HERBERT SMITH FREEHILLS

Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers – CP 488

Herbert Smith Freehills LLP Response to consultation

1. INTRODUCTION

1.1 We welcome the opportunity to comment on the Government's proposals for reforming competition and consumer policy. The comments set out below are those of Herbert Smith Freehills LLP and do not reflect the views of individual clients.

1.2 The proposals are very high level at this stage and cover a wide range of issues identified by Government as requiring legislative updates in order to speed up the relevant processes. In our view many of the reforms proposed aim to address issues that either do not require legislative changes or cannot be addressed through legislative changes alone, as they also need to be addressed by the CMA in its procedural approach and practical application of the legislation. By way of example, the UK merger control regime contains statutory timetables for phase 1 and phase 2 of a merger investigation. The pre-notification phase is not regulated in the same way and often ends up taking multiples of the statutory phase 1 period. The pre-notification process could be accelerated without the need for further legislation.

1.3 The high level nature of the proposals makes it harder to provide meaningful comments, in particular as so much will ultimately depend both on the detailed proposals and on how the CMA implements the changes in practice. Our comments are therefore of a more general nature, with particular focus on the implications for businesses. If the aim of the reforms is to attract investment and create growth and innovation, it is essential that any of the measures being proposed takes into account and recognises the importance for businesses not to be deterred from investing in the UK or innovating by an overly burdensome competition regime.

2. STATE OF COMPETITION AND GOVERNMENT STRATEGIC STEER

General comments

2.1 The Government is seeking feedback on whether it should take a more active approach in setting the strategic direction for the UK's competition policy. In recent decades competition policy has been driven by a move away from political intervention towards decisions by impartial, independent regulators. While recognising that independent evidence-based decision making remains crucial to an effective competition policy, the Government considers that to be truly effective, its regulatory and economic policy needs to be

supported by strong and effective competition law that also responds to the strategic needs of the UK's economy. The Government is now seeking views on the merits of a more active approach to setting the CMA's strategic steer, including making it more regular and updating it to ensure it remains relevant to the issues facing the UK.

Q3. ***Should Government provide more detailed and regular steers to the CMA?***

2.2 In our view the political independence of a competition regime and its regulators is a key feature of a successful regime as it ensures that the competition rules will be applied in a transparent and consistent manner as opposed to in the interest of short term political goals.

2.3 Although the strategic steer would remain non-binding and the CMA would be free to depart from it if it believed it appropriate to do so, it can nevertheless be expected to influence the CMA's priorities and approach, which in turn will reduce predictability of the competition regime. This will make it harder for businesses to engage in long-term planning and may ultimately deter innovation and investment in the UK.

3. MORE EFFECTIVE MARKET INQUIRIES

General comments

3.1 The UK market study and market investigation regime is internationally recognised as a world class regime that other competition authorities have looked to replicate. In November 2020 the EU Commission looked at the UK markets regime as an option for a new competition tool in order to allow the Commission to intervene with regard to anti-competitive behaviour by powerful but not dominant players in tipping markets and to prevent the creation of future market players with entrenched or gatekeeper positions.

3.2 The Government recognises that market inquiries (market studies and market investigations) are one of the most powerful tools for promoting competition in UK markets, but it has concerns that the tools are significantly underused and that their processes are overly complex.

3.3 Success of the regime should however not be measured by the number of investigation references that have been made but by the quality of the process and the outcomes achieved. It is far more important for the CMA to focus on targeting references on key markets rather than aim to increase the number of investigations, which would increase the regulatory burden on business without any corresponding consumer benefit.

3.4 The proposals also look to speed up the process of market inquiries. Reducing timeframes was also considered in the context of the Enterprise and Regulatory Reform Act (ERRA 2013) reforms which resulted in a reduction of the time limits from 24 months to 18 months,

but with a possibility of one 6 month extension in special circumstances, to be used in more complex cases. In most market investigations carried out by the CMA since these changes were introduced the CMA investigations have exceeded the 18 months period. Market investigations can be a complex exercise, involving a considerable number of parties providing large quantities of information. It is important to ensure that due process is not compromised for speed, in particular at the remedies stage. This is important where structural remedies are involved, but also for non-structural remedies which can be equally intrusive for the businesses concerned.

