
**INTERNATIONAL BAR ASSOCIATION**
**ANTITRUST SECTION MERGERS WORKING GROUP**

# COMMENTS ON THE CMA REFINING OUR COMPETITION REGIME - CONSULTATION

**31 March 2026**

## 1. INTRODUCTION

1.1 The International Bar Association's ("**IBA**") Antitrust Section ("**Section**") would like to thank the Competition and Markets Authority ("**CMA**") for the opportunity to provide feedback on its package of reforms proposal - Refining our Competition Regime - published on 20 January 2026 ("**Consultation**").

1.2 The Section appreciates the CMA's willingness to engage in a review to refine its approach to merger control to improve the pace, predictability, proportionality and process of engagement, and to reflect the UK government's Industrial Strategy, which recognizes that promoting competition and refining the competition regime is central to its growth mission. The Section welcomes the aim of the CMA to meet the UK's government challenge in the Strategic Steer for the UK to be an international "best in class" competition regime. The Section offers this submission for the CMA's consideration.

## 2. ABOUT THE IBA

2.1 The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including the UK, and it has considerable expertise in assisting the global legal community.

2.2 The Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy. The contributions of the Section's Mergers Working Group ("**MWG**") draw on the considerable experience of the Section's members in merger control law and practice around the world.[1]

2.3 The MWG is responsible for following merger control developments in different jurisdictions across the world covering procedural, jurisdictional and substantive issues. It provides input and comments on various consultations on proposed new and reformed legislation to which the IBA's international perspective and the members' collective expertise and experience can bring significant added value.

2.4 As a general principle, the MWG believes that there should be a convergence toward agreed best practices by all jurisdictions in terms of the development and operation of merger control regimes, and for this convergence to be rooted deeply in the principles of transparency, consistency, predictability, certainty, and procedural fairness.

2.5 The International Competition Network ("**ICN**") has issued Recommended Practices for Merger Notification and Review Procedures (the "**ICN Recommended Practices for Merger Notification and Review Procedures**"), which the MWG considers are relevant and insightful in the context of considering the implementation of the potential changes to the CMA's approach to decision making and procedural changes to the UK merger regime. The ICN

[1] Further information on the Antitrust Section and its Working Groups is available at: https://www.ibanet.org/unit/Antitrust+Section/committee/Antitrust+Section/3001.

Recommended Practices for Merger Notification and Review Procedures and the ICN Recommended Practices are further referred to in this submission where relevant.

## 3. OVERVIEW

3.1 In order to provide an international perspective, the MWG has sought contributions from members whose home jurisdictions include the European Union, France, Germany, Mexico and the UK. The MWG has provided responses to three of the four sections in the Consultation: (i) Enhancing accountability for CMA decision-making in mergers and markets, with a focus in the response on mergers, (ii) Mergers; and (iii) Further cross-cutting changes.

3.2 This submission does not include any responses to the questions raised by the Consultation with respect to: Markets Work and Market Remedies, or with respect to stronger investigative powers for algorithms.

3.3 The following comments represent collectively the views of the MWG and not the position of any individual member within the MWG. As explained below, the MWG is broadly supportive of the proposed changes, subject to the important observations made below on the need to incorporate appropriate "checks and balances" in what would become a purely administrative system over which the CMA executive exerted considerable power.

## 4. CONSULTATION RESPONSE

## A. ENHANCING ACCOUNTABILITY FOR CMA DECISION MAKING IN MERGERS AND MARKETS

### 4.A.1. Reform of CMA decision making in mergers and markets

***Q1. 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.***

The MWG acknowledges that the proposed reform will consolidate decision-making within the CMA. The expectation is that this is likely to result in direct accountability for the CMA Board on all merger outcomes, although under the proposed reforms it remains unclear as to who will ultimately be responsible for decision-making (see response to Q3 below).

The proposed reform will grant the CMA executive significantly more power with respect to Phase 2 merger investigations, which are the most challenging and complex merger decisions taken by the CMA. It is unclear if these proposed changes will increase consistency and predictability of decision-making in Phase 2 merger cases, and an argument exists that the proposed changes will further increase inconsistencies because of the proposed structure of the Board sub-committee. The proposed changes also raise questions concerning the independence of decision making and due process that are addressed below.

