Consumer and Competition Policy Directorate
Department for Business, Energy, and Industrial Strategy
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London
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By email: RCCPconsultation@beis.gov.uk

1 October 2021

Dear Sir or Madam,

GC100 response to BEIS consultation 'Reforming competition and consumer policy: Driving growth and delivering competitive markets that work for consumers'

I am writing on behalf of GC100.

GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 125 general counsel and company secretary members of the group, including representatives from over 85 of the UK FTSE 100 companies. Please note that, as a matter of formality, the views expressed in this letter do not necessarily reflect those of each and every individual member of GC100 or their employing companies.

Part A: GC100's comments on the Government's proposals

Overview

1.1 GC100 welcomes the Government consultations, "Reforming competition and consumer policy" and "A new pro-competition regime for digital markets". GC100 notes the challenges of addressing the evolving needs of consumers and markets, particularly in the digital era. GC100 also notes the unprecedented challenges facing the UK as it adapts to life outside the European Union, seeks new international trade arrangements and recovers from the COVID-19 pandemic.

1.2 GC100 agrees that, while aspects of the UK's current regime work well, aspects may be improved. However, GC100 considers the UK is starting from a strong foundation, with competition and consumer law regimes that are internationally respected and renowned.

1.3 GC100 therefore considers that any reforms should be targeted and assessed against a long-term rather than short-term UK market views. GC100 also considers that reforms should be conducted with due consideration to the interaction of sector regimes.

1.4 In relation to the consultations generally, GC100 has the following comments:

(A) **Balance of powers and accountability.** GC100 considers it key to UK business and investment competition that the UK has both strong competition and consumer enforcement, and accountable regulators with robust safeguards on appeal. GC100 considers that this balance underpins UK business confidence, ensures

transparency, and enhances the UK's reputation as an open place to do business. In this respect, GC100 notes the consultations propose certain expanded enforcement powers, including those with immediate and wide-reaching business impact (e.g. interim measures). GC100 also notes the proposals on appeal standards, such as limiting the standard to that of judicial review.

GC100 has concerns that in combination these measures may encourage regulatory intervention without proportionate due process, unduly impacting UK competitiveness. GC100 considers the priority should be to build and maintain a balanced enforcement system, backed by robust judicial oversight.

(B) **Independent regulation.** GC100 notes that the de-politicisation of UK competition law has been a key achievement of the last 20 years. Under the previous regime, a general "public interest" test applied in mergers and markets, and the Government had final decision-making power. Separating competition law from wider policy matters was essential to the Competition Act and Enterprise Act reforms, which delegated enforcement powers to an expert non-ministerial body. GC100 considers maintenance of this regime crucial for giving businesses confidence that the right powers and remedies will be applied, in a consistent, predictable and transparent manner.

For this reason, GC100 has concerns over the proposal for the Government to give more regular, more directional CMA strategic steers. GC100 is concerned that this could encourage re-politicisation of the UK competition regime unless appropriate safeguards, limitations and budget protections were considered.

(C) **Collaborative approach.** GC100 agrees it is crucial for the smooth functioning of the regulatory regime that the CMA works collaboratively with businesses, and that its information gathering powers are sufficient and flexible enough to support its functions. GC100 agrees with measures to deter fraudulent responses to information requests, but is concerned that certain measures may discourage communication or place unreasonable burdens on businesses.

(D) **Long term view of UK competition.** GC100 considers that as the UK emerges from the COVID-19 pandemic and attempts to "build back better", the focus will likely be on recovery, growth and innovation, and encouragement of investment competition. In this regard, and given the severity of recent disruption, GC100 has some concerns at the potential for short-term bias in the consultation proposals and in the assessment of the status of UK competition. For example, GC100 notes the consultation quotes the CMA State of Competition Report 2020 as finding, "*competition in the UK may have weakened over the last two decades*". GC100 notes the CMA report found mixed evidence on the extent of the UK recovery since the 2008 financial crisis, and therefore GC100 cautions against over-reliance on the CMA's concluding remarks. GC100 is concerned this may encourage unnecessary interventions into markets that are otherwise characterised by well-functioning competition, discouraging future investment competition.

1.5 Against that backdrop, GC100 discusses the consultation proposals in more detail in the following paragraphs and in its responses to the consultation questions in Part B below.

Competition law reform proposals

2.1 GC100 notes the Government is proposing a range of reforms to the CMA's powers and processes to support faster and more efficient investigations. GC100 agrees with the importance of fast and flexible investigations that identify and resolve anticompetitive conduct in a timely manner, avoiding unnecessary delays. At the same time, GC100 notes that competition investigations can be burdensome on businesses, and result in quasi-criminal penalties. It is therefore important investigations are carried out with the necessary rigour, providing parties with sufficient time to collate the relevant information for such investigative processes. This has implications for a number of the Government's proposals, as discussed below.

