

# Summary of responses to consultation on CMA Annual Plan 2014/15 and Prioritisation Principles

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This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

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## **Summary of responses to consultation on CMA Annual Plan 2014/15 and Prioritisation Principles**

### **Overall**

1. Respondents generally welcomed the CMA's Annual Plan and its proposals for putting into action the CMA's overall vision and its mission to make markets work well in the interest of consumers, businesses and the economy. They also welcomed the CMA's emphasis on cooperation with other independent sector regulators and with consumer bodies. Respondents also acknowledged the CMA's goals for its various activities and commented on these. Comments from respondents about a number of specific aspects of the CMA's Annual Plan are set out below.
2. The few respondents who commented on the Prioritisation Principles broadly endorsed them, though some sought more detail on how the CMA proposed to use them. One argued that the CMA should seek to refresh them as a medium term priority.

### **CMA Vision**

3. One respondent was unclear as to whether the CMA's objective was the pursuit of total welfare (consumer surplus plus producer surplus) or consumer surplus alone. It would be important to be clear as to which standard the CMA would use as this would affect how penalties would be determined.
4. The standard the CMA used would also affect how it intended to ensure that businesses and individuals knew the law and were aware of the sanctions they faced if they broke it. If the CMA used consumer surplus; then its emphasis should be on ensuring that business and individuals knew and understood the law. The CMA should also explain how it intended to address uncertainty about how it would decide whether an action was anti-competitive.
5. One respondent expressed concern that mergers resulting in a SLC appeared to be classed as 'anti-competitive' and as 'wrongdoing' in the same way as activities investigated under the Competition Act 1998.

### ***The CMA view***

6. The CMA notes the points raised by respondents about its vision and objectives. These were published (following consultation) in January; the CMA is not inclined to change how it expresses them at this stage. The CMA's chosen wording is not designed to signal any change to the welfare standard it applies. The wording related to mergers merely reflects that enforcement of

the law relating to mergers found to be anticompetitive forms part of the CMA's enforcement obligations.

### **Resources, Prioritisation, Impact**

7. One respondent was concerned that the Government's Strategic Steer for the CMA, which identified specific sectors in the economy it wished the CMA to investigate, risked pre-judging the levels of competition in those sectors. It argued that the CMA must be free to choose, on the basis of evidence, which sectors it will investigate. Competition policy should be administered by independent institutions which base their decisions on facts and evidence, and this approach will be vital to the CMA's work in restoring trust and confidence in the markets it investigated.
8. The CMA should put a greater emphasis on consumer choice and product differentiation when considering how competitive a market is and should not focus as strongly on the number of players in it. The CMA should also be open to evidence about technological developments and how these might affect competition in markets.
9. The CMA should clarify whether the 10:1 ratio of consumer benefits to costs that it seeks to achieve includes indirect as well as direct benefits. There may be cases where there is a high direct benefit but little deterrence impact and vice-versa. The CMA will need to be clear about how it takes this into account when prioritising cases and how it reports on how well it has met its targets. The CMA should not choose cases purely on the basis of whether they will assist it in meeting this target. The CMA should set out clearly how it will assess direct cost benefits to consumers. The CMA should give further information about what the 10:1 ratio means in practice. For example, what is the typical cost of a Competition Act 1998 investigation or market study and what level of turnover for the relevant sector does the 10:1 target suggest. It is also arguable that the 10:1 test will be only be met if the sectors investigated are shown to be genuinely failing. The CMA should also make sure it avoids double-counting, especially in relation to indirect benefits, in regulated sectors where sector regulators have already taken action.
10. It is unclear whether enforcement should be more or less stringent in innovative industries. The CMA should keep in mind that opinion in the academic community is split and is still evolving on this issue and, while encouraging innovation can be one of the main benefits from competition, analysing levels of innovation for the purposes of prioritisation is challenging.
11. The 10:1 consumer benefits to costs ratio should be an aim rather than a target which could restrict the CMA's operation. The recent public scrutiny of

the 8:1 cost benefit ratio used by the Environment Agency for flood risk management spending shows the dangers of allowing criteria to become too rigid and restrictive.

12. In assessing consumer benefits the CMA should remember that interventions incur costs for businesses which need to be taken into account when considering consumer benefits.
13. While the CMA should pursue cases where it can expect to achieve an impact across entire markets, it should note that such cases can be expensive to pursue and uncertain in their outcome. The CMA is right to consider the likelihood of successful outcomes when selecting cartel cases for prosecution.
14. The CMA should set out more clearly in the Annual Plan or Prioritisation Principles how it will work alongside sector regulators, and how it will manage their priorities, which may include non-competition objectives, alongside its own.
15. The CMA should do more to explain its position in the European system for the enforcement of Articles 101 and 102 and the operation of the European Competition Network. The CMA should have the confidence to influence the European Commission and should also work to maintain close links with authorities in Europe, particularly the Irish Competition Agency, and beyond.