The MWG notes that the challenge the UK government is seeking to address arises because of the merger between the Office of Fair Trading ("**OFT**") (responsible for Phase 1 merger decisions) and the Competition Commission ("**CC**") (responsible for Phase 2 merger decisions) into the CMA. To date, the CMA has maintained the independent decision-making and "fresh pair of eyes" aspects in Phase 2 investigations by way of an independent panel. However, this relationship between the panel and the CMA has over time become blurred.[2] This structure has,

[2] For example, the Panel Chair and one of the Inquiry Chairs sits on the CMA Board as non-executive directors, which did not occur with the OFT and CC. In addition, the CMA staff has overtime grown, with larger legal and economics teams who overlap and are members of the Phase 1 and Phase 2 case teams. This overlapping is designed to increase efficiency between Phase 1 and Phase 2 but has also increased the influence of the CMA on Phase 2 investigations.

resulted in confusion for businesses, and the MWG agrees with the UK government's consultation that states that the current structure "*can create confusion regarding accountability for those impacted by decisions"*. However, the proposed changes fail to fully address these concerns (see also the response to Question 3 below), and it is likely that case teams will continue to be able to influence the outcome of the sub-committees, which runs the real risk of maintaining the existing confirmation bias.

The MWG notes that post-Brexit the CMA gained jurisdiction to review transactions that would have previously only been notified in the EU to the European Commission. The CMA vigorously enforced its merger regime when assessing mergers with respect to remedies, where the CMA at times diverged from decisions taken by the European Commission. It was unclear at the time if the CMA had a mandate for aggressively enforcing the UK merger regime, for which the CMA would ultimately be politically accountable.[3] In addition, while the UK government can provide clear guidance to the CMA with respect to policy via the use of a new strategic steer,[4] it is unclear if the strategic steer applies to the Independent Panel, which therefore gives rise to the potential for inconsistent results.

Under the proposed reforms, the day-to-day investigation decisions for Phase 2 mergers should be the responsibility of a case team, as opposed to the (Panel-led) inquiry group, which is likely to be beneficial with respect to the pace of decisions. However, as Phase 2 cases will ultimately be decided by key senior stakeholders in the CMA (including the CEO), the MWG is concerned that in practice this may result in timing pressures given the existing limited bandwidth of these senior stakeholders.

The MWG notes that the current Phase 2 process, which came into force in 2024, has enabled merging businesses to argue their case more directly (and therefore more effectively) to decision makers at the CMA. The MWG is concerned that under the revised procedure, the CMA sub-committees will not have the same capacity to review and assess all the evidence and analysis that Phase 2 cases involve and may therefore lack the same ability to engage with merging businesses on a fully-informed basis, which could have a negative impact on the consistency and predictability of Phase 2 decisions.

The proposed reform removes the "checks and balances" provided by an independent panel, gives rise to a risk of confirmation bias,[5] raises questions about the independence of the regime,[6] and does not fully address the concerns of "blurred lines" with the CMA and the inquiry panel. Historically, the CMA has defended the absence of certain of these protections on the ground that the quasi-judicial nature of the current Phase 2 process obviated the need to provide for these and other "checks and balances". To minimise these risks and to increase predictability of decision making, the MWG has considered international regimes, and set out the following proposals to ensure appropriate "checks and balances" are in place, which should result in an increase in predictability and consistency of decision making by the CMA:

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3 The CMA should arguably not be politically accountable for decision making in a specific case, but should be politically accountable for a change in enforcement policy.

4 Strategic steer to the Competition and Markets Authority, 15 May 2025.

5 The MWG notes that an argument exists that the proposed reform is likely to increase the very real risk of confirmation bias.

6 The MWG notes that further questions with respect to the independence of the regime are raised by the proposal of the increased role of the Secretary of State's role in CMA guidance, see response to question 24 below.

(i) *Access to file*

The MWG notes that in many jurisdictions merging parties and interested third parties have 'access to file', namely the right to see evidence that the authority is relying on before it can take an adverse Phase 2 decision. The purpose of access to file is to allow the merging companies and interested third parties to understand the basis of the case against the merger, to review the evidence that the authority is relying on, and to submit responses in their defence. To assist the CMA, the MWG has set out below a short summary of the access to file regime in the European Union:

**European Union**: Access to file under the EU Merger Regulation is a core procedural guarantee that enables notifying parties (and certain third parties) to exercise their rights of defence once the European Commission has issued a "Statement of Objections" ("SO") in Phase 2. The regime is founded upon Article 17 and Article 18(1) of the Implementing Regulation and is complemented by the guidance provided by the European Commission in its access to file notice and the practice of the Hearing Officer.

