RESPONSE TO DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY CONSULTATION

Reforming competition and consumer policy

We welcome the opportunity to respond to this important consultation. We have also participated in the response being provided by the Joint Working Party of the UK Bars and Law Societies and some of our comments (e.g. on the markets regime) use material prepared for the purposes of that response. We have focused our response on those questions that are most pertinent to our day-to-day practice.

Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

- We note that the government expects the CMA's 'State of Competition' reports to inform the government's overall competition policy and help shape any future action by the government and the CMA. The precise use of the report is very relevant to the scope of the metrics and indicators, and the extent of evidence collection, required to put the report together. The report will be of more value to the government and the CMA if it is based on robust evidence and analysis, but any such work will demand significant resource.

- The CMA published its first report on 30 November 2020. Much of the study used analysis covering the last 20 years and therefore sets a good baseline for future work. However, the most recent data used in the 2020 report was from 2018. Ideally, the reports would use more up-to-date information, covering a 20-year period including the most recent calendar year. Just a year's delay can reduce a report's accuracy and relevance.

- We consider that it is vital for the CMA – as it did in its first report – to use a range of both quantitative and qualitative indicators of how markets are functioning. Continuing to analyse higher-frequency data (e.g. on business formation and closure) would help to provide a more 'real time' picture of competition across the UK economy, which would in particular help to assess the impact of the pandemic.

- The government states that it agrees with Penrose's recommendation that the CMA should produce 'regular' reports (at para 1.37). Penrose suggested that the reports should be published annually. We agree that annual reports, using rolling data, would provide the most relevant and useful picture of the state of competition in the UK and how it is evolving over time, especially as the economy adjusts after the pandemic. However, the government will need to ensure that the CMA is provided with adequate resource to conduct such a frequent analysis.

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

Yes / No / Maybe

- Whilst we agree that the CMA will need meaningful and accurate data on which to base its 'State of Competition' reports, we consider that any new power to obtain that information should be limited. In particular, individuals/undertakings should not be compelled to respond to information requests and there should not be any penalty, financial or otherwise, for failing to respond.

- Ideally, the CMA would implement a system to discuss with recipients the feasibility of providing the information sought, for example in terms of scope and timing, in advance of any request being made. In addition, all such information requests should clearly set out the statutory basis of the request and the recipient's statutory obligations and consequences.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

Yes / No / Maybe

- We consider that it is vital to maintain the CMA's operational independence and impartiality. There is a concern that more detailed and regular strategic steers will impact the CMA's ability to make independent, evidence-based decisions free from undue political pressure.

- A government steer, based on sound evidence and findings, has the potential to assist the CMA and other concurrent regulators with work prioritisation in the context of supporting the UK's economic recovery. It can also provide useful clarity for businesses and other market players as to areas of potential concern. However, we agree that the government's strategic steer should remain non-binding; it should not prevent the CMA from responding to and prioritising cases, compliance or other issues it faces that fall outside the current steer.

- We consider that the government should be limited to issuing a steer no more than once a year, to coincide with the Parliamentary cycle. While we can see that in some (exceptional) circumstances, it might be desirable for the government to issue a new strategic steer outside the Parliamentary cycle to account for unexpected challenges, we believe that these types of situation are already adequately dealt with by ad hoc, targeted, government requests for the CMA to look at a particular issue. The recent PCR travel tests request is a good example.

- In terms of the detail of the strategic steer, we consider that there could be a case for the steer to set out more information on the sectors that the government expects the CMA to focus on in the coming year. This would be helpful for the CMA and for businesses. We do not, however, support the steer becoming more detailed in other areas, for the reasons listed in the first bullet above.

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

Yes / No / Maybe

- Please see our response to question 5 below.

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

Yes / No / Maybe

- We recognise the criticism (at para 1.52 of the consultation) that the end-to-end process for market studies and investigations can be very slow at around three years, and we would support measures to reduce the overall timetable, and in particular to reduce the remedy implementation timeline. However, a more efficient and flexible process should not come at the expense of procedural safeguards.

- In particular, in our view, it is crucial that the role of CMA Panel members, as independent decision makers, is preserved. This is particularly important given the intrusive nature of the remedies available to the CMA in a market investigation (e.g. breaking up firms, imposing price controls, mandating third party access), and the fact that they can be imposed where the firms involved have not broken any laws. Institutional checks and balances therefore play a vital role in the markets regime and the role of CMA Panels in providing a fresh pair of eyes, and bringing their own professional experience to bear, should not be under-estimated.

- We have a number of concerns with allowing the CMA Board the power to impose remedies at the end of the market study (proposal 1 at para 1.58 ff). While para 1.61 argues that the CMA Board would provide a 'second pair of eyes' review in these cases, this is in no way comparable to the independent scrutiny

currently provided by CMA Panel members. Our strong preference is for an independent Panel to make such decisions:

- Basic principles of regulatory best practice and procedural fairness dictate that decisions to impose remedies in markets cases should be open to public scrutiny, and proposals should be subject to consultation. It would therefore be a particular concern if CMA Board decisions are made behind closed doors, without adequate consultation.

- For the same reason we believe that parties likely to be affected by remedy proposals should have access to the decision maker before final decisions are taken. It is not clear to us how this could be accommodated if the CMA Board is to be the decision maker. We have heard suggestions that decisions on remedies could be delegated to a Board committee, but we would still be concerned that parties would not have sufficient meaningful access to the decision maker in order to present their case before potentially very far-reaching decisions are taken.