3.5 We support greater efficiency in the process which can be achieved through the CMA's internal processes without the need for legislative changes, for example by adopting a more streamlined and targeted approach to evidence gathering from the main parties rather than issuing very wide-ranging information requests. The interaction with the proposals on information gathering (see below) should also be considered – these will have a tendency to slow down inquiries.

3.6 The investigation process and subsequent remedies can be very intrusive for business and it is therefore essential that due process and the parties' rights of defence are protected. Further reduction in the timeframes risks affecting the robustness and quality of decisions that should be aimed at providing long term benefits for businesses and consumers.

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

3.7 We do not support greater remedy powers for the CMA at the end of the market study process which 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. Any remedies should therefore be imposed only after the detailed assessment of a market investigation; imposing remedies after the shorter and less detailed assessment of a market study would introduce an unacceptably low bar for intervention in markets and increase the risks of inappropriately specified remedies and unintended consequences.

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

3.8 We support the current two-phase process of market studies and market investigations and are not in favour of replacing the regime with a new single stage market inquiry tool.

Removing the filter of a first phase market study risks investigating the wrong issues in the wrong markets.

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

3.9 We strongly oppose a proposal under which the CMA would be able to impose interim measures at the start of a market inquiry. Early on in any market inquiry it will not be clear what the issues are. The threshold for the CMA to make a market investigation reference is whether the CMA has reasonable grounds to suspect an AEC, which means the threshold of belief that a problem exists could be less than 50%. The concerns identified at the initial phase of an investigation do not always turn out to be the real issues and 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. Furthermore, imposing remedies before fully understanding the relevant market(s) would carry a very significant risk of mis-specified remedies, in particular since even non-structural interim measure orders may necessitate fundamental changes to business models and practices. Imposing interim measures in such cases would result in over-enforcement and may be damaging to businesses who would not have recourse to compensation for any harm caused by measures which may turn out to be entirely inappropriate once the market(s) have been properly investigated.

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

3.10 We support proposals to enable the CMA to accept binding commitments at any stage in the market investigation process as this will allow the CMA to complete its investigations more quickly, provided the commitments can be agreed by all market participants.

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

3.11 We agree that implementation trials to test and trial how best to implement remedies can be useful in order to achieve effective and versatile remedies. In our view there is no need for legislative changes in order to achieve this. It should be possible for the CMA to do so in the context of its current remedies powers under which it cooperates with businesses in order to achieve the most efficient remedies.

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

3.12 In our view the legislative framework for market studies and market investigations is sound. It was last reviewed in the context of ERRA 2013 which came into effect in April 2014, resulting in a more efficient and streamlined regime with tighter deadlines and stronger

investigatory powers for the CMA. We consider that there is no need at this stage to make once again further legislative changes to the regime. Improvements should instead be made at CMA level, which has the necessary tools to carry out efficient market inquiries, but should perhaps be looking at the ways in which it applies the legislation. In order to achieve more timely and efficient processes the CMA could, for example, take a more streamlined approach to its evidence gathering as opposed to issuing very wide-ranging information requests.

4. REBALANCED MERGER CONTROL

General comments

4.1 On the whole the Government believes that the UK merger control regime is working well, and that the current voluntary and non-suspensory process continues to strike the right balance between consumer protection and regulatory burden. There is however a growing consensus in the business and legal communities that the current UK merger control regime is not working well. The regime is onerous, both for businesses and for the CMA, lengthy and expensive.

4.2 Whereas the voluntary regime has historically been seen as attractive and flexible for businesses, the cost and complexity of IEOs means that much of the benefit of a voluntary regime has now been lost. In combination with the way in which the CMA is conducting its monitoring function and its powers to call in transactions has moved the UK much closer to a de facto mandatory regime.

4.3 Other issues relate to the review timetable, which is longer than that of many other leading jurisdictions. The pre-notification phase in particular often takes longer than the statutory phase 1 review period. In phase 2 the regime also has the potential to take considerably longer than most other international regimes, due to the option to extend the statutory timeframe by a further eight weeks, a power that has been used by the CMA in 50% of its cases. As a result CMA phase 2 investigations are often two to four months longer than the equivalent EU process. Following Brexit it will be important for the review period and related procedures to be better managed to allow for coordination with the other key international regimes, so that filings, assessment and remedies can be considered within the same timeframe.

