Department for Business & Trade – Refining our Competition Regime

RESPONSE BY FRESHFIELDS LLP

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Freshfields LLP response to DBT's consultation on the UK competition regime

1. Introduction

1.1 Freshfields LLP (***Freshfields*** **or** ***the Firm***) welcomes the opportunity to respond to the Department for Business & Trade's (***DBT***) consultation on Refining the UK's Competition Regime (the ***Consultation***).

1.2 This response is based on our substantial experience and expertise in advising clients on complex and significant UK merger control reviews, market reviews, market studies and market investigations. We rely on this breadth of experience to provide these comments.

1.3 We have confined our comments to those areas of the Consultation which we consider are most significant. This response is submitted on behalf of the Firm and does not necessarily present the position of any of our clients or any individual partners in the Firm.

1.4 We would be willing to discuss any of our comments in more detail, to contribute to further thinking or analysis on these issues as DBT's thinking evolves and to comment on any draft legislation and/or guidance to ensure they do not have unintended consequences.

2. Executive summary

2.1 Many of the refinements, including the jurisdictional threshold clarifications and streamlining of the market investigation process have the potential to enhance the UK's competition regime.

2.2 However, some of the most significant changes suggested in the reforms prompt serious concerns:

(a) **The proposed changes to the Competition and Markets Authority (*CMA*) Phase 2 decision-making model risk poorer-quality decision-making and undermining investor confidence**. In short, the proposed changes would significantly increase the risk of the "wrong" decision being taken. Merging parties (and third parties) would lose important protections that currently form a key part of the process, while the new model would raise concerns around certainty and transparency (which could undermine the reputation of the regime in the eyes of investors). When such a fundamental change is envisaged, it is concerning that the Consultation neglects to identify (and analyse) the purported drawbacks with the current system or consider any other potential options for reform. The stated desire for greater "accountability" (which appears to drive the proposed reforms) is of limited relevance and misunderstands the function of a modern merger control regime based on evidence-led decision-making against objective criteria.

(b) **If the new Phase 2 decision-making model is nevertheless adopted, additional safeguards are needed to mitigate its adverse effects**. If considerations relating to "accountability" do

ultimately drive the introduction of the new model, it would be critical to put in place additional procedural safeguards – such as access to file, an enhanced hearing officer role, and/or more intensive judicial scrutiny – to protect parties' rights and mitigate the loss of the "fresh pairs of eyes" and independent decision-making body. These protections (which would not undermine the "accountability" of the CMA executive so would be fully consistent with the objectives for the proposed reforms) could be accommodated without other adverse impacts (such as unduly prolonging the length of investigations) and would be essential to ensure confidence in the new regime.

(c) **The suggested subjective "adverse effect on consumers"** test for market investigations would remove the discipline on the CMA to make an empirical finding before imposing remedies. This broadened intervention capability, combined with the scope for increased political influence risks transforming the regime from one driven by objective evidence-led competition enforcement to one driven by other considerations (which do not sit comfortably within the remit of a competition authority).

(d) **The enhanced algorithm information-gathering powers** are not necessary or appropriate outside of the bespoke digital markets regime. Imposing obligations to generate new data, simulations or tests, without clear parameters or justification, at the behest of an investigative authority, risks creating disproportionate burdens for businesses operating in the UK. These powers were designed for a use within a bespoke regime focussed on a limited number of businesses (with specific activities) and remain untested; extending them now across the wider economy risks undermining confidence in the predictability and proportionality of the UK competition regime.

2.3 In the context of recent controversies over several high-profile CMA decisions and the Government's removal of the previous CMA Chair, there is a broad public perception that the proposed reforms to CMA decision-making are designed to facilitate greater Government influence over important, individual CMA decisions. Even if that is not the intention of the current Government, the proposals do not appear to build in sufficient safeguards to prevent future Governments from exercising this influence.

2.4 The CMA, as a robust, credible, and fair-dealing competition authority, operating within a transparent and internationally respected legal framework, should be able to play a key role in encouraging growth and inward investment in the UK. Ensuring procedural fairness and impartial decision-making is essential to reducing the risk that poor decisions are taken and to send a signal to businesses (and their advisers) that they can have confidence in the regime. In this context, investor confidence requires that independence, fairness and objectivity are not only present but are seen to be present in the system.

2.5 While some other competition authorities may have greater political "accountability", these authorities, critically, typically have to "make their case" in court before taking final decisions or imposing remedies. By contrast, the CMA is the primary decision maker on all key issues of evidence and assessment, including in respect of remedies. The CMA's merger and markets decisions are subject only to what is in practice a very light-touch judicial review. The proposed regime, by consolidating so much decision-making power on final outcomes within the CMA executive, would be a notable outlier on the international stage. This risks undermining the UK's reputation as a stable, predictable, and genuinely pro-investment legal and regulatory environment, and could negatively influence investors' capital allocation decisions.

3. The nature of the consultation process

3.1 The Consultation is not simply a "tidying up" exercise. Instead, it envisages making fundamental changes to some of the most important aspects of the UK competition regime (e.g. the circumstances in which the CMA is entitled to intervene in markets and who takes "final" decisions in the CMA's most significant cases). But, in contrast to previous proposals for reform, the Consultation contains no meaningful analysis of the *status quo* position and typically arrives at singular solutions, without any material consideration of possible alternatives.[1]

3.2 **There is no assessment of the current regime's supposed shortcomings to justify the proposals.** The Consultation does not present any material analysis or evidence of failings in the current system (e.g. by explaining why specific features of the current regime are considered to be impeding economic growth).[2] While we have had a number of concerns regarding the manner in which the CMA operated the UK mergers and markets regimes in the recent past, we are not aware of any significant call by business or other users of the regime for the abolition of the CMA Panel. The Consultation also appears to entirely disregard the recent changes that have been made to the CMA's Phase 2 processes, which (in our experience) have already begun to materially change business perception. Indeed, in this regard, the Consultation is arguably premature in that there is a very limited period over which to assess the succession of reforms that the CMA has recently introduced. In particular, the most recent changes to the Phase 2 merger control processes have only taken effect relatively recently (in April 2024 and early 2025) and have not had the time

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[1] This approach is at odds with the Cabinet Office's Consultation Principles (2018), which notes: "*Consultations should be informative*: *Give enough information to ensure that those consulted understand the issues and can give informed responses. Include validated impact assessments of the costs and benefits of the options being considered when possible*; *this might be required where proposals have an impact on business*....". It is also at odds with the best practice and policy tools in the Government's Better Regulation Framework updated in 2023 (see para. 1.1).