- We expect that the CMA Board will have a natural desire to try and remedy market failures itself rather than opening a phase 2 market investigation. If (as we expect) the role of CMA Panel members becomes marginalised, one of the vital checks and balances of the current system will be lost.

- Even if the remedial powers of the CMA Board do not extend to 'structural remedies' we expect the CMA Board may well be able to design 'quasi-structural remedies' (e.g. mandating third party access) that come close to achieving the same purpose. And the panoply of other highly intrusive remedial measures will still be at the CMA Board's disposal.

- We think the markets regime could be made more efficient if the CMA Board were to be more directional in scoping the terms of reference to focus on key issues, instead of effectively giving the CMA Panel a blank canvas. Para 1.62 suggests that the regime could be made more efficient if the CMA had greater flexibility to do this, but it seems to us that the CMA already has this flexibility, and we query why it is not being used.

- We also think the regime could be made more efficient by scrapping the current market study phase and moving straight to a market investigation once the relevant evidential threshold (reasonable grounds to suspect that one or more features of a market are giving rise to an adverse effect on competition) has been reached.

- We do not support the proposal (para 1.63 ff.) to replace the current regime with a new single stage market inquiry tool (proposal 2).

    - In particular, we are concerned by the suggestion that CMA Panel members would only be brought in at the Provisional Findings stage if binding remedies are under consideration.

    - We think it is unrealistic to expect CMA Panel members to be able to scrutinise the evidence in any detail and get fully up to speed with a complex case in the final months of a market investigation from a standing start. In practice, we expect CMA Panel members will have to rely heavily on summaries and advice from CMA staff members, undermining the ability of Panel members to play a truly independent hands-on role.

    - While proposal 2 would potentially streamline inquiries requiring an in-depth review and avoid a degree of duplication, on the flip side, more straightforward inquiries could take longer than under the current system if the legal deadline is set by default at two years (plus a possible six month extension) in all cases.

    - Thought would need to be given as to how references by sectoral regulators would feed into this framework – the government has not set out how this would work in a single stage process.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

Yes / No / Maybe

- We have significant concerns about giving the CMA the power to impose interim remedies from the beginning of a market inquiry. The UK's market inquiries regime is a unique and extremely powerful tool. It allows the CMA to review broadly the workings of UK markets beyond potentially illegal conduct and indeed well beyond supply-side market failures. Given this wide remit, we consider that it is right that the CMA can only consider imposing interim measures once it has identified an adverse effect on competition on a balance of probabilities. There would undoubtedly be a risk that earlier use of interim measures, before full analysis of all the evidence, could lead to unintended market distortions and prejudice regulatory incentives. Theories of harm are often dropped or amended during the course of an investigation and so early intervention could be poorly targeted. Any consideration of the need for and scope of interim measures would also detract CMA resources away from the main inquiry and risk extending the end-to-end process. And we foresee significant practical difficulties in implementation given measures could bite on a large part of any given market.

- The Energy and Motor Insurance investigations exemplify cases where apparent competition concerns identified in the early stages of a market investigation subsequently turned out on closer analysis not to give rise to justifiable concerns, highlighting the risk of poorly targeted interventions and over-enforcement if the imposition of remedies is based on those early-stage concerns.

    - In Energy, the phase 1 'State of the Market' study carried out by the OFT, CMA and Ofgem identified concerns about vertical integration and tacit coordination among the Big 6 energy suppliers. Indicators of tacit coordination were said to be the clustering of price announcements and the phenomenon of 'rocket and feather' pricing. But mid-way through phase 2, the CMA dropped both these issues. Had the CMA imposed interim remedies to deal with these apparent concerns, this would have resulted in unjustified over-enforcement. In our discussions with the CMA in 2019, we were left with the very clear impression that Energy is precisely the sort of case where the CMA might have intervened early, had it been legally able to do so.

    - In Motor Insurance, until mid-way through phase 2, the CMA had concerns that repair costs were too high as a result of the separation of cost liability and cost control, and that too many accident repairs were not being carried out to the required standard (under-provision of repair services). But on closer analysis, the CMA accepted that the evidence did not support those concerns and the issues were subsequently dropped. Had the CMA imposed interim remedies to deal with these apparent concerns this would again have resulted in unjustified over-enforcement.

- We also consider that allowing the CMA to impose interim remedies in a market study raises important issues of fairness. The market study process lacks the same level of formality or transparency as a full market investigation: even though submissions from all parties are now routinely posted on the CMA case page, parties and their advisers often have no real idea how the CMA's thinking is developing until the interim report stage; there are no formal hearings; and there is often very little (if any) access to the decision maker.

- On the other hand, we are sympathetic to the point that in some fast-moving markets it may be reasonably obvious from an early stage in the assessment where the problems lie. A recent case in point is PCR Travel Tests, where the CMA carried out a rapid review and identified areas where the market was not working well, despite the fact that this is a sector with low entry barriers and a large number of test providers. This is a good illustration of the point that competitive markets do not always guarantee good consumer outcomes. However, we see the issues in this case as predominantly matters of consumer protection law and the need for a tighter regulatory framework. Therefore, we support the ability of the CMA in such

cases to make recommendations to government and to take enforcement action itself using its consumer protection powers.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

Yes / No / Maybe

- We see the logic in allowing the CMA to accept binding commitments at any stage in the inquiry process as a way of achieving a speedier resolution of the issues. However, we think this will only work where all relevant market participants in a given case are prepared to sign up to the commitments, as it would not seem practical to have situations where some market participants are unwilling to agree.