The purpose of access to file is to allow the addressee(s) of an SO to acquaint themselves with the evidence used by the European Commission against them, safeguarding equality of arms and effective rights of defence. Access to the file is granted to the notifying parties (and other addressees of the SO) upon request and after notification of the European Commission's objections – and such access continues up to the consultation of the Advisory Committee. Third parties showing "sufficient interest" (e.g. complainants, customers or competitors of the parties, as well as trade unions and workers representative bodies) may obtain forms of limited access to the file, normally to non-confidential versions of the documents being relevant to their position.

The "file" comprises the entirety of the evidence gathered by the European Commission's case team such as third-party submissions and responses to RFIs, the market test results and economic material that supports the European Commission's case. In practice, the access involves the identification and disclosure of "key documents" on which the European Commission's findings for a theory of harm rest. Access is provided electronically, via a data room or a digital platform, subject to the protection of confidentiality to ensure compliance with the professional secrecy rules in Article 17 of the EU Merger Regulation.

Any disputes about access and the timing of access are overseen by the Hearing Officer. For the sake of clarity, the access to file process does not render any of this evidence "public" and the ECJ has confirmed that disclosure of documents to the wider public under Regulation 1049/2001 would undermine the protection of commercial interests and the integrity of the merger investigation process.

(ii) *Adding-in house counsel to confidentiality rings*

The MWG submits that a strong argument exists to include in-house counsel to confidentiality rings. In-house counsel are covered by the same regulatory rules as external counsel, and under England & Wales law and Scottish law their legal advice is protected by legal privilege. Furthermore, external counsel on merger control matters are instructed and receive guidance based on their understanding of the business from in-house legal teams. Under the current system, this process is compromised in circumstances where the in-house counsel cannot review the same information as external counsel.

(iii) *Role of the UK CMA Procedural Officer*

The MWG notes that as set out above, in the European Union, disputes about access and the timing of access to file are overseen by the Hearing Officer, who acts independently of the Directorate-General for Competition (DG Competition) and is an independent arbiter ensuring procedural rights. The MWG acknowledges the current role undertaken by the CMA's Procedural Officer. However, in light of the proposed reform, the MWG would strongly support an increase in the role of the Procedural Officer, with respect to procedural safeguards (access to file, managing confidentiality rings) and dispute resolution between merging parties and the CMA, and ensuring that the Procedural Officer is fully independent of the CMA.

(iv) *Standard of review – merits-based review*

The MWG submits that the standard of review should be amended from a judicial review standard to a merits-based review. The MWG notes that the UK irrationality test has a high threshold to be met and is a high threshold relative to other judicial review standards, including the EU's manifest error standard. The MWG also notes that the number of cases appealed under the judicial review system is limited in number, and it is unclear if this will change significantly if the proposed standard of review is changed to a merits-based review, this is supported by the limited number of appeals in jurisdictions such as the EU which has a standard close to a merit-based review.[7] Furthermore, a shift to a merits-based appeal would bring the legal test for mergers in line with that for appeals of cartel and abuse of dominance cases.[8]

The MWG notes that in a speech in 2023 by Sir Marcus Smith, President of the UK Competition Appeal Tribunal ("**CAT**") speaking in a personal capacity stated that "*I defy anyone to find a difference of approach between the CAT's decision in Meta [Judicial Review] and BGL (Holdings) Ltd. V. CMA [on the merits]*".[9] The MWG also notes the Court of Appeal's decision in *Cérélia* v *CMA,*[10] which held that the CAT is permitted to not only review CMA merger decisions with respect to vires and law, but it can also – crucially - review findings of fact and the CMA's evaluations of those facts.

On this basis, the MWG submits that introducing a merits-based review would provide legal certainty and be consistent with the spirit of current practice, reflect the comments by Sir Marcus Smith and the Court of Appeal's decision in *Cérélia* v *CMA.* In addition, such a change would also bring the UK system into line with other major merger systems e.g., the US, and the European Union.

The MWG submits that the introduction of a merits-based review, with access to file and confidentiality rings (which include in-house lawyers), and a robust role for the Procedural

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7 Since EA02 has come into force, 21 mergers cases have been appealed out of 259 UK merger remedy decisions, prohibitions, unwound mergers or mergers that were abandoned. Of these, the current success rate for the merging parties at judicial review is approximately just 25%, which results in a revised decision, which to date has not yet resulted in a full reversal of the contested outcome. The only decision in which the remittal resulted in an amended decision in which one instead of both business lines were unwound was FNZ v CMA.