Interim measures

2.2 Interim measures are powerful measures which, in some cases, can be determinative of the outcome of the investigation even before a finding of infringement has been made. They have the effect of court-granted injunctions, but unlike court granted injunctions there is no independent decision-maker involved, no protection in the form of a cross-undertaking as to damages, and no commitment on the part of the CMA to complete its inquiries promptly. Interim measures can therefore do real damage to businesses by preventing them from pursuing strategies and innovations, particularly given the measures can be in place for some time.

2.3 GC100 therefore considers that any strengthening of the CMA's interim measures powers needs to be balanced with appropriate procedural checks and balances. GC100 considers that interim measures should not be applicable where there is no indication a company's conduct breaches competition law. GC100 also has concerns at the proposal to streamline the CMA's processes and facilitate its powers at the cost of protections such as the right of access to the CMA's file, and/or by changing appeals to a judicial review standard. Access to the file is an essential requirement to protect party rights, and a judicial review standard would not provide adequate protection and may prevent parties challenging aspects of the interim measures, such as their scope.

2.4 GC100 considers that an alternative solution the Government may want to consider would be to require the CMA to apply to the Competition Appeal Tribunal ("CAT") for interim measures, which would then apply appropriate scrutiny to the grant of the interim measures, and supervise their application. The CAT could also impose appropriate conditions, for example, as regards the timing of the CMA's inquiry.

Information gathering powers

2.5 GC100 notes that the Government is proposing a range of measures aimed at strengthening investigative and enforcement powers across the CMA's competition tools. GC100 recognises the importance to the CMA of having effective information gathering powers, supported by appropriate sanctions. At the same time, GC100 also notes CMA information requests can often be broad, subject to tight timetables, and coordinating responses can be resource-intensive for businesses. GC100 therefore considers it is important that these powers are proportionate, subject to appropriate safeguards, and no more extensive than necessary, so as to minimize business disruption. In this regard,

GC100 considers that some of the measures proposed could be counterproductive and disproportionate. In particular:

(A) **Individual accountability.** GC100 agrees greater accountability could assist the provision of information, but it has concerns that imposing such an obligation on individuals, combined with the breadth and complexity of competition law RFIs, may unintentionally slow down companies' responses. This may particularly be the case in large businesses, where the certifying individual or director may not have direct knowledge of the matter, leading to the creation of extensive verification procedures. The proposal will also increase the cost to third parties of responding to RFIs, for example in merger control, where the CMA relies on third party responses to inform its inquiries. The overall result is likely to be parties providing much more guarded responses to RFIs. Alternatively, companies may decide to provide all possibly relevant documents to the CMA to avoid the risk of being accused of failing to provide information.

(B) **Voluntary information.** GC100 is concerned that the wider prohibition against providing false or misleading information to the CMA in respect of voluntary information requests, outside the scope of the CMA's formal investigatory function, is likely to discourage the voluntary provision of information due to the need to put in place extensive verification processes to avoid inadvertent error on the part of respondents.

(C) **Balance of penalty and scope of RFI.** More generally, GC100 notes the higher maximum penalties proposed can be disproportionate when applied to a failure to comply with an information request without reasonable excuse. In light of the increased penalties, it becomes even more important for the CMA to issue RFIs that are reasonable, and realistic, in both time and scope.

2.6 On balance, GC100 considers that the higher maximum penalties should be reserved for serious and intentional breaches such as concealment or destruction of relevant information or the provision of deliberately false information. To ensure continued healthy market and CMA interaction, GC100 also considers that the decision to impose a penalty, and the amount of any penalty, should be subject to full merits review.

Standard of review for CA98 appeals

2.7 In the interests of ensuring due process, in particular in light of the CMA's role in CA98 investigations where it acts as investigator, prosecutor and adjudicator, GC100 considers it is of paramount importance that the CMA's decisions remain subject to a full review, on the merits, by an independent and impartial tribunal. Infringement decisions not only result in significant financial penalties, but an adverse decision also exposes businesses to follow-on damages claims, which can be funded by third parties or on alternative fee arrangements, and can be even more significant than the administrative penalties. Such claims can also cause severe reputational damage and business uncertainty. In light of the potential severity of these consequences for business, there needs to be adequate redress available in cases of over-enforcement.

2.8 The CAT is a highly regarded tribunal, both domestically and internationally, and manages its appeals very effectively, reaching robust judgments which are crucial not only to the litigating parties but also to the wider industry.