- Further, there is a risk that accepting commitments early on in a market inquiry, before the CMA has carried out a full analysis, might not in fact fully address the issues and/or lead to unintended market consequences.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

Yes / No / Maybe

- We are in favour of giving the CMA more flexibility to design and review remedies. We agree that, especially in consumer-facing markets with demand-side issues, remedy implementation trials are a valuable tool for the CMA to test the effectiveness of proposed remedies. We therefore see merit in the CMA being given a power to require businesses to participate in these trials.

- However, that requirement should be kept within reasonable bounds and should not impose unnecessary costs on firms involved (e.g. in terms of new system design, testing and implementation).

- Similarly, we think there is a case for allowing the CMA to review remedies without needing to undertake a further market investigation provided appropriate safeguards are put in place. It is important that the CMA is able to correct remedies efficiently, in particular behavioural remedies, where they are proving ineffective or are no longer necessary.

- In terms of what those safeguards should look like, we suggest there should be a minimum cooling off period of at least five years to prevent perpetual review. On the other hand, we consider this should not prevent the parties from requesting a review of the remedies (e.g. in response to changing market circumstances) at any time. Amendments and revocations should be subject to consultation, with relevant parties given a reasonable opportunity to make representations on the CMA's proposals and an ability to appeal the CMA's revised remedies decision to the CAT. In cases where the CMA is proposing to extend the application of existing remedies, or impose new remedies to address problems identified in a previous investigation, we think there should be a thorough review by an independent CMA panel before any decisions are taken.

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

- See our response to question 5.

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

Yes / No / Maybe

- Although in the past we have supported the retention of the UK's voluntary merger control regime on the basis that a generally applicable mandatory regime would impose an unnecessary regulatory burden (with associated resource and costs implications) on both businesses and the CMA, we now see the debate as being more finely balanced. The UK merger control regime is now probably the most intrusive, onerous and expensive in the world and the decision to notify a merger to the CMA is generally not one that businesses would take lightly. Parties to transactions that may potentially be of interest to the CMA will often use the 'briefing paper' route, to explain to the Mergers Intelligence Committee why there is no reasonable prospect of the test for reference being met, taking the 'no further questions' response as a positive sign that the transaction will not be called in. Bidders wanting the legal certainty of a phase 1 clearance decision will often find themselves in a competitive auction for the target, and may come under commercial pressure from the seller not to notify, because of the delay and uncertainty that would arise from a CMA merger review (even a phase 1 review). The pre-notification phase, before the CMA is willing to start the clock on its merger assessment, may last for weeks or months, and the level of documentary disclosure that is now routinely required by the CMA from merging parties adds significant cost to the merger control process. And if parties choose to complete a merger that is subsequently called in by the CMA, significant time and expense may be involved in negotiating derogations from CMA hold-separate orders. It could be argued that as a result we now have a system that is the worst of both worlds: complex, burdensome, expensive, slow in terms of the end-to-end timescale (ie including pre-notification); yet the fact that it remains voluntary means that bidders will often be forced to 'take the risk' and deal with the consequences after completion. Moving to a mandatory notification regime (with bright line turnover thresholds as the jurisdictional trigger) might ultimately be the best way of cutting through some of these difficulties, albeit this would also need to be accompanied by a simplified notification procedure for clearly non-problematic deals. In the comments that follow, however, we have assumed that the current voluntary regime remains in place.

- In terms of updating the turnover jurisdictional thresholds, we agree with the government's suggestion to raise the target UK turnover threshold from GBP70m to GBP100m. The current threshold is low compared to international counterparts and has not been revised since it was first introduced in the Enterprise Act 2002. The revised level could help to ensure that purely benign or low risk mergers are excluded from review. However, we note that the revised threshold might have limited impact in practice: the impact assessment estimates that it would provide a safe harbour for only an additional one to four cases a year.

- The creation of a safe harbour for small businesses is also sensible. However, we consider that worldwide turnover of less than GBP10m is too low. The impact assessment estimates that the proposal could exclude one to six small mergers from review per year, and our view is that the actual numbers falling under what is a worldwide (rather than UK) turnover threshold would be at the lower end of that range. As a final point, we understand that the CMA's discretion not to refer a deal for a phase 2 review under the de minimis market exception would rightly continue to operate as normal for deals that do not fall in the safe harbour.

- We anticipate that the new 'hybrid' test will substantially increase the administrative regulatory burden for merging parties. This is particularly the case given that the new test does not require any horizontal overlap in the merging parties' activities. We do not agree with the government that "the cost of self-assessment under the new proposal may be simpler than the existing system" (paragraph 99 of the impact assessment). On the contrary, in reality we consider that the new test will require merging parties to expend even more resource to determine whether the thresholds are met. For the CMA, we also foresee the risk of an increased administrative burden – the new hybrid test may result in an increase in 'precautionary' filings, or at least 'briefing paper' submissions, especially in cases of unproblematic vertical overlaps.

- We consider that the thresholds in the new test are set too low. The first limb of the threshold refers to a 25% share of supply. Given the introduction of the new test is intended to allow the CMA to more easily investigate vertical and conglomerate mergers, we consider that 30% – mirroring the guidance note to questions 19 and 20 of the CMA's merger notice – would be more appropriate. And, in particular given the threshold will apply where there is no horizontal overlap between the parties, we suggest that a more

formal market share test rather than an inherently unpredictable share of supply test would ensure improved certainty. Alternatively, we consider that the share of supply test should be confined to the supply (and not the acquisition) of goods or services from which the relevant merging party derives turnover.