[2] See New CMA proposals to drive growth, investment and business confidence – Competition and Markets Authority.

to "bed in", with only five cases having been decided under the process that these changes put in place.[3]

3.3 **No consideration is given to alternative options,[4] including those which would be more reasonable and proportionate.** Even if the Consultation had evidenced why reforms are required, it does not consider alternative options; in practice, it appears to be the case that the customary "call for evidence" and green paper stages have been bypassed, with the Government advancing directly to the white paper stage. The lack of alternative options presented suggests that the proposals being put forward are no longer at "the formative stage" required of consultations of this nature.[5]

3.4 **There is no impact assessment presented of the proposals' costs and benefits.** The Consultation does not appear to consider the potential risks introduced by the proposed reforms. For instance, there is an obvious risk that CMA Board members (who might struggle to find sufficient time to devote to a highly-complex and fact-intensive merger investigation) could become a "bottleneck" for decision-making or be less effective at providing scrutiny and oversight over the work of CMA case teams. This would risk undermining the quality of engagement with merging parties (which has been one of the positive features of the "new" Phase 2 process) and confidence in the system as a whole. These risks appear to us to be real and significant but do not appear to be taken into account at all.

3.5 **There is no coherent rationale underpinning the proposals.** The Consultation relies heavily on "accountability" as a key driver of the proposed reforms.[6] However, the Consultation does not clearly set out where the current issues with accountability lie (e.g. to whom, or at what point in the decision-making process etc). The CMA Board and CEO are accountable for the CMA's overall performance.[7] So, for example, if the CMA were pursuing a policy of unnecessarily "calling in" benign mergers and subjecting them to unnecessary regulatory scrutiny, the CMA Board and CEO would already be accountable for that policy. By contrast, other decisions taken by the CMA are not "policy" decisions but instead involve a quasi-judicial and objective assessment of the available evidence in specific cases to assess how the applicable statutory rules should be applied. It is not

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[3] See, GXO / Wincanton, Global Business Travel Group, Inc / CWT Holdings, LLC, Boparan / ForFarmers (Burston and Radstock mills), Constellation Developments Limited / ABVR Holdings Limited, Aramark / Entier.

[4] The Better Regulation Framework sets out case studies for consultations consulting on multiple or preferred options but in both cases other options are also provided (Better Regulation Framework, para. 5.12).

[5] "Government consultations" (CBP 10190) (House of Commons Library), Research Briefing, 14 February 2025 by Alice Baxter, para. 2.2.

[6] Consultation, para. 6.

[7] CMA "Our governance" reflects the role of the CMA Board to "*ensure that the CMA fulfils its statutory duties and functions*", "*establish the overall strategic direction of the CMA that fits within the policy framework laid down under the* [Enterprise and Regulatory Reform Act 2013]" and that it is responsible for the CMA's annual performance reports.

clear why the CMA Board and CEO are required to be "accountable" (to Parliament and/or the Government) for such individual case decisions.

3.6 **Lack of detail limits consultees' ability to assess the practical impact of many proposals.** More broadly, the majority of the proposals are loosely described with ambiguity as to how they will be implemented in practice and their workability. In practice, this makes it difficult to fully understand the nature of the proposals (and provide specific comments on their effects). Moreover, while the Consultation sets out a series of questions, these generally do not facilitate the provision of constructive input on the key issues relating to confidence in the fairness and objectivity of the UK system as a whole. Accordingly, to ensure our response to the Consultation is meaningful, the response is structured thematically rather than answering each question individually.

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

4.1 To be an effective process in which businesses and investors have confidence, the decision-making regime for Phase 2 mergers and market reviews must: (i) be designed to avoid confirmation bias; (ii) allow decision makers to make timely evidence-based decisions; (iii) withstand capture by businesses, advisers and politicians; and (iv) be appropriate for the whole economy.

4.2 This response focuses on four key points: (i) why the proposal to abolish the CMA Panel is unnecessary in light of the current regime; (ii) how a more reasonable and proportionate approach could be achieved by refining the current model; (iii) why the current proposal falls short of the standards identified in the preceding paragraph 4.1; and (iv) additional measures that would be appropriate to mitigate some of the most significant adverse impacts of the proposed new model if the Government nevertheless decides to proceed with the reforms.

The Consultation does not explain the specific case for change

4.3 It is unclear from the Consultation what problems exist with the current decision-making model to justify the Consultation's most significant changes. The suggestions in the Consultation run counter to our experience as one of the most regular advisers on Phase 2 mergers and markets investigations before the CMA over many years.

4.4 **It is unclear from the Consultation what has changed since the 2011 "competition regime for growth" consultation (*ERRA Consultation*) to necessitate changes to the CMA Panel system.** The ERRA Consultation stated that the two-phase process with an independent panel was introduced to ensure the regime was proportionate, flexible and included safeguards against confirmation bias.[8] The Government's own

[8] "A competition regime for growth: options for reform" (ERRA) Consultation (March 2011), paras. 3.6, 10.16 - 10.17. The ERRA Consultation expressly noted that a reform option which involved removing the Panel for Phase 2 decisions with an independent member of the executive would involve less independence in decision-making than the current structure (para. 10.37).

response to that consultation highlighted that stakeholders perceived the CMA Panel as providing a high level of oversight and that the objectivity and the robustness of the Phase 2 panel system was regarded as a strength of the system.[9] The ERRA Consultation noted, in particular, that the "two-stage" decision-making process in merger and market cases "*helps to ensure that the overall process of decision-making, in combination with an appeal mechanism where judicial review principles are applied, satisfies the requirements in Article 6 ECHR* [European Convention on Human Rights] *as regards the right to a fair trial*".[10] There is no clear explanation to allow respondents to understand, for example, whether, and if so why, the Government considers that the risks of confirmation bias have receded, or whether other policy considerations are now considered to outweigh the importance of the checks and balances provided by an independent Phase 2 decision-making body. We are not aware of any considerations that would justify such a view.

4.5 **Recent experiences of the reformed Phase 2 merger process have been increasingly positive.** If the Government's concern is businesses' perception of the process, our – and our clients' – experience following the April 2024 updates to the merger review process is that clients value the contribution of the Panel within the context of the "new" Phase 2 process.[11] The previous concerns of business and investors related primarily to the way in which the CMA chose to operate in practice and not to the existence of the CMA Panel as such. The CMA's reforms, which increased the frequency of Panel-party interactions, allow merging parties to present their case directly to the Inquiry Group, providing a more meaningful opportunity for merging parties to exercise their right to be heard. This has contributed to a perception that engagement with parties has been more effectively embedded into the process. More effective interactions with the CMA Panel have fostered constructive, meaningful interactive exchanges on key issues where merging parties are able to respond directly – and in real time - to insights the Inquiry Group provides into its evolving thinking. It is important that any changes do not undermine the improvements made to the process in 2024 (e.g. because CMA Board Members lack sufficient bandwidth to engage in the same way).[12]

4.6 **The Government already has multiple mechanisms for oversight over the CMA**. As noted above, while the CMA Board and CEO are already responsible for the CMA's overall running and performance, there is no clear reason for them to be "accountable" for quasi-judicial decisions reached on

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9 BIS "Growth, competition and the competition regime: Government response to consultation" March 2012, para. 11.2.