8 The MWG notes that this change has previously been considered by the UK government and rejected on the basis that cartels are prima facie illegal and are treated as such as soon as they occur, whereas mergers are reviewed on a case-by-case basis on facts and economic evidence and are not deemed illegal for merely existing. Furthermore, the UK government supported the use of a judicial review standard because of the existing two stage review process, which increased independence and which the government is now proposing to remove. As such, a strong argument now exists for a merit based approach to be adopted.

9 Competition and Markets Authority, Judicial Review Conference 2023, 18 April 2023, 25 Cabot Square, Discretion, Sir Marcus Smith, President of the UK Competition Appeal Tribunal, paragraph 40.

10 Cérélia Group Holdings SAS & Anor v. Competition and Markets Authority [2024] EWCA Civ 352

Officer will result in robust checks and balances that will ultimately result in more consistent and predictable results.

To assist the CMA, the MWG has set out below a short summary of the appeal process and the outcomes of appeals in the European Union:

**European Union:** Since 1990, and up to 28 February 2026, there have been approximately 9,938 merger notifications to the European Commission. In that time, only a small fraction of the decisions resulting from those notifications have been appealed to the EU Courts. Whilst a precise number is difficult to readily determined, there have been approximately 50 cases before the EU Courts in relation to concentrations. Of those cases, approximately five or six cases have directly appealed prohibition decisions (out of 33 prohibitions), around six have appealed approval decisions and one or two have appealed decisions on commitments/waivers. As such litigation is comparatively rare in the EU Courts, and the MWG would argue that litigation is likely to remain comparatively rare in the UK courts based on the total number of mergers considered by the CMA. The overall rate of success of appeal in the EU is also very limited compared to the total number of notifications (despite landmark cases like *Airtours, Tetra Laval, Schneider Electric* and *CK Telecoms*).

The EU Courts at first instance (the General Court) apply an intensive review of facts and economics but still accord the European Commission a wide margin of discretion in matters of complex economic appraisals, which in practice keeps the proportion of full annulments relatively low and has led to several cases with only partial annulments or clarifications of the standard of proof rather than whole reversal of European Commission policy. One legacy of *CK Telecoms* appears to be that there is a renewed debate about the intensity of review and the standard of proof, but that the likelihood of an increase in merger-related litigation is likely to be seen. Nevertheless, litigation around procedural aspects of EU Merger control (e.g. challenging fines for gun-jumping and misleading information and on the application of Article 22 of EU Merger Regulation in cases such as *Illumina* and *Nvidia*) have become more prominent.

***Q2. 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. The MWG notes that the aim of the proposed reform is for greater accountability for the CMA Board for merger and markets decision-making. However as set out in response to Question 1 above, and Question 3 below, it is unclear if the proposed reform will result in greater accountability for the CMA Board.

The MWG also notes that the proposed increase in accountability for the CMA executive team, including the CMA CEO, removes a significant and important constraint on the CMA's executive decision making in merger cases. As set out in response to Question 1 above, this leaves the UK merger regime with limited "checks and balances" when compared to other equivalent merger regimes.

***Q3. 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. The MWG notes that the proposed membership requirements for the mergers sub-committees broadly replicate the model which has been implemented for decisions taken by the CMA under the digital market regime. The MWG notes that it is difficult to assess the effectiveness of the current CMA sub-committees process under the digital markets regime as the regime has been in place for just over a year. However, the MWG notes that decisions,

which prima facie seem relatively straightforward, take a significant period of time. The MWG is therefore concerned that replicating this decision-making process for mergers will make it more difficult for the CMA to act at pace.

The MWG understands that members of the sub-committee will be drawn from the pool of non-executive members of the CMA Board, or non-CMA staff experts, and will be appointed to a sub-committee by the CMA Board.[11] The MWG acknowledges that this approach aims to maximise the independence of the sub-committee, with respect to the CMA executive, but is concerned that a similar issue of the perception of independence that occurred with respect to the panel over time (see response to Question 1 above) will also occur with respect to the sub-committee membership. To minimise this risk, and maximise the independence of the sub-committee process, the MWG would propose that the majority of the members of the sub-committee are independent from the CMA and are not CMA executives.

The MWG is also concerned that it is not currently clear as to who will be accountable for decisions under the proposed system: is it the Chair, the Chair and the CEO, the CEO, the Board, a sub-committee of the Board, the independent external advisors? The proposed change runs a real risk of it remaining unclear as to who the final decision-maker is during a merger review. This is an aspect of the UK CMA merger regime that has been criticised by businesses, and which is also recognized by the UK government's consultation (see response to Question 1 above), however the MWG remains concerned that the UK government's proposals do not adequately address this concern.