Merger control

2.9 We note the Government's proposals to introduce an additional jurisdictional threshold, aimed at capturing vertical/conglomerate mergers as well as so-called "killer acquisitions". GC100 notes that the CMA already has jurisdiction over vertical and conglomerate mergers where the target meets the turnover test, and that while there will be instances where the turnover test is not met, the current regime provides certainty to business while still allowing the CMA to investigate material transactions.

2.10 In relation to killer acquisitions, GC100 also has concerns that a share of supply test is too broad for unilateral mergers, due to its wider and more flexible scope compared to traditional market share tests. GC100 has concerns this may create too much uncertainty for businesses as to whether the UK merger regime would apply, deterring a wide range of potential transactions. GC100 considers that a potential solution may be a market share test for "killer acquisitions", set at a higher threshold, such as a level required for market dominance or a threshold of at least 40%.

2.11 GC100 also notes the potential necessity for a "UK nexus" test for any unilateral or expanded UK merger regime, as considered under the digital markets consultation.

Market studies

2.12 GC100 has concerns that greater remedy powers for the CMA at the end of the market study process may be too intrusive for business at such an early stage. Remedies adopted in market investigations can be far reaching, in particular when divestments are imposed. GC100 notes the potential option of excluding structural remedies from the CMA's market study remedial powers, but also notes that non-structural remedies, including data access and interoperability remedies, can be equally intrusive for businesses.

2.13 GC100 also notes that if the CMA is able to impose very similar remedies at the end of the market study phase as it does at the end of a market investigation (with the legal standard for doing so being the same), one of the checks and balances is being removed from the current system – i.e. the market investigation phase does not provide any additional scrutiny over an initial view, reached at the market study stage.

CMA Panel changes

2.14 GC100 notes the Government is seeking views on retention and reform of the CMA panel, and is proposing a smaller pool of dedicated panel members for whom the CMA panel is their primary employment. GC100 notes the panel was introduced when the OFT and Competition Commission merged to avoid confirmation bias, in particular given the CMA's considerable powers under the CA98 and EA2002. GC100 considers that smaller panels may work provided the diverse skills, experience and independence of the existing panel can be preserved. However, GC100 is concerned that members of a smaller panel may become pseudo members of the CMA, and some of the current diversity and broader insight may be lost. GC100 also notes it may be worth considering whether smaller panels

may adversely affect the CMA's regulatory appeal function and lead to a watering down of the appeals process.

Digital markets

3.1 GC100 acknowledges that the rapid growth and characteristics of digital markets pose challenges for competition regulators around the world. GC100 therefore welcomes the Government consulting separately on a new digital markets regime.

3.2 In general, GC100's main area of concern is that proposals for a new digital markets regime are developed consistently and coherently with the general competition regime (and potential additional layer added by Competition Act sector regulators). GC100 considers it would be beneficial for business certainty if there was sufficient alignment, avoiding the need for businesses to navigate "boundary issues" concerning the procedural limits of the two regimes. In particular:

(A) **Alignment and interaction with merger control regime.** GC100 considers that the SMS merger control proposals should be aligned with the general merger control regime and related consultation proposals. GC100 wonders if the SMS merger control regime may be aimed at the same issues as the new "killer acquisition" threshold proposed for the general merger regime, and therefore whether a reformed mainstream regime may be sufficient on this point.

GC100 is also not clear on the rationale for varying jurisdictional thresholds for SMS deals, or how the two regimes would operate together in practice (e.g. transaction value seems relevant for digital mergers, but not other sectors, including other technology sectors). GC100 is also not clear if the "safe harbour" proposals in the mainstream regime would apply to the digital regime. GC100 is concerned that inconsistency could arise, particularly as the "digital" regime could apply to mergers in non-digital sectors.

As above, GC100 is also unclear why the proposed new transaction value threshold for SMS mergers would be accompanied by a "UK nexus test", while such requirement is lacking from the proposed new general merger control threshold.

(B) **Standard on appeal**. GC100 notes the proposal for decisions of the Digital Markets Unit ("**DMU**") to be reviewable on a judicial review basis. GC100 has concerns with this approach, and with the rationale for adopting a different approach to each of the digital and general competition regimes. GC100 is also concerned a varied appeal system may add unnecessary procedural complexity. GC100 considers the digital markets regime, including code breaches and pro-competitive interventions ("**PCIs**"), should track the approach of the general competition regime and be subject to full merits review of enforcement or quasi-enforcement decisions (see further paragraph [2.7] above).[1]

[1] As the consultation recognises at paragraphs 107 to 110, there are a number of key differences between PCIs and the market investigation process, including that PCIs are focussed on investigating and addressing firm-specific competition concerns. GC100 considers PCIs should be subject to full merits review notwithstanding that market investigations are currently reviewable on ordinary judicial review principles.