10 ERRA Consultation, para. 10.17.

11 See respondent response's (published 25 April 2024) to CMA's consultation on Draft revised guidance on CMA's jurisdiction and procedure in relation to mergers, draft revised merger noticed and draft revised template waiver (20 November 2023).

12 It is therefore welcome that the CMA acknowledges in its response that it would expect to provide guidance to "set out how parties can move even more swiftly through the system and engage more directly with decision makers and committee/sub-committee chairs". "CMA response to consultation on refining the UK's competition regime" (CMA Consultation response) (10 March 2026), Response to Q3, para. 11.

an evidence-led basis in individual cases.[13] In any case, to the extent that Parliament (and/or Government) wishes to scrutinise and/or provide a steer to the CMA, existing oversight mechanisms include: (i) the Government's Strategic Steer, which itself has recently been made more comprehensive;[14] (ii) ongoing policy engagement and direct dialogue between the Government and the CMA, where appropriate, to ensure that the Government continues to seek the CMA's advice and the CMA supports the Government's agenda; (iii) ministerial speeches and the broader policy framework, such as the Industrial Strategy and growth agenda, which effectively signal the Government's priorities; and (iv) the CMA's existing obligation to provide regular reports on its work, outcomes and impact in its Annual Report and directly to the Government[15] which allows the Government to shape or critique the regulator's direction throughout the year.

The proposal presents several material risks

4.7 By way of introduction, it is important to recognise that the track record of the Digital Markets, Competition and Consumers Act 2024 (***DMCCA***) model for decision-making, which is referred to extensively in the Consultation,[16] can only be given very limited weight. The regime is still nascent (there have been only three cases to date – and the robustness of the decisions taken under this model has not been tested in litigation).[17] There is a limited basis to assess how effectively the regime is operating in terms of decision-making quality.

4.8 The decision-making proposal would not meet the criteria articulated in paragraph 4.1 above and carries with it substantial risks which have not been considered in the Consultation.

(a) **The proposal exacerbates risks of confirmation bias.** The new model abolishes the "fresh pair of eyes" the CMA Panel provides. The current system provides an essential institutional check and balance, ensuring an independent Inquiry Group, distinct from the Phase 1 case team and executive leadership, critically evaluates the issues and evidence.

(b) **Potential delays and compromises to decision-making.** Involving the CMA Board directly in multiple complex and fact-intensive decisions may create significant bottlenecks and stretch the bandwidth of senior leadership. In addition, the skills and experience

[13] See above, at para. 3.5, and references therein.

[14] The Strategic Steer states that the Government will "continue to engage with the CMA on key policy issues" and "*[w]here appropriate the CMA should, through the markets regime, or through wider advocacy, support the agenda of this government*". See Strategic Steer, section 3, Engagement with government.

[15] See DBT, *Strategic steer to the Competition and Markets Authority* (Strategic Steer) (15 May 2025), section 4, Accountability.

[16] Consultation, paras. 19–24.

[17] The CMA has designated Apple and Google with "strategic market status" in mobile platforms and Google in general search/search advertising under the DMCCA.

required for sitting on the CMA Board (particularly as a non-executive director) are not necessarily the same as those required for making decisions regarding Phase 2 mergers and market investigations. Drawing decision makers from a narrower pool of CMA Board members or the CMA executive may, as noted above, raise bandwidth constraints. These constraints could compromise the depth of the Board's engagement with detailed evidence as well as the running of the CMA more generally. In this regard, there is a material risk that the value of merging parties' "day in court" (e.g. at a main party hearing) will be diminished if decision makers are less well prepared or less effective at providing senior oversight over key decisions. As a result, the helpful "update calls" that now form part of the Phase 2 process risk becoming less frequent and/or informative to parties and their advisers.

(c) **Increased risk of capture by businesses and politicians.** The Consultation argues the proposals will increase accountability to Parliament.[18] As noted above, however, the CMA Board and CEO are already accountable for the CMA's overall performance, and there is no basis to consider that the CMA Board and CEO need to be accountable for quasi-judicial decisions on specific cases. It is long-standing Government policy that merger control decisions should be taken on objective, evidence-led grounds (rather than under the broader "public interest" test historically used by political decision makers to take decisions).[19] Assuming that this remains the case, the proposals run the risk of giving rise to a perception that the Government could (non-transparently) seek to influence the outcome of individual cases for reasons not solidly or solely based on the evidence – or that the CMA Board and/or CEO could feel they should "second guess" the Government's possible views on individual cases (to avoid adverse "feedback" through informal or formal channels of accountability). This could leave individual cases more susceptible to political pressure, which could, in turn, lead to more lobbying of the Government by vested interests to influence specific cases. This could result in a shift away from an objective and evidence-based regime where cases are decided (and seen to be decided) on competition grounds. As a result, over time, confidence in the regime risks being diminished rather than enhanced.

4.9 It has been suggested in different fora by DBT and the CMA that the proposal is designed to allow executive members of the CMA Board to participate in (but not determine) CMA decisions, but otherwise to replicate the existing Panel structure through CMA Board sub-committees. As will have become apparent from the level of public commentary – and our views set out above

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[18] Consultation, para. 6.

[19] Department of Trade and Industry "*A World Class Competition Regime*" (Cm5233, 2001) (as implemented by the Enterprise Act 2002), paras. 5.3–5.5 recognising that it is for the competition authorities, rather than ministers, to make decisions with respect to a "*competition-based test*" rather than a public interest test, ensuring that businesses will no longer need to "*factor in the possibility that decisions will be influenced by political considerations*".

– there is a wide perception that the proposal, coming after high profile controversies over several CMA decisions (such as the *Microsoft/Activision* merger decisions) and the Government's removal of the CMA's prior Chair, is explicitly designed to ensure greater Government influence over important CMA decisions. Against this backdrop, it is hard to construe the call for greater "accountability" in a different light. Even if that is not the current Government's intention, the proposed reforms to the CMA Panel system do not appear to be sufficiently robust to preclude this approach by a future Government.