### ***The CMA view***

16. The Government's Steer is transparent and expresses in a high level transparent way its ambitions for the CMA. The CMA will make decisions about the work it undertakes with the steer in mind, but both these choices and the case decisions it makes will be made by the CMA independently of Government and in line with its published Prioritisation Principles.
17. The 10:1 ratio of consumer benefits to the CMA's costs is a performance requirement set by the Government in the CMA's performance framework. It relates to direct customer benefits. The CMA will measure its performance against the 10:1 target in a manner consistent with the approach currently used by the OFT and CC, which has been independently reviewed and is both robust and internationally well-regarded.
18. The CMA recognises the need to assess the potential impact of its investigations on all parties involved as well as the costs and risks of taking them forward to it and the burdens imposed on parties. It is very conscious of the need to act proportionately, which has been established by successive court judgements.

19. The UKCN will work to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate. Its Statement of Intent notes that its members will engage in strategic dialogue, cooperation in enforcing competition law, enhancing their capabilities, sharing best practice and advocating competition.

### **Deliver Effective Enforcement**

20. Respondents asked the CMA to clarify how section 25 thresholds will be assessed and to spell out more clearly the benefits of a voluntary notification regime and provide more detail on how it will select non-notified mergers for review. One argued that it would be helpful if the CMA could discontinue a phase 1 merger inquiry without reaching a formal decision where it becomes clear early in the process that there is no potential SLC.
21. Whilst supporting the CMA's objective of pursuing the right cases and managing them well, so that it can make 'good, timely decisions that stand up to appeal', one respondent wished to see explicit recognition that cases should also be selected on their positive impact on the economy. Another respondent wanted the CMA to focus on effective enforcement rather than high-impact or high-volume enforcement.
22. Concerns were raised about the CMA's statement of ex ante targets for the number of cartel, Competition Act 1998, and market studies and investigations the CMA intends to start. This type of target could encourage the CMA to undertake cases to meet these targets rather than focusing on cases where intervention is justified. The costs of CMA inquiries into markets will be borne by taxpayers, so it should be clear that such inquiries will be in their best interest. It was also suggested that proposing four examinations of markets in the Annual Plan without specifying which sectors are to be investigated may have the effect of undermining confidence in some markets. Quality of decision rather than the number of cases should be the measure of the CMA's success.

### ***The CMA view***

23. The CMA recognises that setting crude numerical targets can have undesirable distorting effects on a public body's priorities. However, it notes that beyond an ambition to improve on the historical record of number, speed and success of competition enforcement cases, the Government has refrained from doing so. The CMA regards it as appropriate for a body which intends to pursue an ambitious agenda to

give an indication of what it expects to achieve. But it has made clear that it will only pursue cases where the evidence supports doing so and where the case meets its prioritisation criteria.

### **Extend Competition Frontiers**

24. Respondents argued that it would be helpful if the CMA could clarify how it will take into account regional variations in markets when using its competition and consumer enforcement powers. It would also be useful to understand how the CMA will ensure that its prioritisation criteria are set in such a way that ensures that markets in the devolved nations are investigated.
25. One respondent argued that the CMA should ensure that the calls for information, market studies and market investigations it plans to initiate are ones which will make a positive difference to the economy.
26. Another argued that it should be acknowledged that in some regulated sectors progress has been made in liberalising competition and supporting sector regulators. The CMA should explain more about how the concurrency regime will help consumers.
27. Respondent urged the CMA to work to ensure that sector regulators have the skills to use their competition powers effectively and to a similar standard to the CMA. Publishing an annual assessment of sector regulators' use of their competition powers may encourage them to use these powers in inappropriate cases. The CMA should explain how it will manage its relationship with the sector regulators and prevent the unnecessary use of competition powers. It should also be aware of potential conflicts between regulators using their powers to protect consumers and the need to ensure open competition.

### ***The CMA view***

28. The CMA recognises the existence of regional variations in how markets operate and will bear this in mind both in developing its portfolio of cases and in its conduct of cases where appropriate.
29. The UKCN has published a Statement of Intent which sets out its objectives and how it will achieve them. The CMA is obliged by statute to publish an annual concurrency report which will set out how the arrangements are working.