(C) **Statutory Duty.** GC100 agrees with the proposal that the DMU statutory duty be aligned with the well-established duty of the CMA: to promote competition in digital markets for the benefit of consumers. We agree with the view expressed in the consultation paper that it is not necessary to include an additional supplementary duty for the DMU to have regard to innovation. Multiplying duties would distract from the clarity of the DMU's mission, in particular for a new body, and innovation considerations are, in any event, a recognised aspect of competition and so already within the scope of the DMU's proposed primary duty.

(D) **Information sharing.** GC100 considers the powers of the DMU should be aligned with CMA powers and is concerned that a diverging approach would lead to inconsistency and business confusion, in particular where businesses are subject to both regimes. GC100 also notes the Government's proposal for DMU powers to include the power to require the gathering of information not already in the possession of the relevant firm.[2] GC100 notes this could be a significant extension beyond the powers available to the CMA, and considers that any such powers should be clearly limited to circumstances directly analogous to powers under the Communications Act 2003. GC100 assumes, for example, such powers are not intended to apply to merger investigations, although the consultation paper currently does not appear to rule that out.

Consumer law reform proposals

4.1 In this section, GC100 has focussed its comments on the proposals for consumer law enforcement. GC100 supports the aim of fair, effective and proportionate enforcement which provides justice for parties and ensures a level playing field for businesses. We nevertheless have the following comments on the proposals.

Administrative enforcement model

4.2 GC100 agrees there is a disparity in CMA powers under consumer protection legislation when compared to competition law enforcement. We support the proposal to allow for enforcement through an administrative model, subject to appropriate and equivalent checks and balances (such as procedural safeguards and the protection of the rights of defence, including by way of full merits appeal). In this regard the current administrative procedures for competition law enforcement provide a good model.

Right to appeal, standard of review and appeal body

4.3 The consultation recognises that, like competition law, consumer law infringement may carry large financial penalties, and concern conduct that can be a criminal offence. GC100 notes that a finding of a consumer law infringement can also have severe business reputation consequences. GC100 is therefore firmly of the view that, given the CMA's role as investigator and decision-maker, to ensure due process, rigorous and sound CMA decision-making, and to build confidence in a new regime, CMA consumer decisions should be subject to full merits review by an impartial, independent tribunal.

[2] See paragraph 133 of the digital consultation.

4.4 GC100 notes the CAT has fulfilled this function effectively for competition law, and we consider it well suited to perform the same role in relation to consumer law. A particular advantage of the CAT is that it sits as a panel of three members, which allows it to bring to bear cross-disciplinary expertise in its decision-making.

4.5 We also see benefits in allowing sectoral regulators to enforce consumer law through an administrative model, subject to the same protections as set out above. This would complement their sectoral regulation powers as well allow them to bring to bear their sectoral expertise in respect of consumer enforcement.

Collective redress

4.6 To the extent that further routes for private collective consumer redress are to be introduced, particularly if any claims are to be allowed to proceed on an "opt-out" basis, it is essential to achieve an appropriate balance between facilitating such redress, on the one hand, and ensuring that defendants' rights are protected, on the other. In particular, any new mechanism must provide sufficient safeguards to prevent unmeritorious claims being brought, and the corresponding potential for "blackmail settlements", i.e. defendants being compelled to settle claims not because they are meritorious but in the light of the costs and risks of the litigation, even where they have a reasonable defence.

4.7 The key to achieving this balance is to put in place a rigorous certification process for potential claims. The obvious starting point in designing such a process is the procedure for obtaining a "collective proceedings order" (or **"CPO"**) in the CAT, as introduced by the Consumer Rights Act 2015. In this regard, we are concerned that a permissive approach to certification would not provide sufficient protection for defendants' rights. For example, the approach taken by the Supreme Court in the Merricks case introduces a low threshold for claims to be brought. There are concerns that this dilutes the certification process as a mechanism for achieving this balance.

4.8 We consider there should be a higher threshold for bringing claims under any new regime, including an objective suitability threshold, as well as a clear initial merits threshold for claims to be brought so as to weed out unmeritorious claims.

Concluding remarks

5.1 Thank you for the opportunity to share our views on the proposed reforms. We would be happy to facilitate continuing discussions with our members, if helpful, to share their experiences and views of the proposed reforms. Please let us know if you wish to discuss our comments further.