4.10 Any changes to the CMA Panel system will also have a knock-on impact on regulatory appeals and redeterminations in addition to mergers and markets cases. As the Government will be aware, regulatory appeals are complex, with far-reaching repercussions, and any changes to the CMA Panel system should take into account continued access to independent experts that are required to determine regulatory appeals. The system of regulatory appeals is regarded by investors as a crucial check and balance on decisions of sectoral regulators that often underpin billions of pounds of investment in UK critical infrastructure. Accordingly, it is crucial that such checks and balances are not diluted when changing the make-up of the decision-making groups.

Concerns identified can be addressed more effectively and proportionately

4.11 The Consultation identifies two concerns regarding the existing CMA Panel model: (i) the CMA executive's responsibility for defending decisions it did not directly shape; and (ii) the potential for inconsistent outcomes across Panels. These concerns could be addressed more effectively and proportionately without removing the important due process safeguards provided by independent Phase 2 decision makers.

4.12 First, as noted above, it is not necessary for the CMA Board and/or CEO to be accountable for individual case decisions under a framework established by law, supported by CMA guidance (issued under the supervision of the CMA Board) explaining how it seeks to apply the law. The fact that the CMA Board and/or CEO are not (and should not be) accountable for individual case decisions within this framework can be made clear (to the extent necessary) to stakeholders in Government, Parliament, and the general public through effective communications. To the extent that greater public explanation or accountability for CMA Phase 2 decisions is considered desirable, this could be provided by more frequent engagement from CMA Panel Chairs, explaining the reasons behind decisions that have been taken.

4.13 Second, as the UK courts have recognised, the CMA's guidance plays a key role in ensuring consistency between different cases.[20] Other forms of internal coordination and information-sharing could also play a role in ensuring consistency of approach. In any case, it is not apparent that "inconsistent" decisions are being reached in practice to any significant

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[20] *Ecolab Inc v Competition and Markets Authority* [2020] CAT 12, para. 93.

degree (given that all decisions are fact- and context-specific) and the Consultation fails to provide any examples to substantiate this risk.

Minimum mitigations to reduce the adverse impact of diminished due process rights

4.14 If – as it appears – the Government is minded to abolish the Panel system and replace it with the Consultation's proposal, this will result in the loss of perhaps the most significant procedural safeguard for merging parties in the current system. If this is ultimately the Government's preferred approach (i.e. because it considers that the "accountability" of the CMA should take precedence), it will be critical to put in place other procedural safeguards to mitigate the adverse impact on robustness of the regime.

4.15 **Access to file**. The CMA is currently an outlier in its restrictive approach to providing access to evidence on its case file, a matter that is often of significant concern to parties. Providing parties to merger and market investigations with more extensive access to the underlying evidence would bring the CMA into line with the European Commission and other major antitrust authorities to counter the "information asymmetry" and lack of transparency currently present in CMA investigations. Giving the merging parties access to the entire case file following the publication of its provisional findings (using confidentiality protections as appropriate), rather than just the CMA's own summary "gist" of the evidence, would provide important additional transparency where independent decision makers are no longer taking a "fresh look" at the evidence. This would, in our view, be an essential mitigation to seek to maintain confidence in the objectivity of the system overall.

4.16 In a recent consultation on Phase 2 reform, the CMA has said that managing access to file would be an additional burden, delaying decision-making and that there had been "no suggestion" in previous CAT proceedings where the CMA's disclosure of evidence had been challenged that the CMA is "*withholding, distorting or otherwise failing to adequately provide the gist of evidence appropriately, or that merger parties cannot respond sufficiently to the case against them*".[21] These justifications (which were, in any case, unconvincing given international best practices) no longer stand.

4.17 First, this would ignore recent developments in case management and document review tools, facilitated by AI, which materially reduce the burden of evidence-management. It would be entirely inconsistent with the CMA's "4Ps" agenda for the CMA to resist providing access to evidence on its file on the basis that it is unwilling to make the most of these advancements (particularly where off-the-shelf software that could support this process is already readily available).

4.18 Second, it is no longer the case that the CMA has an unblemished track record in accurately providing the "gist" of underlying evidence.[22] The

[21] CMA (20 November 2023) Draft revised guidance on the CMA's jurisdiction and procedure in relation to mergers, draft revised merger notice and draft revised template waiver: Consultation document, paras. 3.36 and 3.41.

[22] See *Spreadex Limited v Competition and Markets Authority* [2025] CAT 13 (***Spreadex***).

recent judgment in *Spreadex* highlights that mistakes inevitably can and do arise when "gisting" evidence. Such errors highlight the benefit that access to file in Phase 2 can provide (in that case, the issue was only uncovered once Spreadex appealed the CMA's decision to the CAT).[23]

4.19 Access to evidence is, in any event, a minimum procedural safeguard and hallmark of fairness and its importance would be underscored if the check and balance provided by an independent Panel is to be removed.

4.20 **Enhance the role of the CMA's Procedural Officer (*PO*).**[24] The PO is a role that already exists within the CMA to provide a degree of internal balance on certain important process decisions. Reflecting certain aspects of the Hearing Officer role at the European Commission, an enhanced role for the PO could provide a senior independent voice to increase the merging parties' confidence in how the investigation is run.[25] Provided the individual is sufficiently senior and independent, and the PO team is well-resourced, this proposal would provide some additional comfort to parties regarding procedural fairness and could also create efficiencies within the CMA:

(a) **Process matters**: the PO's role, which is largely limited to specific process points, could be expanded to include ultimate authority relating to access to file and the administrative timetable (as well as an overarching duty to ensure fair treatment). The role could also include the right to decide on the validity of confidentiality claims. The Consultation proposal currently states that process matters would be taken care of "*within established CMA governance procedures*" rather than by the Inquiry Group.[26] However, unless this role is separate from the CMA executive, it is manifestly insufficient to safeguard the interests of parties before the CMA in these processes. Expanding the role of the PO would remove the "judge and jury" problem where the case team itself decides which evidence the parties are allowed to see.

(b) **Main Party Hearings**: in addition to the above, the PO could have a key role to play in hearings with the parties, for example acting as a neutral chair of the hearings (rather than the sub-committee), with the power to decide the agenda and timings allotted to parties for representations etc.

4.21 **Full merits review on appeal.** The "independent and expert" nature of the CMA Panel was previously a primary justification for keeping the judicial review standard for appeals in merger and markets cases, which the Consultation acknowledges is a "*critical part of fair procedure*".[27] A judicial review standard provides very limited scope to challenge the CMA's decision under the proposed reforms. If checks and balances are reduced within the

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23 *Spreadex*, para. 6.

24 Procedural complaints: raising procedural issues in CMA cases.

25 The Hearing Officers - Competition Policy - European Commission.

26 Consultation, para. 31.

27 Consultation, para. 36.

CMA proceedings, there is a significantly stronger policy case for the CAT to scrutinise the substance of CMA decisions more closely – i.e. to reintroduce a "second pair of eyes" through a full merits review.

