regulators be able to oversee market remedies imposed or accepted by the CMA? [Yes / No / Not sure] Please explain why.

Yes. We support this proposal. This would be optional and would allow the CMA and sector regulators to decide which of them is best placed to oversee remedies on a case-by-case basis. That voluntary, case-by-case mechanism – rather than any automatic or mandatory transfer of oversight responsibility – is in our view the right approach. Enabling the relevant sector regulator to take on supervisory responsibility for remedies within its own area of expertise should in practice reduce the number of regulatory interfaces that businesses must navigate and promote a more effective deployment of regulatory capacity overall.

12 Do you support the proposed consultative approach, where the CMA must consider undertaking a single-phase review following a request from sector regulators? [Yes / No / Not sure] Please explain why.

Yes. We support a shift to a consultative model. We also welcome the consultation's clear statement that sectoral regulators will retain the ability to undertake market studies, and the recognition that the evidence base gathered in the course of such studies could provide procedural efficiencies for any subsequent CMA review. This is because sectoral regulators are often best placed to assess how well competition is functioning in their specialist sector. It is appropriate for the CMA to exercise control over its resource allocation and to determine how any given market review request fits within its prioritisation principles and the government's Strategic Steer. Naturally, due regard should be had to a sectoral regulator's concerns and any findings, but the weight that the CMA should attach to a sector regulator's recommendation will inevitably depend on the quality and depth of the underlying evidence. A recommendation that is not supported by a thorough evidential basis – of the kind typically assembled over the course of a market study – will necessarily carry less persuasive force than one accompanied by a fully developed body of evidence. The CMA is best positioned to make that assessment. It will nonetheless be important for the CMA to be transparent about how it evaluates such requests and to give clear reasons for any decision not to act on a recommendation.

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

N/A.

Chapter 3. Mergers

Increasing predictability in merger control

14 Should share of supply be revised to a closed list of criteria, for both the share of supply and hybrid jurisdictional tests? [Yes / No / Not sure] Please explain why.

Yes. We support the government's commitment to increasing predictability for merging parties. However, as we explain further below, revising the existing share of supply test to a closed list of criteria is insufficient to meet the government's stated aim of providing certainty for businesses. While we welcome the move to provide a clear statutory limit to the metrics which can be applied by the CMA under the current legislation, the considerable discretion held - and used - by the CMA when asserting jurisdiction under the share of supply test, would be largely unaffected by this change.

15 Do you support the proposed criteria for inclusion? [Yes / No / Not sure] Please explain why.

Yes. While we support the government's proposal to remove the open-ended formulation of "or some other criterion, of whatever nature", we consider that more substantial changes to the share of supply test are required in order to ensure it provides the stated aim of predictability.

16 Are there any additional criteria that should be included? [Yes / No / Not sure] Please explain why.

No. However, as set out above, we consider a more fundamental change to the share of supply test necessary, given the expansive interpretation that has been applied to date to the now well-established criteria currently listed under the Enterprise Act 2002 (**EA02**).

17 Would the proposed reform for the share of supply test improve predictability for businesses? [Yes / No / Not sure] Please explain why.

No. While welcoming this proposal, we think it is unlikely to improve predictability for merging parties absent wider reform.

As at January 2026, over the previous three years, the CMA applied the share of supply test or hybrid test in 64 of 117 closed merger reviews. Of those 64 cases, we have not identified any instances where the CMA expressly relied on "some other criterion" not specified in the EA02.

The primary cause of uncertainty in relation to share of supply is that the CMA is able to subjectively define the basis on which it calculates the share of supply of the parties, on any "good" or "service" - irrespective of the economic market definition. The criteria set out under

the EA02, which would be retained under the proposed reform to the share of supply test, are expansive and have been applied broadly in practice by the CMA.

When considering some of the more controversial cases in which the CMA has taken jurisdiction in recent years - for example, *Roche/Sparke* (where jurisdiction was asserted based on the number of "UK based, full time equivalent, employees engaged in activities relating to novel non-GT and GT Hem A treatments") and *Sabre/Farelogix* – (jurisdiction was asserted based on the parties' supply of IT services to British Airways that facilitate the indirect distribution of airline content - despite no revenue being generated by Farelogix from UK customers) - if these cases were to have arisen post-reform, the CMA would still be able to take jurisdiction (using "number of workers" and "quantity", respectively).

If the share of supply test is to be retained, in our view there are a number of legislative changes which are needed - in addition to changes in how the CMA applies the UK jurisdictional tests - to meaningfully improve predictability.