Yours faithfully,

Part B: Response to the Consultation: Reforming competition and consumer policy

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?

GC100 considers that, as the UK emerges from the COVID-19 pandemic and attempts to "build back better", focus will likely be on recovery, growth and innovation, and encouragement of investment competition. In this regard and given the severity of recent disruption, GC100 has some concerns at the potential for short-term bias in consultation proposals and in the assessment of the status of UK competition.

For example, GC100 notes the consultation quotes the CMA State of Competition report 2020 as finding "*competition in the UK may have weakened over the last two decades*". GC100 notes the CMA report found mixed evidence on the extent of the UK recovery since the 2008 financial crisis, and therefore GC100 cautions against over-reliance on the CMA's uncontested concluding remarks. GC100 is concerned this may encourage unnecessary interventions into markets that are otherwise characterised by well-functioning competition, discouraging future investment competition.

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?

GC100 considers important that the CMA be able to work with businesses on a collaborative basis outside of Competition Act and Enterprise Act investigations. GC100 does not support information gathering powers for the advising of government and preparation of the state of competition report as it considers this would be unnecessarily burdensome on resources.

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

The de-politicisation of the competition process has been one of the great achievements of the reforms undertaken in the UK over the last 20 years. Under the previous UK competition regime, a general "public interest" test could be applied in mergers and markets, and final decision-making power rested with the Government. Separating competition law enforcement from wider policy considerations was an essential part of the reforms introduced by the Competition Act and Enterprise Act, which in turn enabled enforcement powers to be delegated to an expert non-ministerial body. It is also a crucial factor in giving businesses confidence that the right powers and remedies will be applied to each issue and more particularly that competition rules will be applied in a consistent, predictable and transparent manner and not for short term political reasons.

We are concerned that the latest proposals risk leaving the CMA and competition policy vulnerable to politicisation once again. For this reason, we do not support the proposals which would see the Government giving more regular, more directional strategic steers to the CMA. Frequent, highly directional steers from the Government risk driving competition policy towards short termism to the detriment of long term consumer welfare. It would also be extremely difficult for businesses to engage in long-term planning when faced with a frequently-changing and hard-to-predict competition policy. We note that the Government plans to consult on the detail of a revised strategic steer later this year.

An acceptable alternative to the current proposal may be to maintain the existing approach whereby the Government provides a high level strategic steer once a parliament, but to ask the CMA to align its annual report more closely to that strategic steer.

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

GC100 does not support greater remedy powers for the CMA at the end of the market study process as this would be too intrusive for business at such an early stage. Remedies adopted in market investigations can be far reaching, in particular when divestments are imposed. Although the Government proposes to exclude structural remedies from the CMA's remedial powers in market studies, it is important to note that non-structural remedies, including data access and interoperability remedies, can be equally intrusive.

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

GC100 offers no comment on this. GC100 agrees with the aim of streamlining market inquires, but considers it materially important that CMA accountability and safeguards are maintained and imposed.

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

GC100 strongly opposes a proposal under which the CMA would be able to impose interim measures at the start of a market inquiry.

GC100 is concerned that concerns identified at the initial phase of an investigation do not always turn out to be the real issues and that there are examples where following a closer analysis the CMA concluded that the evidence did not support its initial concerns and the issues were subsequently dropped.

GC100 considers that imposing interim measures in such cases would result in over-enforcement and may be damaging to businesses, across an entire market, who would not have recourse to compensation for any harm caused by these inappropriate measures.

GC100 considers that interim measures should be reserved for cases of anti-competitive conduct, where there is concern that an undertaking is in breach of the Competition Act.

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

GC100 offers no comment on this.

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

GC100 offers no comment on this.

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

GC100 offers no comment on this.

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?*

We have no objection to the Government's proposal to raise the current turnover-based threshold for the target from £70 million to £100 million in order to adjust for inflation. Taking into account the real rate of inflation over the period since the threshold was set to £70 million until now there may be an argument to increase the threshold further.

The Government proposes to create a safe harbour for mergers between small businesses, where the worldwide turnover of each of the merging parties is less than £10 million. We welcome the creation of a safe harbour for mergers between small businesses but question whether this goes far enough to provide a meaningful exemption. It would be helpful if the CMA could provide details of the number of transactions which meet this threshold and over which it took jurisdiction over the last 5 or 10 years, which would be an indication as to whether the level of turnover is set at an appropriate level.

The Government is also proposing to add an additional jurisdictional threshold which is aimed at capturing vertical and conglomerate mergers as well as so-called "killer" mergers. GC100 does not consider there is a gap in the CMA's jurisdiction which prevents it from reviewing vertical or conglomerate mergers, as the CMA can take jurisdiction over such transactions provided the target meets the turnover test.