## B. MERGERS

### 4.B.1. The 'share of supply test'

***Q14. 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. Section 23(5) of the Enterprise Act 2002 ("**EA02**") gives the CMA broad discretion when assessing if the share of supply or hybrid test is measured. The CMA may have regard to any of the criteria specified in EA02 (i.e., value, cost, price, quantity, capacity, and number of workers employed) that it considers appropriate "*or some other criterion, of whatever nature*." In practice, this has resulted in increased uncertainty for businesses when assessing if the CMA's share of supply or hybrid jurisdictional test is met. The Government therefore proposes to remove the ability to consider "*some other criterion, of whatever nature"* from EA02.

The MWG notes that the proposal to remove this open-ended formulation is in line with the CMA's updated merger guidance on jurisdiction and procedure, which states that "*The CMA will typically only focus on the factors specified in the Act to determine whether the 25% threshold is met, for example value, cost, price, quantity, capacity and number of workers employed*".[12] The guidance also notes that the CMA will "*typically"* rely on the value and/or volume of goods sold when applying the share of supply test, although this approach, and the Government's proposal, still leaves the CMA with significant flexibility to establish jurisdiction (see comments below).

The ICN Recommended Practices for Merger Notification and Review Procedures, recommends that notification thresholds should be clear and understandable.[13] The ICN notes

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11 The CMA Board includes senior CMA staff, CMA board members, and "expert decision makers" appointed by the government.

12 Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2, paragraph 4.74.

13 ICN Recommended Practices for Merger Notification and Review Procedures, Part II, D.

that "*the business community, competition authorities, and the efficient operation of capital markets are best served by clear, understandable, and easily administrable "bright-line" tests*".[14] Furthermore, the ICN recommends that mandatory notification thresholds should be based on objectively quantifiable criteria.[15] The ICN however notes that: "*when voluntary notification thresholds are used to determine whether the competition authority has jurisdiction to review the transaction or to provide safe harbours, competition authorities should use objective criteria or provide guidance to assist parties in determining which transactions meet the thresholds or qualify for the safe harbor protection*".[16]

In this respect, the MWG considers that the UK government's proposed approach is broadly in line with the ICN's Recommended Practices. The MWG agrees with the CMA that the removal of the current open-ended formulation of "or some other criterion, of whatever nature" is likely to result in an increase in legal certainty and predictability.

The MWG therefore broadly welcome the UK government's proposal to introduce a closed list of statutory factors, which will limit the extent of the CMA's discretion with respect to determining when the share of supply test and hybrid test are met. The MWG is of the view that this revised approach should in theory provide greater legal certainty and predictability. However, the MWG does note that as the test does not explicitly define how these factors will be assessed and the CMA's guidance sets out that the CMA will "typically" rely on value and/or volume, the proposed changes may in practice not result in the desired increase in legal certainty and predictability.

The MWG also notes that most jurisdictions that use a 'share' based test to determine jurisdiction use a market share test and not a share of supply test. This approach provides greater certainty to merging parties as it is an economically defined market, as opposed to a share of supply test which gives very significant discretion to the CMA.

***Q15. Do you support the proposed criteria for inclusion? [Yes / No / Not sure] Please explain why.***

Yes. The MWG broadly welcomes the proposal by the CMA to amend EA02 so that the share of supply and hybrid jurisdictional tests will be assessed under a closed list of criteria, namely: value, cost, price, quantity, capacity and number of workers employed. The MWG notes that this would bring EA02 into line with the CMA's guidance on how it applies these tests.

***Q16. Are there any additional criteria that should be included? [Yes / No / Not sure] Please explain why.***

Not sure. The MWG is of the view that no additional criteria should be included, but the approach to assess the current criteria should be clarified. As set out in response to Question 14 above, and as noted in the CMA's guidance in applying the share of supply and hybrid tests, the CMA will "typically" rely on value and/or volume. The MWG submits that the closed list of criteria should confirm that the CMA will only rely on value and volume when applying revised EA02 criteria, except for employees which should be calculated by number of workers.

***Q17. Would the proposed reform for the share of supply test improve predictability for businesses? [Yes / No / Not sure] Please explain why.***

Not sure. The MWG broadly welcomes the proposed reform for the share of supply test. However, the MWG is concerned that as the revised test still gives the CMA a significant

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14 ICN Recommended Practices for Merger Notification and Review Procedures, Part II, D, comment 1.