In brief these are:

1. **Consistent use of economic market definition**: currently the share of supply test is independent of economic market assessments and the jurisdictional "frame of reference" may differ from the relevant market used for competitive assessment. We would welcome legislative change to ensure that the jurisdictional frame of reference adopted by the CMA is consistent with the economic market assessment applied in its competitive assessment, save in limited and explained circumstances. Using a test based on shares of a clear economic market, would be consistent with the approach taken in many jurisdictions around the world and ensure that the right deals are still caught. It would improve predictability from the outset for businesses and avoid the risk of uncertainty where the CMA's jurisdictional and competitive analysis apply different lenses.
2. **Increment in share of supply**: we would welcome legislative change, or at the very least, a commitment in CMA guidance, that the CMA will not assert jurisdiction solely on the basis of a marginal or theoretical increment absent a clear UK dimension to the increment. This would materially improve commercial predictability.
3. **UK nexus under the hybrid test**: the hybrid test (both as a matter of law and CMA guidance) sets an extremely low bar for UK nexus. It can in principle be satisfied even where the target has no UK supply or turnover. We would therefore welcome legislative change to constrain or, at the very least, further guidance (beyond that set out in the *Guidance on the CMA's jurisdiction and procedure, CMA2,* Jan 2025) from the CMA which limits how it will apply the hybrid test in practice. For example: (a) a commitment that the CMA would generally only exercise jurisdiction under this test where the acquisition of the target would have a specific and distinct impact on UK consumers; (b) an objective materiality threshold for the UK nexus limb, such as that the target has generated some turnover in the UK in the prior financial year; and/or (c) a similar materiality approach to the 33% share of supply limb of the hybrid threshold. This would improve predictability for businesses engaged in cross-border transactions with limited UK activity.

18 Should the material influence and de-facto control tests be revised to a closed list of statutory factors? [Yes / No / Not sure] Please explain why.

Yes. The current material influence test is fact specific, determined on whether a stakeholder has the ability to materially influence commercial policy. It is generally an extremely broad

test, which relies on subjective interpretation by the CMA (considering a range of factors) of the point at which potential "influence" over a company becomes "material".

In theory, providing in statute for a closed list of factors that can be considered by the CMA in determining whether there is such material influence could permit greater certainty for merging parties on whether the CMA has jurisdiction over their transaction. However, as detailed further in our response below to Question 21, in practice, our view is that the proposed list, without additional refinement and guidance, will not materially change the scope of the test and may, in fact, make things more uncertain for parties.

19 Do you support the factors proposed for inclusion? [Yes / No / Not sure] Please explain why.

No. The proposed factors largely reflect those already considered by the CMA in its guidance. However, they should not be treated as having equal weight in assessing material influence. As set out above, having a "commercial arrangement" or "access to confidential strategic information", independent of other corporate governance rights, could bring a wide range of minimal stakeholders within the realm of having material influence over a company.

If the government is minded to retain the concept of "material influence", refinement of a number of these factors, at the very least, is needed to ensure that the test provides certainty for parties – particularly around the extremely broad criteria of "access to strategic confidential information" and "commercial, financial or consultancy arrangements". Given the uncertainty that would result from including these two criteria, we would propose removing both from the list of factors.

Further guidance from the CMA is also needed – particularly in respect of (a) which factors are capable of establishing material influence on a free-standing basis and (b) the weighting given to different factors where multiple factors are in issue.

As set out further below, we would favour a more fundamental reform of the test.

20 Are there any additional factors that should be included? [Yes / No / Not sure] Please explain why.

No. We do not propose any additional factors. We suggest, at the very least, refinement of the listed factors, as set out above, in combination with further guidance in respect of (a) which factors are capable of establishing material influence on a free-standing basis and (b) the weighting given to different factors where multiple factors are in issue.

However, as set out further below, to ensure predictability for businesses, we consider a more fundamental reform to the material influence test to be the better solution.

21 Would the proposed reform for the material influence test improve predictability for businesses? [Yes / No / Not sure] Please explain why.

No. Again, while we welcome the ambition behind the proposed reform, it would not, in our view, improve predictability for businesses in terms of how the material influence test is applied. The central issues for businesses with the material influence test relate to:

1. the indeterminate concept of "influence" (there is no clear definition);
2. the unclear point at which influence becomes "material"; and

3. the considerable discretion afforded to the CMA in determining whether the test is met.

In our view, this proposal on its own does not sufficiently tackle these issues, and so would not deliver any material improvement in certainty for businesses self-assessing jurisdiction.