In relation to killer acquisitions, GC100 has concerns that a share of supply test is too broad for unilateral mergers, due to its wider and more flexible scope compared to traditional market share tests. GC100 has concern this may create too much uncertainty for businesses as to whether the UK merger regime would apply, deterring a wide range of potential transactions. GC100 consider that a potential solution may be a market share test for 'killer acquisitions', set at a higher threshold, such as a level required for market dominance or at least 40%.

GC100 also notes the potential necessity for a "UK nexus" test for any unilateral or expanded UK merger regime, as considered under the digital markets consultation.

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

GC100 offers no comment on this.

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

GC100 offers no comment on this.

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

The panel was introduced as a result of the merger between the OFT and the Competition Commission, in order to avoid confirmation bias. The CMA has considerable powers under the CA98 and EA2002 and it is important that appropriate checks and balances are embedded in its administrative processes in order to avoid confirmation bias. Smaller panels may work, provided the diverse skills and the experience as well as the independence of the existing panel can be preserved. It is possible that as the members of the smaller panel are essentially becoming pseudo members of the CMA, some of the current diversity and broader insight of the panel may be lost and we will instead end up with a panel of similar-minded people. It is also worth considering whether smaller panels may adversely affect the CMA's regulatory appeal function and lead to a watering down of the appeals process.

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?

GC100 offers no comment on this.

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?

GC100 offers no comment on this.

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?

GC100 offers no comment on this.

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?

GC100 offers no comment on this.

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?*

Streamlining the CMA's processes and facilitating its powers, such as making it easier for the CMA to use its interim powers, should not be achieved at a cost to the parties' protection by removing their right of access to the CMA's underlying file and by changing the standard of review to a judicial review standard should the parties decide to appeal such a decision. Access

to the file is an essential requirement to protect the parties' rights, and a judicial review standard is not an adequate protection.

Parties may wish to challenge aspects of the detail of the interim measures such as the scope, which may not be susceptible to review on this basis.

Interim measures can be very powerful measures and may be determinative of the outcome of the investigation, even before a finding of infringement has been made. Unlike in the case of court granted injunctions, there is no independent decision-maker involved, no protection of a cross-undertaking as to damages should the interim measures turn out to be unnecessary or unwarranted and no commitment on the part of the CMA to complete its inquiries promptly to minimise the impact of the interim measures. Interim measures can therefore do real damage by preventing businesses from pursuing strategies and innovation as they can be in place for some time. Any strengthening of the CMA's powers in this regard therefore needs to be balanced with appropriate procedural checks and balances.

An alternative solution the Government may want to consider would be for the CMA to make an application to the CAT, which would apply appropriate scrutiny to the grant of interim measures and would supervise their application and could impose appropriate conditions for example, as regards the timing of the CMA's inquiry.

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?*

GC100 does not support proposals for wider powers for the CMA to interview individuals. Under section 26A CA98 the CMA has the power to require individuals with a connection to the business under investigation to answer questions at interview. "Connection to a business" for this purpose is very widely defined and includes former employees, former directors and advisers to the company. Information from those further removed from the company should be obtained on a voluntary basis.

As far as preservation of evidence is concerned, businesses under investigation already have a duty to cooperate with the CMA which would include a duty not to destroy any evidence that is relevant to the investigation. Extending this duty to circumstances where a person suspects that an investigation is likely to be carried out may go too far, in particular if criminal sanctions are being imposed for breach.

Any extension of the CMA's seize and sift powers when inspecting domestic premises under a warrant would need to include extra safeguards to protect privacy as domestic premises will not typically be the main place of work, and other individuals may be working from the same premises but for a different business.

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?

GC100 offers no comment on this.

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?

GC100 offers no comment on this.

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?

GC100 offers no comment on this.

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

GC100 offers no comment on this.

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

In the interest of due process, in particular in light of the CMA's role in CA98 investigations where it acts as investigator, prosecutor and adjudicator, it is of paramount importance that the CMA's decisions remain subject to a full review, on the merits, by an independent and impartial tribunal. Infringement decisions not only result in significant financial penalties, but an adverse decision also exposes businesses to follow-on damages claims which can be even more significant than administrative penalties.

The CAT is a highly regarded tribunal, both domestically and internationally, and manages its appeals very effectively, reaching robust judgments which are crucial not only to the litigating parties but also to the wider industry.

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?*

The decision to impose and the amount of any penalty in relation to non-compliance with the CMA's investigative and enforcement powers should also be subject to a merits based judicial scrutiny.

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?

GC100 offers no comment on this.