4.22 Without these safeguards, the proposed reforms would leave the UK significantly "out of step" internationally in terms of procedural rights (see **Annex A**).

4.23 In conclusion, the decision-making reforms raise significant concerns around certainty and transparency, and could ultimately undermine the reputation of the regime. The desire in the Consultation for greater "accountability" is of limited relevance – the concerns identified in the Consultation could be addressed more effectively and proportionately without removing important procedural safeguards.

5. Markets work and market remedies

Single-phase market review

5.1 In principle, a simplified single-phase market review tool is sensible as it would facilitate a more proportionate and streamlined process. The proposed timings also seem reasonable provided they do not jeopardise robust analysis, procedural safeguards or the parties' rights of defence. However, further detail – and consultation – including on extensions, is required to ensure the proposal achieves its objectives.

Single legal test of "adverse effect on consumers"

5.2 It is logical to deploy a single test for a single-phase market review. However, replacing the current "adverse effect on competition" test with the market study equivalent of an "adverse effect on consumers" test could have serious adverse consequences. In particular, by enabling intervention on the back of a relatively opaque legal test, there is a risk that this reform could undermine the UK's reputation as a stable investment environment.

5.3 The current "adverse effect on competition" test has a meaning based on legal precedent, requiring the CMA to clearly demonstrate a structural impact on competition based on objective empirical evidence. In contrast, the "adverse effect on consumers" test appears to be much more subjective, which would lower the bar for an adverse finding to be reached (and remedies to be subsequently imposed), whilst weakening affected parties' ability to defend themselves. These risks are, of course, exacerbated where decisions are taken under a model with fewer checks and balances.

5.4 Given the recent expansion of the CMA's consumer law powers under the DMCCA, there is no "gap analysis" to explain why an additional "consumer"-related power should be introduced or in what circumstances the CMA should act to protect consumers under its market investigation powers (as compared to its (reformed) consumer law powers). This important issue is not currently addressed in the Consultation.

CMA market remedies

5.5 **Automatic sunset clauses in remedies are welcome, but they should be regarded as the minimum safeguard.** The inclusion of a positive obligation for the CMA to review relevant remedies every ten years should not mean this review period becomes the default position: the CMA should be obliged to review – and subsequently revoke or vary – remedies as soon as is appropriate given relevant market conditions (which may be much shorted than ten years in markets subject to fast-moving technological change). Parties should also retain the ability to request that the CMA reviews remedies more frequently (e.g. if there are a change of circumstances).[28]

5.6 Furthermore, as with many of the other proposals, the Government should consult on the detail to ensure the proposal's success including:

(a) guidance on how the CMA will decide on the duration of sunset clauses and/or cases where such clauses would be inappropriate, including relevant factors for consideration; and

(b) what would constitute the "exceptional circumstances" required to depart from a ten-year review period; and in those exceptional circumstances, an obligation on the CMA to give clear, evidenced reasoning with an opportunity for the parties to challenge why a ten-year review is inappropriate.

5.7 Finally, the Government must commit to providing the CMA with the resources (including budget) required to invest the necessary time and attention to implement the proposal successfully without detracting from other important parts of the CMA's work.

Concurrency

5.8 **The concurrency proposals are sensible, enabling the CMA to capitalise on the sectoral regulators' expertise and experience in complex regulated industries, while increasing control over its own resources.** Furthermore, sectoral regulators are best placed to opine on remedy design, monitoring and enforcement in their industries given the interplay between remedies and existing regulatory landscape. As with the other proposals, the Government will need to consult further on this proposal's detail to ensure its workability.

6. Mergers

Increasing predictability in merger control

6.1 The open-ended nature of the CMA's jurisdictional tests and their various limbs (e.g. "substantial part of the UK") can make it difficult for merging parties to confidently assess whether a given transaction will fall within the

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[28] CMA11, "Remedies: guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders" (January 2014, revised August 2015), paras. 3.2 – 3.3.

CMA's jurisdiction. In this respect, the UK merger regime is currently significantly more complex and uncertain than other major merger control regimes globally. This uncertainty complicates deal planning, introduces timing risk and can deter investment activity, particularly when the CMA can call transactions in retrospectively. Such outcomes are inconsistent with the Government's overriding objective for growth and the CMA's commitment to the 4Ps.[29]

6.2 Against this backdrop, the jurisdictional proposals appear sensible. However, the benefits of these proposals will only be realised if they are correctly implemented. It is imperative that the final legislative provisions are precisely drafted, and that the CMA's guidance on their application is clear, specific and grounded in practical examples that enable businesses and their advisers to conduct meaningful self-assessments. Conversely, a closed list comprising open-ended, ambiguous criteria will merely perpetuate the existing uncertainty (or introduce new, untested issues giving rise to uncertainty).

6.3 More broadly, to ensure predictability and administrative coherence, the proposals for jurisdictional certainty must be applied uniformly across: (i) all UK merger control regimes – including those for energy networks and water – unless there is a clear case to the contrary; (ii) the National Security and Investment Act (***NSIA***) regime; and (iii) the public interest intervention notice regime under the Enterprise Act 2002.

The "share of supply" test

6.4 Again, the proposals to limit the factors the CMA can assess to determine the "share of supply" has the potential to significantly improve transparency and predictability by limiting the CMA's flexibility to create novel jurisdictional criteria or interpretations of the test. However, the benefits of this proposal will only be realised if correctly implemented. This necessitates further consultation to:

(a) **ensure the factors are tightly drafted and clear**. Based on experience, criteria such as, "value", "quantity", and "number of workers employed" are generally understood, but the practical application of other concepts (e.g. "price") is unclear. Unless these terms are clearly defined in the legislation or, at a minimum, in guidance, there is a material risk that the CMA will retain the ability to interpret even a closed list of metrics creatively;

(b) **clarify whether the CMA will apply a hierarchy of factors and how the parties are expected to assess their share of supply**. Based on past cases, "value" and "quantity" are the most appropriate and readily ascertainable criteria and should, therefore, be treated as the basis for assessing share of supply. The remaining criteria should be applicable only in exceptional and clearly delineated circumstances. Without these limitations, the introduction of a

[29] CMA, 4Ps framework (New CMA proposals to drive growth, investment and business confidence – Competition and Markets Authority). Also see Strategic Steer.

closed list will not, in itself, alleviate the considerable existing uncertainty and burden for the merging parties. Businesses, particularly those with diverse operations across multiple product and geographic markets, would still be compelled to undertake the burdensome exercise of assessing their position against all criteria on the list to achieve certainty;

(c) **limit the CMA's discretion in interpreting the list.** For instance, the relevant statutory provision should include a formal interpretive note, requiring the share of supply to be interpreted "narrowly";[30] and

(d) **require the Government to periodically review and amend the closed list** using delegated powers to ensure its continued relevance to fast-evolving markets. The Government should review the list every five years, while retaining the ability to review earlier in specific and exceptional circumstances. Any amendments (including associated drafting and guidance) should be subject to consultation.