The proposed list contains a wide range of factors, that, in reality, are not all of equal importance in assessing material influence - as has so far been reflected in practice by the CMA, which carries out a holistic assessment of most of these factors. The proposed rules take a more mechanical approach, so even a commercial arrangement or access to confidential strategic information—combined with any minimal shareholding—could be enough for material influence. This creates increased uncertainty about whether minor stakes or commercial arrangements need to be reported.

The cleanest solution, in our view, to ensure predictability for businesses, would be replacing the concept of material influence with a reliance on *de facto* control, in line with other jurisdictions. This would create a far clearer, more predictable, bright line threshold for parties (there is an established understanding of what *de facto* control means) and would require far less guidance.

22 Should the timeframe for submitting and considering Phase 1 remedies be extended from up to ten to up to twenty working days? [Yes / No / Not sure] Please explain why.

Yes. We support the extension, which is proportionate and consistent with the CMA's commitment under the 4Ps framework to engage more meaningfully with parties at an early stage and to resolve concerns without requiring a more intensive Phase 2 investigation.

The value of the extension is contingent on the CMA committing to active engagement with the parties during the extended period, including providing substantive feedback on remedy proposals, rather than simply deferring a Phase 2 reference.

Chapter 4. Further cross-cutting changes

Stronger investigative powers for algorithms

23 Should the CMA be granted enhanced powers to investigate algorithms in its competition and consumer protection functions? [Yes / No / Not sure] Please explain your reasoning.

No. We recognise that with the rapid adoption of GenAI, there is now significantly greater potential for the antitrust and consumer risk associated with algorithms to crystallise. We also recognise that while algorithmic antitrust and consumer harms can be classified according to traditional theories of harm, there is novelty in their implementation. Government (and the CMA) will be mindful to ensure the CMA continues to have the “right” investigative tools at its disposal.

However, the CMA already has very significant information gathering powers across both its competition and consumer functions. The proposal would give the CMA extremely broad powers, including to require businesses to produce simulated outputs or data, vary usual conduct including how services or content are presented to users, and perform demonstrations or tests. Given the limited guidance and understanding of how initiatives in

this space will be viewed by regulators, it may be preferable to favour more guidance and an open-door policy, to facilitate understanding. The proposed powers have the potential to be extremely burdensome for parties and at present there are no proposed checks on how the CMA exercises those powers. Absent evidence of a clear need for new CMA information gathering powers, the starting position, in our view, should be that the CMA's current powers remain fit for purpose.

We appreciate that this reform is intended to align the CMA's competition and consumer powers with powers already available to it in respect of its digital markets function. However, that regime is in its infancy, is limited in scope (to certain companies operating in strategically important digital markets) and these powers remain relatively untested. As such, we invite government to "pause" this proposal pending learnings from the use of these powers in the digital markets context.

The Secretary of State's role in CMA guidance

24 Should the Secretary of State have a formal role in a wider range of key guidance documents? [Yes / No / Not sure] Which ones, and please explain why.

Not sure. The CMA produces wide-ranging guidance for a variety of audiences, pursuant to its statutory functions and as a matter of good administration. As government recognises, CMA guidance plays an important role in providing greater certainty and consistency for businesses in respect of the CMA's approach. We expect there will be a very large number of CMA-issued guidance documents where formal consultation with or approval by the Secretary of State is unnecessary. While the CMA is currently required to seek approval from the Secretary of State for a limited number of guidance documents – guidance relating to the digital markets regime, civil penalties and international cooperation – the government itself notes that this reflects areas of novel or increased sensitivity, where approval is needed to ensure guidance reflects legislative intention.

We recognise that there may be value in a transparent mechanism for government to have input into CMA guidance - particularly in respect of the CMA's merger functions. Where CMA guidance has been applied in a rigid or formulaic way, a requirement for the CMA to explain and justify proposed guidance changes to government could serve as a useful discipline, promoting greater transparency about the interaction between government policy and CMA practice. A formal role of this kind may, in certain respects, be preferable to less visible forms of government influence.

Excluding the Christmas period from statutory time limits

25 Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits? [Yes / No / Not sure] Please explain why.

Yes. We support the government's proposal given the significant challenges that can arise for the CMA and merger / market parties where statutory deadlines fall over the Christmas period.

To ensure this proposal meets its stated aim – to drive positive relationships between the CMA and parties – it must however operate as a pause both to (a) the CMA's statutory time limit for completion of a study or investigation and (b) the statutory deadlines imposed on

parties in relation to responses to information requests. This could be achieved by the CMA as standard practice excluding the designated Christmas “pause” as non-working days from its calculation of statutory deadlines for information requests.

26 If so, what length should the pause be?

We think the “pause” should begin on 24 December (inclusive) and end on the first working day (UK wide) following 1 January.

Linklaters LLP

31 March 2026