



Competition and Markets Authority

**Annual Plan 2023/2024 Consultation
KPMG Economics Response**

KPMG LLP
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We welcome the opportunity to respond to the Competition and Markets Authority (CMA) Annual Plan 2023/2024 consultation.¹ We advise clients on a range of competition economics matters, including in the context of merger investigations in the UK and worldwide. The opinions expressed in this response are our own, and do not necessarily align with those of our clients.

KPMG welcomes the structure the CMA has given in the plan, giving additional clarity on how it views its role and priorities over different time periods. We also welcome the chance to comment on the draft annual plan and contribute to the CMA's approach to its case work for the short and medium term.

Below we present our commentary on the CMA's medium-term priorities. We have commented on specific areas where we consider it may be beneficial for the CMA to clarify its approach further, or where we consider there may be other issues that the CMA might want to take into consideration.

The CMA's priority sectors for its work

The CMA mentions that it will focus action on the areas where consumers spend most money and time, and provides examples of sectors such as housing, food, leisure, and education.²

We agree that it is useful for the CMA to consider where its intervention is more likely to benefit consumers. However, we would caution that the markets where CMA action would be most impactful to consumers do not necessarily coincide with those markets where consumers directly spend the most money or relate to essential goods. In particular, non-consumer facing markets (e.g., commodity or industrial product markets) may indirectly, through their role in the supply chain, have a significant impact on the prices consumers ultimately pay. We think it important that the CMA takes this into account in assessing where to prioritise its interventions.

With that in mind, alternative or additional measures (other than direct consumer spend) may also be helpful for the CMA to consider in its prioritisation, such as the relative important to the economy based on established metrics (alongside, of course, indications that competition appears muted, as the CMA notes).

A useful complement to the CMA's prioritisation activities would be some more targeted and precise insights into the impact and effectiveness of the CMA's work. We note the significant amount of evaluation work that the CMA undertakes, for example in relation to merger remedies effectiveness evaluation and the study we undertook for the CMA on merger clearance decisions involving evidence on entry

¹ <https://www.gov.uk/government/consultations/competition-and-markets-authority-annual-plan-2023-to-2024-consultation>

² CMA Annual Plan, paragraph 5.4.

and exit.³ We strongly support the CMA's activities in this area, and its commitment to publishing insights. One area where we would note that the CMA does less work – as far as we are aware – is evaluating whether the ex-post evidence supports the CMA having made certain interventions. Examples of such assessments might include:

- examining whether the subsequent development of markets following some high-profile market studies or investigations is consistent with the finding of an Adverse Effect on Competition (AEC) that the CMA identified and sought to address;
- testing whether interventions following market studies or investigations not only were effective in achieving their aim but whether they had other, potentially unintended consequences; or
- ex-post evaluations of merger prohibitions or undertakings-in-lieu (UILs) cases (though we recognise that the counterfactual may be harder to identify than in clearance decisions).

The CMA's approach to promoting innovation

The CMA notes that it is intending to ensure that competitive, fair-dealing businesses can innovate and thrive by enabling open access to markets for innovating businesses; and helping emergent sectors to develop into high growth, innovative and competitive markets.⁴

On the CMA's statement that it will enable open access, we consider that the CMA's priority should always be to protect the competitive process as a whole. While this may at times mean intervening to lower barriers to entry and innovation where those are harming competition, we would caution against an interpretation of this text which points to the CMA taking a pro-active role in maximising entry without a holistic assessment of the barriers to competition and innovation and competition in a sector, including considerations of whether such a remedy would reduce incentives to invest in a market.

On the CMA's ambition to intervene in emergent sectors, while we believe it is appropriate for the CMA to monitor these sectors, any intervention would in our view have to be done carefully. There are of course clear examples where prompt intervention through enforcement cases in emergent sectors may help ensure a

³ KPMG produced a report for the CMA in 2017 on the topic of "Evaluation of entry and expansion in UK merger cases". The report consisted in a review by KPMG of the assessment of entry and expansion in eight merger clearance decisions by the CMA and its predecessors. Our report can be found at the following link:
<https://www.gov.uk/government/publications/evaluation-of-entry-and-expansion-in-uk-merger-cases>

⁴ CMA Draft Annual Plan, paragraphs 5.7-5.8

market developing competitively; or in other cases a role in supporting industry where there may be a gap. However, there may be a risk in the CMA taking a wider approach to steer the evolution of the market. It is important that the CMA considers the proportionality of its interventions.

In particular, if the route to intervention is to use the market study instrument, the CMA should take care not to overly burden small businesses in emergent sectors with information requirements. Emergent sectors are particularly hard to analyse as there is, by definition, less data and their functioning and on the likely entrenchment of any position of support market power. This means particular care is required when using the sort of information that is likely to be available (such as internal documents) when corroborating evidence (for example market data) might be misleading or incomplete.

Intervention in these situations should be limited to cases where there is clear and compelling evidence of an AEC, and of an effective remedy to tackle it. These conditions may be difficult to reach in emergent sectors, compared to more established ones, where the evidence base might be scarser. We would also suggest that monitoring the CMA's remedies, including whether they are needed, might be particularly important in emergent sectors.

On the CMA's work to support a more resilient and sustainable economy

The CMA has stated that it will take action to promote economic resilience over the medium term.

In our view, a 'resilience' goal for the CMA is very different and much less well defined than a competition goal. We agree that effective competition enforcement is a key ingredient for a competitive economy. At the same time, a robust and competitive market should also deliver resilient solutions, and therefore agree that the CMA's work has an important role in ensuring the resilience of the UK economy. We do, however, note the CMA's reference to "plurality of supply", and – while the CMA's intentions are not clear – we would caution against inferring that resilience necessarily depends on a "plurality of supply". An effective competitive process should generally ensure the most efficient and resilient market structure, even in situations where this process results in fairly concentrated market structures. In our view, therefore, the CMA should not seek to pursue resilience through any means other than ensuring competitive markets. Intervening to increase "plurality of supply", beyond what would be warranted by a competition objective, risks distorting competition and potentially ultimately even reducing resilience.

It is also not clear in what areas of its work the CMA envisages resilience factors being picked up, or what framework the CMA will apply to incorporate this issue (to the extent that the CMA is considering anything beyond its usual way of ensuring effective competitive markets). More clarity from the CMA in this area will be important, in order to reduce regulatory uncertainty for UK businesses.

In relation to sustainability, we strongly welcome the CMA undertaking work to support the UK's ambitions on sustainability and recognise the important role the CMA will play in ensuring that concerns about competition law do not prevent businesses from taking necessary action in pursuing sustainability goals.

It is very useful to have seen recent CMA publications that provide clarity in this area, and we look forward to hopefully seeing statements published about the decisions the CMA will take in this space. All of this will be important so that businesses can start to be more confident about what sorts of actions they can take when collaborating to develop products and services that are more sustainable.

We would also welcome the chance to have more debate and discussion amongst practitioners on the sorts of evidence and economic analysis that can be used to demonstrate sustainability benefits in competition cases. We would be supportive of any role the CMA can play in fostering such debate and discussion.

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