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?*

The Government is proposing a range of measures aimed at strengthening investigative and enforcement powers across the CMA's competition tools. In relation to the CMA's information gathering powers, GC100 recognises the importance for the CMA to have accurate information supported by appropriate sanctions. However, some of the measures proposed by the Government are likely to be counterproductive and disproportionate:

- Use of a personal declaration for the provision of evidence is likely to slow down the provision of information, particularly where, in large businesses, the certifying director may not have direct knowledge of the matter (similar to the senior manager regime in financial services) as the director will need to put in place extensive verification processes particularly in circumstances where it is unclear what amounts to reasonable verification. It will also increase the cost of responding to RFIs by third parties, such as in a merger control context where the CMA relies on third party responses to inform its inquiries and are likely to lead to more guarded responses to RFIs.

- The wider prohibition against providing false or misleading information to the CMA for voluntary information requests, outside the scope of the CMA's formal investigatory function, is likely to discourage the voluntary provision of information due to the need to put in place extensive verification processes to avoid inadvertent error on the part of respondents.

- More generally, the higher maximum penalties proposed are disproportionate when applied to the failure to comply with an information request without reasonable excuse.

In light of the increased penalties it becomes even more important for the CMA to issue information requests that are reasonable and realistic in terms of scope.

GC100 therefore recommends that the higher maximum penalties should be reserved for serious and intentional breaches such as concealment or destruction of relevant information or the provision of deliberately false information. The decision to impose and the amount of any penalty should also be subject to a merits based judicial scrutiny.

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?

GC100 submits that:

- New enforcement powers and penalties should apply to new directions, orders, undertakings and commitments to avoid acting retrospectively, and to reflect any change in regulatory environment. For the same reason, to the extent any reform were to apply to existing directions, orders, undertakings and commitments, it should be clear that these new powers operate on a forward-looking basis to only capture compliance issues that arise after the relevant law takes effect.

- Fining methodology and guidance for any reformed administrative penalties should be able to take into account and reflect the materiality of the breach to ensure procedural fairness. For example, there will likely be scope for a wide variety in severity of breach and aggravating/mitigating factors. GC100 also submit it should be appropriate for the CMA to have discretion to not apply fines for ongoing breach in circumstances where a party can demonstrate genuine attempts to end the administrative infringement.

- The maximum level of fines will need to be balanced against the CMA's wider objectives, given a high cap (such 5% annual turnover) and potential for technical infringement may deter businesses from entering commitments.

- The power to impose higher penalties should be balanced by a greater obligation on the CMA to review the continued application and appropriateness of directions, orders, undertakings and commitments, greater use of sunset provisions, or greater ability of companies to request review.

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

GC100 offers no comment on this.

Consumer Rights

Q30. Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?

GC100 offers no comment on this.

Q31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?

GC100 offers no comment on this.

Q32. Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?

GC100 offers no comment on this.

Q33. How would expressly requiring consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?

GC100 offers no comment on this.

Q34. Should the reminder requirement apply where (a) the contract will auto-renew or roll-over, at the end of the minimum commitment period, onto a new fixed term only, or (b) the contract will auto-renew or roll-over at the end of the minimum commitment period

GC100 offers no comment on this.

Q35. How would the reminder requirement impact traders?

GC100 offers no comment on this.

Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?

GC100 offers no comment on this.

Q37. What would be the impact of proposals regarding long-term inactive subscriptions have on traders' business models?

GC100 offers no comment on this.

Q38. What do you consider would be a reasonable timeframe of inactivity to give notice of suspension?

GC100 offers no comment on this.

Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?

GC100 offers no comment on this.

Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?

GC100 offers no comment on this.

Q41. Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?

GC100 offers no comment on this.

Q42. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?

GC100 offers no comment on this.

Q43. What impact would the reforms mentioned in Q42 have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?

GC100 offers no comment on this.

Q44. What 'reasonable and proportionate' steps should be taken by businesses to ensure consumer reviews hosted on their sites are 'genuine'? What would be the cost of such steps for businesses?

GC100 offers no comment on this.

Q45. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?

GC100 offers no comment on this.

Q46. Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?

GC100 offers no comment on this.

Q47. Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?

GC100 offers no comment on this.

Q48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?

GC100 offers no comment on this.

Q49. Are there perverse incentives or unintended consequences from our existing consumer law?

GC100 offers no comment on this.

Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?

GC100 offers no comment on this.

Q51. Do you agree that these powers should be used to protect those using "savings" clubs that are not currently within scope of financial protection laws and regulators?

GC100 offers no comment on this.

Q52. What other sectors might new powers regarding prepayment protections be usefully applied to?