4.4 Another unwelcome development is the CMA's approach to the share of supply test over the last few years. This is a subjective test which, in the CMA's apparent view provides it with almost limitless discretion, making it difficult for businesses to predict the CMA's approach to jurisdiction, except to assume that if the CMA wishes to assert jurisdiction, it will find a way of doing so. The CMA has taken an increasingly expansionist approach to

the share of supply test in order to assert jurisdiction over transactions which attract its interest, no matter how tangential the UK nexus. We recognise that the CAT has supported the CMA's interpretation of the test in the cases that have come before it, but we do not believe that this was how the legislator intended for the test to be applied. The Enterprise Act 2002 (EA 2002) gives the CMA some discretion in determining whether the relevant goods/services are of the same description and whether the 25 per cent threshold is met, but in both cases the CMA's decision must be "appropriate" (section 23(5)and 23(8) EA 2002). During the Parliamentary debates which preceded the enactment of the EA 2002 there was significant emphasis on the fact that the jurisdictional thresholds—including the share of supply test—should be "straightforward" and "simple and easy to determine quickly" in order to promote certainty and alleviate the burden on businesses. If, notwithstanding the above, the view is that the share of supply test as currently drafted justifies this expansive approach from the CMA and the CAT, then we consider that the test should be amended in the interest of greater certainty and predictability.

4.5 We welcome the Government's recognition that the apparently infinite elasticity of the current application of the share of supply test reduces the predictability of the UK merger control regime for businesses and investors, and its invitation for comments as to how the test could be reformed. The issue can already be addressed, without the need for immediate legislative changes, by the CMA reverting to its previous, less expansive approach to the share of supply test (which is arguably more in line with Parliament's original intention), thereby making the existing voluntary regime more predictable and less burdensome for businesses.

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?***

4.6 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.

4.7 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. In our view the £10 million threshold for worldwide turnover is so low as to be practically meaningless in that it is difficult to think of many transactions currently at risk of review that would escape review due to this safe harbour. It would be helpful if the CMA could provide details of the number of transactions which would have met this threshold, but over which it

took jurisdiction over the last 5 or 10 years. This information may provide an indication as to whether the level of turnover is set at an appropriate level, including whether the safe harbour threshold should apply with reference to UK, not worldwide, turnover.

4.8 The Government is also proposing to add an additional jurisdictional threshold that is aimed at capturing vertical and conglomerate mergers, as well as so-called "killer" acquisitions in order to plug a perceived enforcement gap. We do not believe there is such a gap in the CMA's jurisdiction which prevents it from reviewing vertical or conglomerate mergers, nor would there be even if the share of supply test were not applied in the expansive way it currently is. Nothing prevents the CMA taking jurisdiction over such transactions where the target meets the turnover test. In circumstances where the target does not meet turnover test, there is a real question of whether such a merger can give rise real competition concerns that should attract investigation. Even assuming for the sake of argument that such a transaction can give rise to competition concerns, that still does not amount to an enforcement gap: it has to be recognised that the CMA cannot and should not to take jurisdiction over all cases. Any merger control regime that seeks certainty and predictability through clear jurisdictional thresholds has to accept that that certainty and predictability may mean that some transactions cannot be reviewed for want of jurisdiction.

4.9 As far as killer acquisitions are concerned, there may be room for a hybrid threshold as set out in the proposed test, but in that case the share of supply test should be raised from the proposed 25% to, for instance, 50%, as the CMA should only have concerns about vertical or conglomerate theories of harm and require jurisdiction where the acquirer's market share is close to dominance. Furthermore, there can be no justification for the hybrid test for as long as the share of supply test remains in its current unreformed form: the necessary corollary of the introduction of the hybrid test would be the tightening of the share of supply test to remove the CMA's excessive discretion.

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

4.10 As discussed above, the Government should consider whether the proposed changes to the jurisdictional thresholds are set at an appropriate level in order to ensure they achieve what they set out to do. There is no point in introducing a safe harbour for mergers between small businesses if the threshold for exclusion is not set at a meaningful level. Similarly, a new jurisdictional threshold in order to allow the CMA to review killer acquisitions needs to reflect a strong market position of the acquirer, otherwise it is not dealing with a killer acquisition.

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

4.11 The current pre-notification process is in many cases far too lengthy and the CMA should be looking at options for reducing the pre-notification phase. The legislation provides for statutory timeframes for phase 1 and phase 2, but lengthy and open-ended pre-notification periods remove the benefit of these statutory timelines (which are already longer than those of most other leading merger regimes). In many cases the period of pre-notification exceeds the phase 1 review period.