15 ICN Recommended Practices for Merger Notification and Review Procedures, Part II, E.

16 ICN Recommended Practices for Merger Notification and Review Procedures, Part II, E, comment 4.

amount of discretion, that decisions will remain unpredictable for businesses. In particular, the MWG is concerned that the flexibility retained by the CMA in how it will interpret the test namely "typically" value and volume, will result in a jurisdictional test which can still be interpreted broadly and therefore may be unpredictable for businesses.

### 4.B.2. The 'material influence' test

**Q18.** ***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. Under the EA02, a 'relevant merger situation' occurs when two or more enterprises cease to be distinct and any of the jurisdictional tests in EA02 relating to turnover and/or share of supply (see responses above) are satisfied. Enterprises cease to be distinct if they are brought under common 'control'. Control is defined in three tiers: legal control (typically over 50% of voting rights), de facto control (the ability to direct policy in practice), and material influence (the ability to directly or indirectly, materially influence the commercial policy of the target enterprise).

The ICN Recommended Practices for Merger Notification and Review Procedures recommends that jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws, which includes broader concepts, such as the acquisition of "control" or of a "competitively significant influence" (the equivalent of material influence under EA02) to determine what transactions are within the scope of their merger laws.[17] The ICN recommends that authorities should seek maximize legal certainty and predictability, through a consistent and transparent decision-making practice, and the use of guidelines or informal practice.[18]

In this respect, the MWG considers that the UK government's proposed approach could be viewed to be broadly in-line with ICN Recommended Practices. The MWG agrees with the CMA that its current process to assess material influence on a case-by-case basis, considering a broad range of factors, may in practice make it difficult to assess whether a transaction, in particular minority investments or strategic partnerships or other 'edge' cases with complex factors, meet the material influence test, which thereby reduces legal certainty and predictability. The UK government's proposal to resolve this issue is to introduce a closed list of statutory factors that it can consider, which in theory may limit the extent of the CMA's discretion with respect to when material influence occurs.

The MWG broadly welcomes the UK government's proposal to introduce a closed list of statutory factors, thereby limiting the extent of the CMA's discretion with respect to when material influence occurs. The MWG is of the view that this revised approach should in theory provide greater legal certainty and predictability, although the MWG notes that the current proposed list remains broad and that the CMA retains significant discretion, which may in practice not result in the desired increase in legal certainty and predictability.

The MWG acknowledges that certain other regulators have the equivalent of either de facto control, or a material influence test, with guidance provided that broadly ensures legal certainty. For example, within other international jurisdictions:

**European Union** (Decisive Influence): this is a "control" test based on the possibility of exercising such influence over an undertaking through rights, contracts or other means that allow decisive influence over strategic commercial behaviour (budget, business plan,

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17 ICN Recommended Practices for Merger Notification and Review Procedures, Part I, B.

18 ICN Recommended Practices for Merger Notification and Review Procedures, Part I, B, Comment 3.

appointment/removal of senior management, key investments). Outside of majority shareholdings and majority board rights, a minority shareholding can confer control on for example the basis of contractual rights such as veto rights in a shareholders' agreement over strategic commercial behaviour or de facto control if the holder can achieve a consistent and stable majority at shareholders' meetings.

**Germany:** In Germany, as the GWB does neither require the acquisition of a certain percentage of shares nor the acquisition of control, it is possible that even the acquisition of very low minority shareholdings may be sufficient. Whether the possibility to exercise such influence exists must be assessed on a case-by-case basis. According to the practice of the Federal Cartel Office and the courts, three cumulative conditions generally need to be fulfilled:

(i) A corporate law link: Such link typically consists in the acquisition of a minority shareholding below 25% (as otherwise Section 37 (1) No. 3 GWB is given) whereas purely economic or financial dependencies are insufficient. There have been cases where the acquisition of shares in the amount of less than 10% have been regarded as sufficient.

(ii) "Plus-factors": The second precondition are so-called "plus factors" which are usually additional rights, in particular, enhanced information, consultation and control rights, the right to appoint board members etc. which result in the possibility of the acquirer to influence the strategic business decisions of the target or specific/superior market know-how as compared to other shareholders. The lower the shareholding in the target, the more significant the 'plus factors' must be and vice versa.

(iii) Competitive nexus: It is important that the corporate link and the plus factors have a competitive effect in the sense that the acquirer and the target no longer act independently in the competitive environment. According to the FCO it is decisive that the acquisition of shares enables the acquirer to influence the decision-making process and, consequently, the market behaviour of the target. This also includes the acquirer's ability to assert his own competitive interests when deciding how to allocate the target's resources. This requirement is typically given where the undertakings concerned operate in the same markets (as competitors or potential competitors) or in vertically related markets. It may, however, also be the case for closely related markets.