- The second limb of the threshold would bite if the merging party (likely the acquirer) with the 25%+ share of supply has UK turnover of only GBP100m. Setting the threshold at this low level will potentially catch a significant number of transactions.

- Should the government decide to introduce the new hybrid test, we would support retaining the existing briefing paper process so that firms meeting the new thresholds could make use of it to get a degree of comfort for non-problematic deals.

- Turning to the share of supply test more generally, we are encouraged that the government is seeking views on whether the test could be amended in order to deliver more predictability. The current formulation of the test gives the CMA an extremely wide discretion both to identify a specific category of goods or services supplied or procured by the merging parties and to apply measure(s) it considers appropriate to calculate the merging parties' share of supply. Indeed, the CMA is already adopting a highly flexible and expansive approach (e.g. Roche / Spark, Sabre / Farelogix). This approach results in considerable uncertainty for merging parties. In order to address these concerns, we reiterate the points set out above in relation to the share of supply threshold in the new hybrid test, i.e. that the government should consider a shift to a more formal market share test, or to confine the share of supply test to the supply (and not acquisition) of goods or services.

Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

Yes / No / Maybe

- If government were minded to move to a mandatory notification system, it would be important to have 'bright line' jurisdictional tests (e.g. based on turnover only, as is the case with most jurisdictions). A share of supply test would not be appropriate in a mandatory notification regime.

Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

- We generally agree with the changes proposed by the government.

- There is some merit in allowing the CMA to agree binding commitments earlier in phase 2, especially if the parties narrowly missed agreeing undertakings in lieu with the CMA before the end of phase 1. However, suggesting that undertakings in lieu might be 'timed out' implies that with an unspecified longer period of time in phase 1 discussions, remedies would have been agreed. The CMA cannot be certain of that outcome. The benefit to merging parties of this proposed change should be balanced against the interests of third parties who would otherwise have more opportunities to engage with the CMA during the phase 2 review. Any powers to accept commitments earlier in phase 2 should therefore include an adequate third party consultation process. We see merit in the formal offering of commitments leading to a suspension in, or extension of, the review timetable.

- We consider that restricting the scope of a phase 2 investigation to the adverse effects on competition identified at phase 1 would be an artificial restriction. There are two clear unintended consequences: (i) the CMA might miss additional theories of harm that could only become apparent after a more detailed review; and (ii) conversely, the CMA may give undue weight to speculative theories of harm identified in phase 1. In our experience, the CMA is already prepared to narrow down the theories of harm early on in its phase 2 review where appropriate. Protections could be put in place to minimise inefficiencies between phase 1 and phase 2, including retaining some of the phase 1 case team members into phase 2 (we note

that the 2014 version of the CMA's guidance on jurisdiction and procedure stated that "the CMA would normally expect to have a degree of case team continuity by retaining at least some of the phase 1 case team", but that this text has been removed from the 2020 version of the guidance).

- We support the introduction of an automatic phase 2 referral – it would streamline cases where the parties are keen to start an in-depth review and is likely to be used in practice, for example where the parties believe that a behavioural remedy (unlikely to be approved in phase 1) would address competition concerns. It is important that parties would not be required to formally accept that the merger could result in an SLC. Given the Secretary of State is not able to issue a public interest intervention notice in relation to a transaction after the CMA has referred it for a phase 2 review, we would also expect clarity on how this new fast track route would accommodate government intervention under the public interest regime. Would parties be compelled to raise relevant public interest considerations when making the request for automatic reference?

- We would also welcome clarity on whether merging parties would still be able to request a fast track into phase 2 after a phase 1 review is underway (as is currently the case – see para 7.14 of the CMA's guidance on jurisdiction and procedure).

- We agree that the CMA is likely to require more time to review some of the transactions automatically referred into phase 2. However, we do not consider that the CMA should apply an extension as a matter of course, at the start of phase 2. The CMA may be able to resolve some cases within the current statutory phase 2 timeline. The CMA could instead serve an extension notice when it becomes apparent that extra time is needed. We agree that an extension of up to three weeks would be appropriate and would not nullify the timing benefits of the automatic referral.

- In principle, we have no objection with the CMA having the power to extend the phase 2 timetable by up to eight weeks. But we agree with the government that there is a need to reduce unnecessary delays. In our experience, in practice, timetable extensions are often the result of extensive CMA information requests. We are increasingly concerned about the length and detail of the information increasingly being requested by the CMA, with statutory section 109 notices issued by default. Such an approach adds significantly to the burden on merging (and third) parties. In our view, the CMA should use (particularly statutory) information requests much more sparingly.

- More generally, the government asks whether "the CMA's power to extend the timetable should be subject to additional conditions", but does not expand on what those conditions might be. We would welcome the chance to comment on any conditions proposed. As a broad comment, we do not consider that the CMA should have any greater flexibility to be able to extend the statutory timetable unilaterally.

- We agree that the obligation on the CMA to publish the fact of having received merger notices in the London, Edinburgh and Belfast Gazettes is outdated and should be replaced with an obligation to publish on the CMA's website.

Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

Yes / No / Maybe

- The CMA Panel structure is an essential feature of the UK regime. An inquiry group's ability to operate as a 'fresh pair of eyes' in a phase 2 investigation is vital to avoid confirmation bias and operates overall to ensure the robustness of decision making. The UK's markets regime in particular grants the CMA extremely intrusive powers to reshape markets, even when market participants have not broken antitrust laws. Checks and balances, including the role of the CMA Panel, are therefore a critical element of the regime.

- In our experience, however, the inquiry group system could work better. We agree with the government that improvements could be made to the effectiveness and efficiency of the decision-making processes.

- We support the proposal to reduce the overall size of the CMA's Panel to a smaller pool of dedicated Panel members. Having fewer members, committed to being available for a certain minimum amount of time per year, could assist in ensuring faster, coherent and robust decision-making as well as predictability. However, the size of the pool of members should not be too small to be workable. One solution would be for the CMA to have access to a 'core' dedicated CMA panel as well as additional part time panel members, allowing for greater resourcing flexibility in times of heavy caseload.

- In terms of composition, we consider that the focus in choosing Panel members should be on ensuring that each member has a suitable base level of expertise to be able to reach an informed judgement on most or all aspects of a case on his/her own. The point of an inquiry group is that the debate of all substantive matters among all members will lead to a higher quality decision. This will not happen if groups delegate within themselves responsibility for different aspects of the decisions because not all members have the relevant expertise (albeit recognising that there will in some cases inevitably be more technical areas that naturally lend themselves to the expertise of particular Panel members than others).

- We have some concerns as to the proposals for the role of the Panel. We agree that non-contentious day-to-day elements of an investigation, such as most specific information requests and more straightforward confidentiality issues, should be delegated to CMA staff. Panel members should not be distracted from substantive issues by an unnecessary administrative burden. However, we consider that the role of the Panel members should extend beyond making final decisions on theories of harm and remedies. Confidentiality, for example, can sometimes become a highly contentious issue in phase 2 investigations, and the Panel should be involved in the decision making process. Parties should have the ability to request that an issue be escalated directly to the inquiry group, and parties should have sufficient access to Panel members during the life of an investigation.

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

Yes / No / Maybe

- We understand the government's rationale for this proposal. Should it adopt the change, we agree that the test should require any effects to be direct, substantial and foreseeable. Otherwise, there is a risk that the widening of the geographic scope of these prohibitions could extend their reach to include remote effects. The CMA should provide clear guidance on these terms (including scope and timescale), with examples.

Q15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

Yes / No / Maybe

- We are cautious about any reduction in the thresholds for immunity from penalties. While we agree with the government's point that small markets *can* be very important to the consumers that use them, this will not be the case for all small markets. We therefore consider that the current system, where the thresholds are higher but the CMA is empowered to withdraw immunity retrospectively in exceptional cases, works sufficiently well. In particular, we consider that the conduct of minor significance threshold should not be lowered below GBP50m. We are not aware of any agreement or conduct cases where the CMA has been denied the ability to impose fines because the infringing parties' turnover fell below the current thresholds.

- Should the government decide to reduce the immunity thresholds for small agreements and conduct of minor significance, it is vital that the CMA continues and, in some markets, steps up its advocacy work (including the issuing of open letters). It is clear from the CMA's July 2021 competition law quantitative research report that familiarity with competition law and the CMA's role is still low among many private sector businesses. Awareness of competition law among small businesses must be improved if a greater number of these firms are to fall within the scope of the prohibitions.

Q16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

- We consider that the small agreement immunity threshold should apply to any business which is party to an agreement and which has an annual turnover of less than GBP10m. The immunity would then benefit every small firm. Deterrence would not be undermined as any firm that is party to the agreement and has turnover of more than GBP10m would still be within scope of the Chapter I prohibition. We foresee that the alternative formulation – for the immunity to apply only to agreements to which *all* the businesses that are a party have an annual turnover of less than GBP10m – would catch such a small number of agreements in practice that it would substantially reduce the benefit of the safe harbour.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

Yes / No / Maybe

- We are cautious about providing immunity holders with additional immunity from liability for private damages.

- A clear and comprehensive immunity from liability for damages caused by a cartel for holders of full immunity from fines could incentivise leniency applicants to report cartels to the CMA, and to do so as early as possible in order to be first in the queue.

- However, there are a number of disadvantages with this approach. First, the fact that the smaller pool of non-immunity cartelists will be joint and severally liable for damages claims could result in such awards becoming punitive. Those cartelists might have to pay out proportionately more in damages, especially where there are a limited number of participants in the cartel. This in turn might actually deter leniency applicants since the CMA's reduction in fine for being second or later in the queue might not outweigh the greater exposure to private damages liability. Second, we consider there is a risk that applicants could embellish information in a bid to claim the immunity 'prize'. Third, we foresee challenges with applying the mechanism to standalone damages claims that are based on conduct similar to that investigated in the public enforcement process, but with slightly different duration or scope. Finally, we note that this proposal runs counter to the EU damages directive, which gives only limited protection to immunity/leniency applicants.

- In our view, any such approach should not apply to cartel ringleaders. We do not think it appropriate for firms to win immunity from fines and/or damages claims if they have taken a leading role in the infringement and/or coerced other players to join the cartel. We would welcome the CMA reviewing its threshold for those undertakings that are not eligible for immunity. In our view the current application to coercers is unclear and seldom used.

- Overall, it is important that any immunity from liability for damages does not deprive cartel victims of obtaining full compensation for the harm they have suffered.