Material influence test

6.5 Retaining the material influence test while clarifying its scope by reference to a closed list of statutory factors is a proportionate and well-targeted reform that could, if correctly implemented, deliver a meaningful increase in legal certainty.

6.6 The relevant factors set out in the proposals broadly reflect current practice. However, for this proposal to be effective, the Government should consult further, including on:

(a) the wording of the final list of relevant factors to ensure it is tightly drafted;

(b) accompanying guidance, elaborating on the interpretation of each factor, particularly the more ambiguous ones (e.g. "strategic" decisions and information) and providing clear case studies;[31]

(c) how the CMA's discretion should be limited to prevent any unduly broad interpretation of the closed list of factors that would reintroduce the uncertainty the reform is intended to address;[32] and

(d) introducing a potential safe harbour (see below).

6.7 A significant shortcoming in the current regime – and one on which the proposal is silent – is the absence of a clear statutory safe harbour below

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[30] See Freshfields' comments within Freshfields response to the "'4Ps' updates to the CMA's mergers guidance (CMA2) and mergers notice template" consultation, para. 3.10.

[31] Further details on precise suggestions are provided in Freshfields response to the "'4Ps' updates to the CMA's mergers guidance (CMA2) and mergers notice template" consultation, paras. 3.3 – 3.5.

[32] Also see Freshfields comments within Freshfields response to the "'4Ps' updates to the CMA's mergers guidance (CMA2) and mergers notice template" consultation, para. 3.6 which note the material influence test should be interpreted "narrowly".

which material influence is presumed not to arise. It would be consistent with the Government's objective to increase predictability to:

(a) introduce a statutory safe harbour stipulating that a shareholding of less than 15% will not, absent exceptional circumstances specified in legislation, confer material influence. This approach would largely codify established CMA practice, as findings below this level are rare, and the CMA itself acknowledges their limited applicability.[33] Such a safe harbour would provide a clear, predictable baseline for businesses and investors, aligning the UK with other major jurisdictions that employ such thresholds; and

(b) articulate workable presumptions within the accompanying guidance for shareholdings between 15%–25%, without which considerable uncertainty would remain due to the CMA's fact-specific assessment. For instance, the guidance could state that no material influence is assumed for this range absent other evidence of influence (e.g. board representation, veto rights over strategic commercial decisions etc).[34]

6.8 Finally, for legal consistency, we would welcome confirmation that any clarifications made to the "material influence" threshold in a merger control context will apply equally to the NSIA.

"UK nexus" requirements

6.9 **The Government should take this opportunity to narrow and clarify the "UK nexus" requirement in the hybrid jurisdictional test**. The UK nexus test is not precisely defined in primary legislation. The CMA's guidance then creates further uncertainty by suggesting a particularly broad interpretation, stating that the threshold could be met even where only a "preparatory step" has been taken towards *potentially* supplying goods or services in the UK.[35] Such a broad, ambiguous test is inconsistent with the Government's aim to provide the regulatory certainty needed to encourage investment in the UK, as well as internationally recognised best practice on local nexus requirements.[36] In practice, merging parties have to conduct extensive fact-finding to consider any possible links (however tenuous) a business might have to the UK. The need for a clear-cut nexus test is, in fact, arguably even stronger (by comparison to the share of supply or material influence tests) given that this forms part of the test for mandatory

[33] CMA2 "Mergers; Guidance on CMA's jurisdiction and procedure" (**CMA2**) (updated December 2025), page 122, FN52 recognises in the CMA's decisional practice it has only rarely found shareholdings of less than 15% to confer material influence.

[34] See Freshfields comments within Freshfields response to the "'4Ps' updates to the CMA's mergers guidance (CMA2) and mergers notice template" consultation, para. 3.3.

[35] CMA2, para. 4.92. See page 46, FN141, which recognises that this can consist of "*steps going beyond mere feasibility studies taken outside the UK*".

[36] See ICN Recommended Practices for Merger Notification and Review Procedures (2002) and the OECD note on Local Nexus and Jurisdictional Thresholds in Merger Control, DAF/COMP/WP3(2016) para. 4, which examine best practices for local nexus requirements, underscoring that notification criteria should be objectively quantifiable and readily accessible tests. See Freshfields comments within the CMA's consultation on draft updated mergers guidance documents (CMA2, CMA18, CMA64, CMA108, CMA17 and CMA190), paras. 2.1 – 2.3.

merger reporting for firms designated with strategic market status.[37] This test should therefore also be revised to be based on a "closed list" of factors that can be concretely assessed by merging parties.

Providing additional time to consider remedies at Phase 1

6.10 The Government's proposal to extend the statutory period for the CMA to consider Phase 1 remedies recognises the benefits of resolving competition concerns at the earliest appropriate stage. The additional time and flexibility provided by the extended timeframe would enable more meaningful engagement on remedies during Phase 1, increasing the prospects that merging parties can develop proposals that fully address the CMA's concerns. The CMA's continuing ability to proceed directly to Phase 2 where it is clear that remedies at Phase 1 will not be achieved is an important safeguard, ensuring that the extended timeframe is not used to delay such cases.

6.11 That said, merging parties will need certainty and predictability to be able to factor the extension into their strategic planning when designing a remedy offer and realise the full benefits of the proposal. In particular, we look forward to more clarity on:

(a) **When the CMA will consider and communicate its extension decision.** If the CMA waits until close to working day 5 before communicating its decision, the practical benefit of the extension will be significantly diminished. We would suggest that the CMA should be required to indicate as soon as is practicable, and in any event no later than the end of Phase 1 (i.e. Day 40) whether the CMA considers that the circumstances of the case are such that the CMA would be minded to accept any requested extension from the parties to further develop their proposals.

(b) **A clear description to explain when the CMA is likely to consider that there is a "reasonable prospect" of resolving the CMA's concerns at Phase 1 to justify the extension.** This might include – among other factors – the nature and complexity of the remaining issues to be resolved. Providing businesses with visibility on the relevant criteria would enable them to effectively engage in early remedy discussions during Phase 1 and calibrate their initial proposals accordingly.

(c) **The communication of reasons not to grant an extension and how merging parties could challenge the CMA's decision** to enhance transparency and enable merging parties to understand the basis on which the CMA has concluded that there is no reasonable prospect of resolving concerns.