German law does not provide for a closed list of statutory factors for assessing a "competitively significant influence". There is no specified minimum amount for the minority shareholding. Instead, the assessment remains flexible and effects-based, relying on an overall evaluation of the circumstances and the given plus factors in each individual case. There is certainly a degree of legal uncertainty for the companies involved in this concept which also leads to precautionary notifications with the FCO.

***Q19. Do you support the factors proposed for inclusion? [Yes / No / Not sure] Please explain why.***

Yes. The MWG notes that the factors proposed for inclusion by the CMA are as follows:

- 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.

The MWG agrees in principle with the factors proposed for inclusion, and notes that they are broadly aligned with the factors that are considered by International Jurisdictions when assessing material influence and de facto control.

As noted in the response to Question 18 above, the proposed factors for inclusion are broad and the CMA retains significant discretion when determining if the material influence or de facto control tests are met. The MWG is therefore concerned that the change to a closed list of statutory factors will not ultimately result in the increase in legal certainty and predictability that these reforms are aiming to achieve, and that greater legal certainty would only be achieved by a clear threshold for shareholding and voting rights and board representation.

The MWG notes that while the CMA is proposing to introduce a closed list of statutory factors for the share of supply test (see above Questions 14 to Q17), the CMA retains discretion in interpreting the "UK nexus" test which currently does not have a closed list of statutory factors and has been excluded from this review. A strong argument exists that the "UK nexus" test should also be revised, in line with the current proposals for the share of supply test, material influence and de facto control test, to a closed list of statutory factors. This change would increase legal certainty and predictability as if the "UK nexus" test is met (or deemed to have been met by the CMA) it can give rise to a mandatory merger reporting requirement for businesses designated under the digital markets regime.

***Q20. Are there any additional factors that should be included? [Yes / No / Not sure] Please explain why.***

No. The MWG is of the view that the factors proposed reflect both CMA practice and the CMA's recently amended guidance on jurisdiction and procedure (October 2025),[19] and therefore no additional factors should be included.

***Q21. Would the proposed reform for the material influence test improve predictability for businesses? [Yes / No / Not sure] Please explain why***

Not sure. As set out above, the MWG remains concerned that the flexibility retained by the CMA will result in a jurisdictional test which can be interpreted broadly and therefore be unpredictable for businesses.

The proposed revised material influence test, using a closed statutory list, will still be flexible, which the MWG notes can be beneficial in certain circumstances for both the CMA and business. The proposed revisions are likely to increase predictability for business when compared to the CMA's current approach, but when compared to other jurisdictional tests, which have a stricter brightline approach, the UK government's proposal retains a greater degree of flexibility which can ultimately result in unpredictable results for businesses.

### 4.B.3. Remedies

**Q22.** ***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. The MWG broadly agrees with the CMA's aim of resolving cases as soon as possible. The proposal of extending the review period for Phase 1 remedies to within 10 working days, following the CMA's decision on competition issues, to 20 working days will in principle allow additional time for the CMA to assess complex remedies, including carve-outs, behavioural remedies and 'mix-and-match' remedies. The MWG is of the view that this additional time

[19] Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2

should, in principle, increase the scope of remedies available to merging businesses to resolve competition concerns at Phase 1.

The MWG also notes, that the proposal to extend the remedy review period to 20 working days, retains the requirement for parties to put forward their remedy proposals within five working days following the CMA's decision on competition issues, unless otherwise agreed with the CMA, with the possibility for deadline to be extended by the CMA by five working days.

As submitted to the CMA in its response of 12 May 2025 re: Merger Remedies Review – Call for Evidence ("**Mergers Remedy Review Response**"), the MWG retains its view that the CMA should accept more complex remedies at Phase 1 while still respecting the '*clear cut'* and *'capable of ready implementation'* standard. The MWG in its response of 12 May 2025, noted that the '*clear cut'* standard reflects practical considerations as complex remedies may sometimes not be feasibly implemented within the constraints of the current short Phase 1 timetable. The MWG therefore welcomes the UK government's proposal to extend the review period of Phase 1 remedies to 20 working days, which should facilitate the possibility of the CMA accepting more complex remedies in Phase 1 in the future.

As a result of both the cost and resources required during a Phase 2 investigation, the risk of a Phase 2 investigation is a significant factor considered by businesses with respect to a proposed merger. The increasing willingness of the CMA to accept more complex remedies at Phase 1 e.g., *Schlumberger/ChampionX*, and an extended review period, is likely to be beneficial for merging parties, save CMA resources, while still ensuring a legally robust merger control assessment.