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

Yes / No / Maybe

- We do not support a change in the standard of review of appeals against interim measures decisions. Interim measures are imposed on businesses that have not been definitively found to have infringed any law and they have the potential to be extremely intrusive and onerous on that business. Questions of law and facts will be key to the CMA reaching its decision and these should be subject to a full merits review.

Q19. Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

Yes / No / Maybe

- Broadly, we consider that the proposed reforms are sensible, provided that appropriate safeguards are in place.

- The proposal to enable the CMA to carry out formal interviews with non-connected individuals in CA98 cases seems sensible. It would align the CMA's powers with its existing powers under the Enterprise Act 2002 and is also in line with the powers of other UK regulators such as the FCA. As set out in para 2.16 of the guidance on the CMA's approach to market studies and market investigations, the CMA should "adopt a flexible approach" to engagement with such individuals. It should only proceed on a formal basis, therefore, where informal co-operation has not been forthcoming.

- In relation to the proposal to introduce a duty not to destroy evidence in CA98 investigations (as already exists in criminal cartel investigations and consistent with the powers of other regulators such as the FCA), with both civil and criminal sanctions for breach, we understand the government's rationale behind the change. However, such a duty is arguably unnecessary. In our experience, firms that are under investigation for suspected breaches of CA98 will, as a matter of course, halt document destruction processes, thus preserving the relevant evidence. If the government did introduce this new duty, we urge it only to put in place civil (and not criminal) sanctions for any breach.

- We also consider that the proposals to give the CMA powers to 'seize-and-sift' evidence when inspecting domestic premises under a warrant make sense.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

Yes / No / Maybe

- We are cautious about the proposal for use of Early Resolution Agreements (**ERAs**) in abuse of dominance cases. Overall, we are concerned that ERAs may create confusion about the voluntary resolution options available to undertakings.

- In terms of likely take-up, we agree that requiring businesses to admit to an infringement of competition law and/or making an ERA binding in follow on damages actions would undoubtedly reduce the attractiveness of the process. It is also possible, however, that a business would remain reluctant to enter into such a settlement if the published ERA decision sets out its acceptance of certain relevant factual matters, as these could still be relied on by claimants in damages actions. Indeed, it would be very helpful to claimants and their funders to have the facts stated in circumstances where, even though there is no finding of an infringement, the CMA has "reasonable grounds to believe" that an infringement has

occurred. An ERA decision, therefore, may well be sufficient in terms of the requirement for the claimant to plead an arguable cause of action, which in turn would be enough for the claimant to obtain disclosure and impose settlement pressure on the dominant firm. In addition, in many damages cases, a key issue concerns the economic consequences of (otherwise disputed) facts, rather than whether the facts amount to an infringement.

- We do not agree with the proposal that there should be a settlement payment as part of the ERA. We believe that the process would work better (in particular by being more attractive to companies) if, like the Article 9 commitments processed at EU-level, there is no fine. If the government is minded to introduce the settlement payment into the ERA process, it seems likely to us that a business will only consider this route if it can guarantee that the payment is less than what it might have been fined following an infringement decision. We note the government states "it *may* also be appropriate for the settlement payments…to be reduced compared to the penalty a business would have needed to pay if an infringement decision was reached". Surely it *is* appropriate for there to be a reduction in the business' financial pay out (even if it has not been required to admit to an infringement) to reflect the savings in time and cost to the CMA. As noted above, the ERA route is unlikely to deter damages claims. Therefore, to be attractive to companies, the financial consequences of the ERA route need to be sufficiently more advantageous to compensate for the earlier onset of damages claims than if the company challenged the infringement. In addition, a business will be more attracted to the ERA route if the CMA involves it in negotiations over the appropriate level of the settlement payment, together with the scope of the commitments as to future conduct.

- One criticism of the EU Article 9 commitments process is that it deprives companies and their advisers from having access to a detailed decision setting out the Commission's position on the law and its application to the conduct in question – in other words, an Article 9 decision has limited precedential value. The same argument could be made in relation to any new UK ERA process. However, in practice, our experience is that Article 9 commitment decisions are widely cited (including in key textbooks) and regarded as setting out the Commission's view of the law. This is the case even though such decisions contain limited detail, do not fully set out the Commission's analysis and may include the company under investigation agreeing to commitments that go further than required to settle the competition concerns. There is a danger that this could also be the case for ERA decisions, and we suggest that this is something that the government should bear in mind when designing the ERA process.

- We do not support the suggestion for the CAT to approve ERAs. A CAT approval process would add an extra layer of complexity and therefore reduce the efficiency of the process. Such a move would go against the general tenor of the reforms, which are generally trying to move away from the requirement for court involvement. In our view, the CAT's role should be restricted to hearing appeals of ERA decisions.

- In relation to the proposals for amendments to the current settlement regime, we consider that binding admissions and short form decisions would improve the speed of the enforcement process. The latter option, while only relating to non-hybrid settlements, would dilute the precedent effect of a settlement decision. We appreciate the consultation notes (fn 98) that the decision should be sufficiently detailed to ensure precedential and deterrent value, but we are not convinced that would be the case. However, a large part of the attraction of settlement for undertakings is that only a shortened decision is available to potential private damages claimants. On balance, we therefore agree with the proposal.

- We are concerned to ensure that removing procedural requirements for the settlement process from the CMA Rules does not deprive undertakings of their rights of defence. We would expect sufficient safeguards for parties throughout the process, including clarity and predictability on the process that the CMA will follow.