[37] DMCCA, section 57, amending the Enterprise Act 2002.

7. Further cross-cutting changes

Stronger investigative powers for algorithms

7.1 The Government proposes to extend the investigative and information-gathering powers currently available to the CMA under its digital market functions pursuant to the DMCCA, "*to the CMA's wider competition and consumer protection functions*"[38] (including its functions under the Competition Act 1998 (***CA98***) and the Enterprise Act 2002). With respect to algorithms, the proposal lacks sufficient detail to enable a meaningful assessment of the scope, proportionality and practical implications of the proposed powers. In particular, it is critical for the Government to provide further detail on:

(a) **the rationale for providing the CMA the ability to compel a firm "*to produce simulated outputs or data not already held*" outside of a DMCCA context** (e.g. by showing that the CMA does not already have this power). This is particularly important given such expanded powers could result in a disproportionately burdensome investigative process for businesses and therefore should be restricted solely to cases where such powers would be justified;

(b) **why the powers designed for the regulation of a narrower set of digital firms are appropriate or proportionate when applied to the wider set of businesses** which may be subject to the CMA's investigatory or enforcement action. The CMA's enhanced powers under the DMCCA were deliberately constructed for policy objectives relating to the unique characteristics of digital markets, and we would have significant concerns about any proposal to wholesale extend these powers beyond that context;

(c) **how the CMA will be able to utilise these information gathering powers**, including whether these will be applied within the existing scope of information gathering powers in each regime. For instance, for CA98 investigations, the CMA's powers should continue to be expressly limited to information required "*for the purposes of*" such an investigation where the CMA has "*reasonable grounds for suspecting*" that an infringement has occurred;[39] and

(d) **the threshold (if any) that would be applied to the investigation of algorithms**. The Government should explain whether the powers would apply to 'simple' algorithmic systems or only complex systems and explain how each will be defined.

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[38] Consultation, para. 95.

[39] CA98, section 25(2), (4) and (6).

The Secretary of State (SoS) role in CMA guidance

7.2 There is no justification for SoS involvement in general CMA guidance; indeed, such intervention would be inappropriate. In particular:

(a) **the central purpose of CMA guidance is to provide a neutral, authoritative interpretation of relevant statutes**, grounded in CMA precedent and current decisional practice. Effective guidance increases predictability, ensures substantive consistency, and facilitates impartial competition analysis, safeguarding parties' rights. Subordinating CMA guidance to the Government's evolving industrial strategy priorities would invariably foster uncertainty and unpredictability, thereby diminishing inward investment – an objective explicitly counter to the Consultation's stated aims;

(b) **the Consultation provides little rationale for or detail on the proposal**, particularly where such guidance does not address novel or highly sensitive areas. Indeed, the Government's Strategic Steer and other mechanisms set out in paragraph 4.6 above are already sufficient to ensure the CMA takes Government policy into account and the Consultation does not set out any reasoning to the contrary;[40]

(c) **guidance must be updated regularly to remain current and introducing an additional layer of ministerial approval would delay the process**, materially increasing operational risks and reducing certainty for businesses;[41] and

(d) **SoS involvement will compound concerns regarding the CMA's independence**[42] and the perception that UK competition policy is becoming a political football.

Excluding the Christmas period from statutory time limits

7.3 We support the proposal to exclude the Christmas period from relevant statutory time limits and suggest a period from 24 December (or 22 or 23 if 24 December falls on a Sunday or Saturday) until the first working day after 1 January. Excluding this period is sensible and pragmatic; it would ensure case timetables are not unduly compressed by the holiday season, while also bringing the CMA's timetable into line with other comparable competition regulators.[43]

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[40] The Strategic Steer states that the Government will "continue to engage with the CMA on key policy issues" and "[w]here appropriate the CMA should, through the markets regime, or through wider advocacy, support the agenda of this government". See Strategic Steer, section 3, Engagement with government.

[41] See CMA Consultation Response, Response to Q23, para. 46.

[42] See CMA Consultation Response, Response to Q23.

[43] For example, the EU's European Commission, Australian Competition and Consumer Commission, New Zealand's Commerce Commission and Japan's Fair Trade Commission.

Annex A – High-level comparison of procedural rights across comparable jurisdictions

Jurisdiction	Access to File	Procedural / Hearing Officer	Merits review	Separation between decision makers and the competition authority's executive
Australia	**Yes** but only upon appeal. Access to the case file is not permitted during the ACCC's review;[1] [2] it is only granted if the ACCC determination is appealed to the Competition Tribunal.[3]	**No**. There is no dedicated procedural officer role. During Phase 2, notifying parties and third-parties engage with the same ACCC case team as was allocated in Phase 1.	**Yes**. Review of an ACCC determination is available on a "limited merits basis" by the Competition Tribunal.[4] This review is generally restricted to the material that was originally before the ACCC, except in specific and limited circumstances.[5]	**Yes.** There is formal separation: the ACCC staff case team investigates and makes a recommendation, while the (independent) ACCC Commissioners make the final determination. Parties can appeal an ACCC determination to the Competition Tribunal.
Brazil	**Yes**. The general rule is that all documents in the case files are treated as public, granting continuous access to public versions.[6]	**No**, at the Superintendence-General (***SG***) level; there is no designated officer during the initial review. **Yes**, at the Tribunal level; a Commissioner is appointed as a Rapporteur to manage and lead the review of the case. [7] The Commissioner Rapporteur is also responsible for deciding when the merger under investigation will go to trial at CADE's Tribunal.[8]	**No**. Judicial review of CADE's Administrative Tribunal decisions are limited to procedural errors.[9]	**Yes.** Brazilian competition law provides for a separation between the authority's investigative body (the SG) and its decision maker (the CADE's Administrative Tribunal).[10]
Canada	**No, not during the administrative review.** Reflecting the regime's adversarial nature, there is no formal or informal access to the file while the Competition Bureau reviews the merger.[11] **Yes, conditionally during litigation.** If the Bureau challenges a transaction before the Competition Tribunal, respondents gain access to the file via	**No**. This position does not exist in the Canadian system.	**Yes, in some cases.** Decisions of the Competition Tribunal can be appealed to the Federal Court of Appeal.[13] If the appellant seeks to challenge a question of fact, they must first obtain permission from the Federal Court of Appeal.[14]	**Yes.** Canadian competition law provides for a separation between investigation and adjudication. The Competition Bureau functions as an independent investigator and applicant, while the Competition Tribunal serves as the sole decision maker.

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1 ACCC's Process Guidelines, pp. 29 and 35.