The MWG notes that the UK government's proposed extension for Phase 1 remedies to 20 working days is broadly in line with the extension for remedies in other international jurisdictions. For example:

- **European Union**: In Phase I, the review period of 25 working days is extended by 10 working days if remedies are submitted on or before the 20th working day.
- **Australia:** In Phase I, the review period of 30 working days is extended by 15 working days if remedies are submitted on or before the 20th working day.
- **France**: In Phase I, the review period of 25 working days is extended by 15 working days if remedies are submitted.

## C FURTHER CROSS-CUTTING CHANGES

### 4.C.1 Secretary of States's role in CMA guidance

***Q24. 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.***

No, with respect to technical merger guidance. The MWG recognizes the benefit of the comprehensive guidelines published by the CMA that provide additional guidance for businesses, and their advisors, in providing clarify and predictability including merger control guidance documents. The MWG concerns, as set out below, are with respect to the role of the Secretary of State on guidance that is of a technical nature i.e., merger control guidelines, as opposed to the role the Secretary of State has with respect to providing policy guidance to the CMA.

The MWG notes, that the Government is considering providing the Secretary of State with a formal role, including seeking their approval before publishing key guidance documents such as the Merger Assessment Guidelines.

The MWG is concerned that providing a formal role to the Secretary of State with respect to the CMA's merger guidelines increases the risk that the independence of the CMA may be eroded. While this risk may appear more theoretical in nature, the MWG is of the view that the independence of the CMA is of vital importance where the merger control guidelines and ultimately merger control decisions are concerned.

The MWG is concerned, therefore, that an increase in the role undertaken by the Secretary of State may result in merger guidelines which reflect the priorities of the government of the day and may have less emphasis on the CMA's statutory requirements.[20]

Furthermore, the merger assessment guidelines have historically not been subject to frequent review. The initial merger assessment guidelines were published on 1 September 2010, and the updated and current merger assessment guidelines were published on 18 March 2021.[21] An additional concern therefore exists that an increase in the role for the Secretary of State may also result in an increase in the frequency of the revision of the merger assessment guidelines to more closely reflect government policy which would decrease the predictability of the UK merger control regimes for businesses.

Finally, the MWG notes that the ICN Recommended Practices for Merger Notification and Review Procedures recommends that Competition agencies should have sufficient independence to ensure the objective application and enforcement of merger view laws.[22] As noted above, the MWG is concerned that the increased role for the Secretary of State may undermine the CMA's independence.

### 4.C.2. Excluding the Christmas period from statutory time limits

***Q25. Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits? [Yes / No / Not sure] Please explain why.***

Not sure. The MWG submits that merging parties should be given the option to request a longer Christmas period to be excluded from merger review statutory time-limits. This optionality should be available as there may be instances where the merging parties would prefer the review to continue as they are required to close by a particular date.

The MWG notes that the ability to exclude statutory time-limits for the Christmas period is likely to result in a more positive relationship between the CMA and the parties with a stake in its investigations as, in practice, individuals responsible for providing the information are away during the Christmas period, and businesses may also be closed during this period. However, it should be noted that the CMA is unlikely to receive the benefit of this approach, if it sends a request for information on the last working day before the Christmas period with a deadline to respond shortly after the Christmas break ends, as in effect external advisors and in-house counsel are likely to work on this request throughout the holiday period.

The MWG also notes that even in well-resourced in-house legal teams, the requirements of CMA requests for information can be burdensome and time consuming. This is particularly the case for in-house legal teams preparing responses to requests for information that require

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20 The MWG notes that the CMA is implementing the government's growth agenda, whereas under the Enterprise and Regulatory Reform Act 2013, the CMA's primary duty is to promote competition.

21 During this period the UK had five governments, Coalition Government (May 2010 to May 2015), Conservative Majority Government (May 2015 – July 2016), Conservative Minority and Coalition Government July 2016 to July 2019), Conservative Majority Government (July 2019 to July 2024), and Labour Majority Government (July 2024 to date).

22 ICN Recommended Practices for Merger Notification and Review Procedures, Part XII, C

information to be obtained from the business in different time zones, often with a short time-period to respond, which significantly increases the burden on these individuals.

While noting that this is a UK government consultation, the MWG would appreciate the opportunity more broadly to discuss these issues with the CMA, with the aim of developing a best practice way of working with respect to requests for information in mergers.

***Q26. If so, what length should the pause be?***

The MWG submits that the length of the pause, which can be requested by the merging parties, should be from the last working day before 24 December up until the first working day after 3 January.