## **Consumer Protection**

30. Respondents argued that the CMA needs to set out more clearly how and when it will use its consumer powers instead of its competition ones, or when it would consider that another body would be better placed to act under the Consumer Protection Partnership (CPP). It is also invited to consider further how it can support the objectives of its key partners in the CPP, including the National Trading Standards Board.
31. Respondents argued that sector regulators should have a more prominent role in influencing the priorities of the CPP in order to better address cross-sectoral issues.
32. One submission highlighted tension between the CMA's consumer protection and competition enforcement roles, arguing that some anti-consumer practices may arise from intense competition and suggesting that the CMA try to define a set of generic anti-consumer practices, which would assist in reducing legal uncertainty, rather than simply react to each case individually.
33. There is support for the CMA's role in educating consumers and businesses about consumer protection law and the need for cooperation with other consumer protection bodies.
34. One respondent queried whether 'competition enforcement' included market studies and investigations. This should be made explicit. There were other ways of helping consumers, such as advocacy.

## ***The CMA View***

35. The CMA's competition and consumer work will complement each other. When determining what cases to take and what action should be taken and by whom, the CMA will consider carefully how its consumer protection role can support and reinforce the effect of competition action taken to improve markets by addressing problems where competition enforcement alone does not, or cannot, make a market work well for consumers.
36. The CMA will play a full and active part in the Consumer Protection Partnership, which brings together a number of consumer protection agencies across the UK to share intelligence, identify future issues that could adversely affect consumers and agree priorities for enforcement, information and education. The CMA's primary role in the reformed consumer enforcement landscape is to take cases which will be precedent-setting and achieve an impact across entire markets to the benefit of consumers. But it will also retain

a lead on specific policy areas where it has particular knowledge and expertise and will collaborate with its partners on enforcement.

### **Achieve Professional Excellence**

37. Respondents welcomed the CMA's emphasis on training, arguing that resources for it should be protected even in a climate of increased case loads and reduced budgets.
38. Respondents argued that the CMA may wish to consider the use of secondments from sector regulators and the private sector where appropriate, and that sector regulators should be granted full access to the CMA's Enforcement Academy as this will help to create a common understanding of competition law and economic issues and allow for the sharing of best practice, which will assist cooperation between the CMA and the concurrent regulators.

### ***The CMA view***

39. The CMA intends to use a variety of approaches to developing its own capacity and that of its partners. The UKCN's Statement of Intent notes that its members will contribute to staff training and development and the sharing of best practice, including the development of model procedures, across the network.

### **Economic Context**

40. One respondent agreed that the CMA was right to acknowledge the cost of living in its Annual Plan as this is a major concern for consumers, particularly in relation to energy costs and groceries. Another suggested that the CMA should not focus too much on current economic conditions, as these could change quickly, and the broad objectives of competition policy should remain the same.
41. Whilst the CMA's acknowledgement of the increase in online business and the consequent greater need for online security was welcome, one respondent argued that it was important to ensure that consumers without internet access were not left behind.

### ***The CMA View***

42. The CMA will take a broad view of developments across the whole of the economy. The proposals in the Annual Plan reflect the CMA's ability to focus

on a variety of sectors and address the various issues which may arise in them.

### **Relations with Stakeholders**

43. Respondents argued that the CMA should continue to work with external stakeholders and provide additional details about how it plans to manage these relationships. The CMA should consider how debates can be held about general market issues and develop ways of information gathering outside of a formal inquiry process. There was also support for the CMA's commitment to assisting businesses to comply with competition law by engaging with business and its advocacy work. One respondent suggested setting up a standing committee made up of representatives from industry and the CMA.
44. The CMA should take a lead in shaping international discussions on competition law and policy and working with international competition bodies and its counterparts in other countries. The CMA's international division should be properly resourced to enable it to undertake this work.

### ***The CMA View***

45. The CMA will engage and work with a range of stakeholders including consumers and business and their representatives and other interested organisations to gather information and feedback that will inform its work and processes. It will work with these stakeholders to advocate the benefits of competition and through them influence businesses and consumers to make markets work well. The CMA will also strongly advocate the role that competition can play in achieving policy objectives to the UK Government, devolved administrations and other public bodies.
46. As the lead agency in one of the world's most established competition regimes, the CMA will build on the work done by the OFT and CC in coordinating our actions with our counterpart agencies around the world and, where appropriate, assisting other jurisdictions in developing their competition enforcement and consumer protection regimes. In an increasingly internationalised business environment, the CMA's effectiveness is linked to the effectiveness of other regimes in other jurisdictions.

## **Annexe – List of respondents**

Civil Aviation Authority

Confederation of British Industry

The Consumer Council (Northern Ireland)

EDF Energy

Energy UK

Financial Conduct Authority

Financial Services Consumer Panel

International Chamber of Commerce

Joint Working Party on Competition Law of the Bar Council and Law Societies of England & Wales, Scotland and Northern Ireland

National Trading Standards Board

OFWAT

Professor David Ulph of the University of St Andrews and Professor Yannis Katsoulacos of Athens University of Economics and Business