4.12 The Government is proposing allowing the CMA to agree binding commitments earlier during phase 2 in particular in order to deal with a situation where the parties were timed out on agreeing commitments with the CMA at the end of phase 1. In our view it would make more sense to extend the phase 1 remedies phase, rather than tipping over to phase 2. The purpose of the phase 2 investigation is to carry out a detailed substantive analysis and the parties will not be in a better position to offer commitments at the start of a phase 2 investigation than at the end of phase 1. One key difference between remedies in phase 1 and phase 2 is that the time and more detailed analysis in phase 2 allows for the remedy to be targeted and calibrated more specifically to the particular competitive harm which has itself been more carefully articulated due to the more detailed analysis. If remedies were considered at the start of phase 2 before any of this more detailed analysis has been carried out, it is really just phase 1 remedies being considered after the transaction has been referred to phase 2. In those circumstances it would be more coherent to allow greater flexibility in the phase 1 process to deal with remedies before a reference to phase 2.

4.13 We would support the Government's proposal for narrowing the scope of the CMA's phase 2 investigation to the concerns it has identified at phase 1, provided this does not result in the CMA simply including every possible issue at phase 1, without sufficient thought as to what is really relevant. In other words, we would support this proposal if it results in narrowing phase 2, but not if it has the unintended consequence of expanding phase1.

5. STREAMLINING CMA PANEL DECISION MAKING

5.1 The Government is seeking views on whether the CMA panel should be retained but reformed and it is proposing a smaller pool of dedicated panel members for whom work on the CMA's panel is their primary employment. To reflect the smaller number of panel members, Government is considering revising their role to making final decisions on theories of harm and remedies. This would retain the role of the CMA panel as a 'fresh pair of eyes', while allowing greater administrative flexibility during the course of the investigation.

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

5.2 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 under the EA2002 and it is important that appropriate checks and balances are embedded in its administrative processes to avoid confirmation bias. Smaller panels may work, provided the diverse skills and experience of the existing panel can be preserved. There is a risk that, with the members of the smaller panels essentially becoming quasi members or employees of the CMA, some of the current diversity and broader insight of the panel may be lost and that we will instead end up with a panel of similar-minded people. It is also worth considering whether smaller panels could adversely affect the CMA's regulatory appeal function and lead to a watering down of the appeal process.

6. STRONGER AND FASTER ENFORCEMENT AGAINST ILLEGAL ANTICOMPETITIVE CONDUCT

General comments

6.1 The Government is proposing a range of reforms to the CMA's powers and processes in order to support the CMA in conducting its investigations more quickly and efficiently. It is also considering the merits of providing indicative timescales as targets for the completion of Competition Act investigations, in the revised strategic steer to the CMA.

6.2 Fast and flexible investigations which identify and resolve anticompetitive conduct in a timely manner are in the interest of the parties as well as the CMA. Competition law investigations can be lengthy processes with companies as well as individuals at risk of serious penalties over a period of years rather than months. We therefore support the overall aim of avoiding unnecessary delays.

6.3 At the same time it is important that investigations that can result in quasi-criminal penalties are carried out with the necessary rigour providing the parties with sufficient time to participate in the process. Competition investigations can be complex, involving the production, review and analysis of large volumes of documents, and shorter investigation timelines should not affect due process and the parties' rights of defence and their broader rights.

6.4 Without the need for legislative measures it should be possible the for the CMA to improve the efficiency of its investigative processes, for example by adapting the scale and scope of its investigations and issuing more focused and targeted information requests. But streamlining the CMA's processes and facilitating its powers, for example making it easier for the CMA to use its interim measures 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

changing the standard of review to a judicial review standard should they decide to appeal such a decision.

6.5 We also strongly support maintaining the full merits standard of review in appeals of CA98 decisions. This is necessary in order to ensure regulatory accountability and provide access to meaningful justice for those affected by the, which can impose quasi-criminal penalties. The CAT manages its appeals very effectively and its procedures focus on efficient time management. It has wide powers to control the admission of new evidence and to sanction late production of evidence imposing costs orders. It is also the case that new evidence often comes to light as a result of arguments and findings by the CMA during the appeal process but which were not available to the parties prior to the appeal or were not set out in the decision.