2 For completeness, the ACCC is required to publish a "Notice of Competition Concerns" (NOCC) if a notified acquisition proceeds to a Phase 2 review (in depth assessment) beyond a 25-business day period. The NOCC will only describe any material issues of concern and feedback in an aggregated, non-identifying manner.

3 Competition Tribunal Practice Direction No 3; One of the matters to be addressed at the first directions hearing is: the provision by the ACCC to the participants (e.g. the merger parties) of: (i) the information that was referred to in the ACCC's reasons for making the determination to which the review relates; and (ii) any other information furnished, documents produced or evidence given to the ACCC in connection with the making of the decision by the ACCC to which the review relates.

4 Competition and Consumer Act 2010, s.102A.

5 Competition and Consumer Act 2010, ss. 100T and 100R; Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024, para. 6.21,: "*The purpose of limited merits review is for the Tribunal to stand in the shoes of the original decision-maker, and make its own findings of fact and reach its own decision, based on the information which was before the Commission (unless otherwise permitted in limited circumstances)*".

6 CADE's Internal Regiment, Articles 52 and 54.

7 Brazilian Competition Law (Law No. 12529/2011), Article 58.

8 Brazilian Competition Law (Law No. 12529/2011), Article 60.

9 Statutes of CADE, Articles 121 and 122.

10 Brazilian Competition Law (Law No. 12529/2011), Articles 9 and 13.

11 Competition Tribunal Rules (SOR/2008-141), s.60.

13 Competition Tribunal Act, s.13(1).

14 Competition Tribunal Act, s.13(2).

Jurisdiction	Access to File	Procedural / Hearing Officer	Merits review	Separation between decision makers and the competition authority's executive
	the discovery process, subject to redaction and confidentiality rules.[12]			
EU	**Yes**. Parties are granted access to the file upon request at every stage after a Statement of Objections is issued.[15] Parties can also be granted early access to key documents immediately after the European Commission's decision to initiate a Phase 2 investigation.[16]	**Yes**. An independent Hearing Officer (***HO***) ensures procedural rights are respected and chairs formal oral hearings. The HO holds decision-making power regarding deadline extensions and, access to file disputes. The HO also issues reports on respect for parties' rights of defence.[17]	**Partially.** While the European courts recognise that the European Commission has a "margin of appreciation" the Court has ruled that merger decisions are subject to a high degree of judicial scrutiny: "*Not only must the Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from* it".[18]	**No**, there is no institutional separation. While the European Commission combines investigative, prosecutorial and adjudicative powers within a single body, there are control mechanisms in place to ensure impartiality. These include the independent HO[19], internal scrutiny panels[20] and the Competition Chief Economist whose role it is to verify that the economic reasoning behind the European Commission's decisions is sound.[21]
Germany	**Yes**. Parties have a statutory right to access the Federal Cartel Office (***FCO***) file.[22] Counsel is typically granted access to a non-confidential version of the file.	**No**, there is no dedicated HO role at the FCO; decisions are taken collectively by specialised decision divisions. [23]	**Yes**. FCO decisions can be challenged before the Higher Regional Court of Düsseldorf, which conducts a full merits review, independently reassessing the case and substituting its own judgment if necessary.[24]	**No**. There is no institutional separation. Specialised "decision divisions" within the FCO conduct the investigation and adopt the final decision in both Phase 1 and Phase 2. [25]
Japan	**Yes,** parties have the right to access the file by virtue of their right to view evidence during a "pre-order hearing" before a final decision is issued.[26]	**Yes**. A neutral JFTC official (not involved in the investigation) conducts the pre-order hearing to ensure due process.[27]	**No.** The law does not specify the standard of judicial review.[28]	**Yes**. The initial assessment and decision are made by the secretariat of the JFTC, while the final review decision is approved by the (independent) Commission itself.[29]

[12] Competition Tribunal Rules (SOR/2008-141), s.60.

[15] EUMR, Articles 18(1) and (3); Commission Implementing Regulation (EU) 2023/914, Article 17(1); Commission Notice on the rules for access to the Commission file (EC) No 139/2004, paras. 17-22 and 28.

[16] DG Competition Best Practices on the conduct of EC merger control proceedings, 20 January 2004, paras. 45-46.

[17] Terms of Reference of the Hearing Officer, Articles 4(2), 7, 9(1), 14 and 16-17.

[18] Case C-12/03 P *Commission v Tetra Laval*, para. 39.

[19] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (2011/695/EU).

[20] Merger, Manual of Procedures, 29 November 2024, paras. 195-199.

[21] Merger, Manual of Procedures, 29 November 2024, para. 250.

[22] Section 56(3) German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, ***ARC***) (official English translation; reflecting amendments up to October 2023): "*The parties have a right to access the files concerning the proceedings at the competition authority to the extent that knowledge of the information contained in the files is required for asserting or defending their legal interests.*"

[23] ARC, s.51(2) and (3).

[24] ARC, s.76: "*If the issue concerns the validity of mandatory law, the correct application can be reviewed in full by the court*" (Higher Regional Court of Düsseldorf, decision of 22 December 2004 – VI-Kart 1/04 (V)).

[25] ARC, s.51(2).

[26] Article 52 Anti-monopoly Act stipulating that the parties have a right to "*submit a request to the [JFTC] to inspect or copy the evidence proving facts found by the [JFTC] with respect to the case for hearing… In this case, the [JFTC] may not refuse the inspection or copy unless this is likely to infringe on the interests of a third party or unless there are any other justifiable grounds.*"

[27] Anti-monopoly Act, Article 53(1)(2). See also Rules on hearing of opinions by the Fair Trade Commission (and its tentative English translation; reflecting amendments up to January 2015), s.14(3).

[28] Anti-monopoly Act (Article 77) confirms that the Administrative Case Litigation Act (***ACLA***) applies to the judicial review procedure of the JFTC's decisions. Where the JFTC issues a cease-and-desist order against a party to a merger (i.e., prohibiting that merger), that party would apply for an "*action for the revocation of the original administrative disposition*" (Article 3(2) ACLA). The ACLA does not specify a "standard of review" formula for this action (except when reviewing the administrative body's exercise of discretion, in which case courts are bound by Article 30 ACLA; although this is debated, it is generally understood that Article 30 ACLA does not apply to judicial review of the JFTC's cease-and-desist orders). This means that, legally, the courts are unrestricted when reviewing the JFTC's decisions and can conduct a full merits review. In practice, however, the courts tend to defer to the JFTC's findings.

[29] Anti-monopoly Act, Articles 27, 27-2, 29 and 35. The JFTC consists of the chairman and four commissioners. The General Secretariat carries out the administration of the JFTC. The staff members of the General Secretariat undertake the assessment and draft decisions, which are then approved by the Commission.