GC100 offers no comment on this.

Q53. How common is the practice of using terms and conditions to delay the formation of a sales contract?

GC100 offers no comment on this.

Q54. Does the practice of using terms and conditions to delay the formation of a sales contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?

GC100 offers no comment on this.

Consumer Law Enforcement

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?*

We agree that there is a disparity in the powers afforded to the CMA in relation to consumer protection legislation when compared to competition law enforcement and we support the proposal to allow for enforcement through an administrative model subject to appropriate equivalent checks and balances such as procedural safeguards and the protection of the rights of defence including by way of a merits appeal. In this regard the current administrative procedures for competition law enforcement provides a good model.

Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

GC100 offers no comment on this.

Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

GC100 offers no comment on this.

Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?*

The consultation recognises that, like competition law, consumer law infringement may carry significant penalties in the form of fines and relates to conduct which may also amount to a criminal offence. In addition, a finding of a consumer law infringement can have severe reputational consequences for businesses. GC100 is therefore firmly of the view that to ensure due process (given the CMA's role as both investigator and decision-maker), rigorous and sound decision-making by the CMA and to build confidence in the new regime the CMA's decisions should be subject to a review by an impartial and independent tribunal on a full merits basis.

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?*

The CAT has fulfilled this function effectively in relation to competition law enforcement and we consider that it would be well suited to perform the same role in relation to consumer law. One of the advantages of the CAT is that it sits as a panel of three members which allows it to bring to bear cross-disciplinary expertise in its decision-making.

Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?*

We see benefits in allowing sectoral regulators to enforce consumer law through an administrative model subject to the same protections as set out above. This would complement their sectoral regulation powers as well allow them to bring to bear their sectoral expertise to consumer enforcement.

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?*

As in respect of the CMA's information gathering powers across its competition tools, GC100 recognises the importance for the CMA to have accurate information supported by appropriate sanctions. We would not support penalties in the context of voluntary information requests, which is likely to discourage the voluntary provision of information due to the need to put in place extensive verification processes to avoid inadvertent error on the part of respondents. The parties should have a reasonable excuse defence and the higher level of penalties should be reserved for serious and intentional breaches such as concealment or destruction of relevant information or the provision of false information.

Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

GC100 offers no comment on this.

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

GC100 offers no comment on this.

Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?

GC100 offers no comment on this.

Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

GC100 offers no comment on this.

Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

GC100 offers no comment on this.

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

GC100 offers no comment on this.

Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?

GC100 offers no comment on this.

Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

GC100 offers no comment on this.

Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?

GC100 offers no comment on this.

Q71. How can government best encourage businesses to comply with these changes?

GC100 offers no comment on this.

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

GC100 offers no comment on this.

Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?

To the extent that further routes for private collective consumer redress are to be introduced, particularly if any claims are to be allowed to proceed on an "opt-out" basis, it is essential to achieve an appropriate balance between facilitating such redress, on the one hand, and ensuring that defendants' rights are protected, on the other. In particular, any new mechanism must

provide sufficient safeguards to prevent unmeritorious claims being brought, and the corresponding potential for "blackmail settlements", i.e. defendants being compelled to settle claims not because they are meritorious but in the light of the costs and risks of the litigation, even where they have a reasonable defence.

The key to achieving this balance is to put in place a rigorous certification process for potential claims. A starting point in designing such a process is the procedure for obtaining a "collective proceedings order" (or CPO) for competition claims in the CAT, as introduced by the Consumer Rights Act 2015. In this regard, we are concerned that a permissive approach to certification would not provide sufficient protection for defendants' rights. For example, the approach taken by the Supreme Court in the *Merricks* case introduces a low threshold for claims to be brought given the risks to the right of defendants to which a collective action gives rise. We are concerned that this dilutes the certification process as a mechanism for achieving this balance.

We consider there should be a higher threshold for bringing claims under any new regime, including an objective suitability threshold (since it is not clear that in consumer disputes there will be common issues that are suitable for determination collectively), as well as a clear initial merits threshold (which is set higher than the strike out threshold) for claims to be brought so as to weed out unmeritorious claims. This approach of rigorous certification by the CAT would be consistent with what had been envisaged in the various consultations which lead up to the competition collective action regime.

We are also concerned that there are other aspects of the design of the competition collective actions regime which should not be carried across into a consumer disputes. For example, the competition collective action regime allows for so called "carriage disputes" where potential class representatives can compete to bring a collective action. These disputes impose additional costs on the potential defendants to such actions.

Q74. How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?

GC100 offers no comment on this.

Q75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance? A new pro-competition regime for digital markets.

GC100 offers no comment on this.