- Finally, we note that the CMA has recently consulted on amendments to its guidance on the settlement regime, proposing to make clear that it will only agree to a settlement if the party commits not to appeal the settlement decision, including any fine. While we understand the CMA's rationale, following the

appeal by Roland in the musical instruments case, we do not agree with the proposed approach. We consider that the parties should always have the ability to appeal, even if they have gone through a voluntary settlement process. This is in line with the approach at EU level. An alternative option would be to implement a regime similar to the "focussed resolution agreements" used by the FCA and PRA. These allow a company to contest part of a decision, such as facts, infringement or level of penalty, while retaining part of the settlement discount. This has the advantage of incentivising parties to settle even if they do not agree with one aspect of a case (with the resultant benefits of streamlining process etc), rather than encouraging an all-or-nothing approach.

Q21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

Yes / No / Maybe

- We think protecting voluntary redress scheme-related documents from disclosure in civil litigation would provide comfort to companies interested in entering voluntary redress schemes and would help to boost use of the process. Constructing voluntary redress schemes is likely to involve input and advice (such as from economists) that would not be protected by legal advice privilege, and it is far from clear that litigation privilege would apply in these circumstances. Therefore, without such bespoke protection, companies may perceive the voluntary redress route as high risk – if any group of affected persons are not happy with the redress offered, the scheme documents could be used to formulate a damages claim (including a claim on a class basis).

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

Yes / No / Maybe

- In theory, the proposal for a new legal framework for confidentiality rings will help to speed up the CMA's access to file process. We agree that non-legal as well as legal advisors may need to be given access to the confidentiality ring. However, a prescribed legal framework is, in our view, too restrictive, and would not be workable in all cases. Our preference would therefore be to retain the current system as we think that, practically, this provides more flexibility. In fact, there may be justification for use of outer and inner confidentiality rings, to account for documents of different levels of sensitivity and individuals with different levels of participation.

- Any new framework will need appropriate safeguards to ensure parties' and third parties' rights of defence. In addition, the CMA should not have the power to impose confidentiality rings. The right of the parties to have their confidential information protected from competitors and customers is paramount. Parties should not be obligated to become part of a confidentiality ring in administrative procedures if they are not comfortable with the set-up.

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

Yes / No / Maybe

- In our view, it is not the Case Decision Group (**CDG**) requirements that prolong CMA Competition Act investigations. We consider that the appointment of a CDG is a vital element of the CMA's decision-making process in every case. Given their significance, final decisions are rightly taken, collectively, by individuals with no previous involvement in the case. We do not consider, therefore, that the clear requirements on decision makers should be removed from the CMA Rules – it is appropriate that they are set out in secondary legislation.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

- We are strongly of the view that a full merits appeal is the appropriate level of judicial scrutiny for decisions by the CMA or any of the concurrent regulators in Competition Act investigations. In particular, we do not believe that there is a case for changing the standard of review in Competition Act appeals and do not support a move to a judicial review standard. We consider that a full merits appeal represents an essential procedural safeguard for the businesses involved in the investigation. Not only are companies exposed to substantial fines and reputational damage (including being branded as a recidivist in the event of future infringements, potentially leading to higher fines in future cases), but they may face follow-on damages actions as a consequence of an infringement decision. Directors may face disqualification. In these circumstances, it is vital that the CMA (or other concurrent regulator), acting as prosecutor, judge and jury, should be held to account and we do not regard judicial review as providing an acceptable remedy.

- In addition, many of the cases before the CAT involve complex and nuanced issues of fact, law and economics; some involve novel theories of harm. Intrusive judicial oversight is a necessary counterweight to the broad exercise of administrative discretion.

- We do not consider that the existence of a full merits review encourages unmeritorious appeals. In terms of infringement decisions taken by the OFT and CMA, our analysis indicates that only around 40% have been appealed by at least one party, with a noticeable recent downward trend in numbers. In general, a party will not waste resources to bring an unmeritorious appeal and we do not believe there is any evidence of such behaviour occurring in practice. It is possible that a party would appeal a matter that will not change the outcome, perhaps purely as a delaying tactic, but that kind of conduct can easily be dealt with as part of active case management, costs awards, and throwing out of unmeritorious appeals.

- On the question of delay, we consider the problem is not the length of the appeal phase or the duration of the hearing but that the CMA's investigative phase takes too long. On average, in the cases that we have surveyed up to the beginning of 2020, the period from the opening of the investigation to the date when the OFT or CMA adopted an infringement decision lasted close to 30 months. By contrast, the average end-to-end period between lodging an appeal and the delivery of judgment at the CAT stage was under half this.[1]

- We are sceptical that moving to a judicial review standard will lead to any shortening of the overall appeal timetable or that it will necessarily reduce the costs of bringing an appeal. It is not necessarily the case that judicial review cases tend to be decided more quickly than full merits appeals.

- Moving away from a full merits appeal to, for example, a judicial review standard would have a number of significant drawbacks:

  (a) A successful full merits appeal could in practice be more streamlined than judicial review since the CAT could substitute the erroneous decision with its own new decision. In contrast, under judicial review principles, the CAT would be required to remit the case back to the CMA (or other regulator) for a second assessment and decision;

  (b) A significant risk of a regulator taking precautions to "JR-proof" a decision – for example, by making clear that a decision is based on a "black box" weighing of qualitative factors and is thus a reasonable exercise of its discretion, rather than opening itself for challenge by setting out the full details of its reasoning with these facts;

  (c) A decline in the accountability and hence the correctness of decisions. Given the specific negative consequences that a poor decision can have for a party directly affected, and the

[1] For further detail, see: *Are competition appeals taking too long?* Mark Friend, 21 January 2020, available here.

broader precedent value of the decision, in principle we believe that the standard of review should be significantly more intrusive than judicial review.

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

- Should the CMA be given the ability to impose substantial financial penalties for non-compliance with investigative and enforcement powers (up to 1% and 5% of annual turnover is proposed), we consider that there is a case for a full merits review of these types of decisions. A high standard of review would encourage robust CMA decision making.

Q26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

Yes / No / Maybe

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

Yes / No / Maybe

- The UK is out of step with other competition authorities in terms of its powers to fine for obstructing cases. Increasing the penalty caps is likely to ensure better compliance with procedural rules. Responses will likely be more accurate and parties will be less likely to obstruct cases, which will allow the CMA to reach its decisions more quickly. However, there is a risk of delay, that parties seek more extensions to information request deadlines in order to avoid submitting inaccurate or incomplete responses.

- We consider that there should be a rectification process before enforcement proceedings are initiated. A company which has potentially committed a breach should be given the opportunity (in response to either a warning by the CMA or following the company itself bringing the potential breach to the CMA's attention) to rectify its conduct, e.g. by providing the outstanding information or correcting any inaccuracies. This would be in line with the CMA's current approach to section 109 notices in the merger control context.

- We agree that the CMA should be obligated to publish guidance on how it will determine the level of penalty in individual cases. In particular, we expect the guidance to account for different forms of procedural breach. Some breaches will demand a more severe penalty than others. Missing an information request deadline, for example, is not as serious as destroying evidence. In addition, there should be appropriate safeguards, e.g. a right of appeal with a full merits review.

- We do not support the additional liability for individuals. We consider the personal declaration to be unduly onerous and impractical as no one individual is likely to have actual knowledge of all the responses, particularly in market investigations. We also consider that the related civil penalties, on top of a potential increase in penalties on companies, are disproportionate. Again, this personal accountability might slow down investigations since directors required to provide the declaration will push for more time to verify the information provided if they are potentially subject to fines and, more significantly, disqualification for getting it wrong.

- We believe that extending the CMA's power to fine in relation to voluntary responses to information requests risks discouraging such voluntary responses, or could prompt companies to submit only the bare minimum of information so as not to risk exposure to fines for inadvertent inaccuracy.

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

Yes / No / Maybe

- Introducing a power for the CMA to impose civil penalties on companies that fail to comply with the CMA's directions, orders, or undertakings or commitments the company has given to the CMA is likely to encourage compliance. We can see the benefits to the CMA in that it will replace the substantial time and cost of enforcing orders in court with a quicker administrative procedure. It will also be beneficial for consumers and businesses suffering harm if any such breaches are resolved more quickly.

- In any event, such a power should not be applied retrospectively. When existing remedies were negotiated and agreed, it was in the expectation that they would not be enforceable through civil penalties. We consider therefore that the proposed power should only apply to new directions, orders, undertakings or commitments, or at the very least applied on a forward-looking basis to capture breaches after the new power takes effect.

- We also consider that introducing civil penalties could make agreeing remedies extremely difficult and even unobtainable. Some cases, particularly market investigations, demand very prescriptive remedies on very technical matters. In these cases, 100% reliability may be unachievable and, at present, the regime allows scope for problems to be fixed or harm to be remedied in a satisfactory manner. The immediate imposition of fines in these cases would be disproportionate. It is also plausible that companies could be less willing to offer remedies/commitments voluntarily where they would have done so in the past, or that firms could be disincentivised from innovating on products or services subject to remedies if that could create a compliance risk.

- We consider that there should be a rectification process before enforcement proceedings are initiated. A company which has potentially committed a breach should be given the opportunity (in response to either a warning by the CMA or following the company itself bringing the potential breach to the CMA's attention) to rectify its conduct, and put in place mechanisms to redress any harm that may have been caused.

- The CMA should be required to publish clear guidance, setting out this rectification process as well as how it will calculate any penalty. In particular it should set out the factors it will take into account when deciding on the seriousness of the breach (including any genuine steps taken by the company to rectify the breach). And it should make clear that fines will only be imposed where the company is unable to put forward a clear justification for the breach, or where the breach was not inadvertent.

- It is important that parties have a right to appeal any fines – this should be a full merits review.

Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

- It is important in a post-Brexit world that the CMA has good relationships with its international counterparts. We therefore support the government's plans to work with the CMA on negotiating cooperation agreements.

- We also support investigative assistance powers being subject to clear conditions, such as reciprocity in terms of powers (i.e. similar assistance could be offered by the requesting authority) and conduct (i.e. the conduct should be similar to that which could be investigated in the country of the requesting authority).

- There are some additional conditions that we consider to be important:

- That the receiving authority cannot use/share the information with other regulators or parties within or outside their jurisdiction for purposes other than the investigation in relation to which the information was requested.

- Requirements to obtain consent of the parties to information sharing should be built into the process as far as is possible.

- We also have some concerns over documents that are protected by legal privilege. The powers should be designed so as to prevent the sharing of documents that are not legally privileged in one jurisdiction with authorities in jurisdictions where such materials would otherwise be privileged.

Allen & Overy LLP
1 October 2021