6.6 The period from statement of objections to final decision by the CMA is often longer than the period from appealing a decision before the CAT to hearing. The CMA argues it needs the time to draft detailed and appeal-proof decisions, but if this becomes an important hurdle to timely conclusion of its investigations the Government may want to consider a move away from the current administrative enforcement regime to a prosecutorial regime. Under such a regime the CMA's case would be set out in the SO and the accused would present its defence before the CAT which would reach a final decision, appealable to the Court of Appeal on points of law only. This may be worth considering as a solution to reducing the end to end duration of CA98 investigations.

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?***

6.7 We have no objection to the proposed changes to the jurisdictional test under the CA98 which would allow the CMA to investigate conduct taking place outside the UK but which has an impact on UK markets and consumers. This would bring the UK regime in line with that of other leading jurisdictions such as the EU and the US.

Q 15. ***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 £10million?***

6.8 We do not support proposals to reduce the current thresholds for immunity from fines for both chapter I and Chapter II infringements, from £20 million to £10 million for Chapter I infringements and from £50 million to £10 million for Chapter II infringements. This would bring the immunity for small agreements to a meaningless level. Leaving the current

levels, which were introduced in March 2000, unchanged in any case already provides a reduction in light of inflation.

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 businesses that are a party have an annual turnover of less than £10 million?***

6.9 Provided the thresholds remain unchanged we would support keeping the current approach under the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulation 2000 which provides immunity for "all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million".

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?***

6.10 We support the proposal for additional immunity from damages claims in order to incentivise more applicants and mitigate concerns that leniency applicants can be an easy target in follow-on damages claims. Government should however be aware that the risk of damages claims is not the only disincentive for leniency applicants. The burden of cooperation imposed on the parties in order to perfect their marker is also seen as a major deterrent and this is an area where the CMA could improve its approach and guidelines in order to attract more applications.

6.11 Implementing this proposal will not be straightforward and it will be necessary to consider and address its consequences, such as the greater burden it will impose on other parties to damages claims who will bear a greater share of any liability and who may be smaller operators and could become insolvent and driven out of the market as a result. It may also mean that claimants will not be fully compensated. There may also be a knock on effect on type B and type C applications. There will be less incentive to seek leniency on this basis if the effect is to improve the prospect of an infringement decision and thereby expose yourself to a larger share of a potential liability to damages claims.

6.12 As far as the prohibition on the disclosure of a whistle-blower's identity is concerned, we believe that there is no need for legislative changes as it should already be within the

CMA's power to do so where as the proposal suggests the CMA is not seeking to rely on evidence from the whistleblower.

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?***

6.13 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. The 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.

6.14 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.

6.15 An alternative solution the Government may want to consider would be for the CAT to have the power to make interim measures orders on the application of the CMA. The CAT could 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 paras 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?***

6.16 We do 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.

6.17 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.

6.18 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 are typically not the main place of work and other individuals may be working from the same premises and using the same devices 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?*

6.19 In our view the proposals for Early Resolution Agreements in order to bring complex chapter II cases to a close are not workable. The proposed Early Resolution Agreement process involves the party under investigation to "*accept certain factual matters relevant to the conduct under investigation"*. It is not wholly clear what this means or how that agreement will be recorded, but if it involves the party under investigation agreeing factual findings relevant to the alleged infringement, this could prejudice its position in any damages litigation.

6.20 In *AB Volvo & Ors v Ryder Limited & Ors* [2020] EWCA Civ 1475, the Court of Appeal, upholding a judgment of the CAT ([2020] CAT 7), held that it is an abuse of process under English law for the addressee of a European Commission settlement decision to plead inconsistently to a recital to that decision, irrespective of whether the recitals in that decision are binding as a matter of EU law, other than in certain narrow circumstances. Notwithstanding the apparent differences between the Early Resolution Agreement process and the settlement process, there appears to be a risk that that principle would extent to the 'factual matters' admitted by the party under investigation.

Even if there is legislation to prevent these factual matters being binding in subsequent litigation, the *Le Patourel* case currently before the CAT (Case no 1381/7/7/21) shows that claimants will seek to rely on settlements even if not binding to found substantial damages claims.

6.21 Accordingly, requiring the party under investigation to admit such factual matters may undermine the Government's stated aim of not prejudicing the party under investigation's

position in future damages actions. This is because there is a risk that the party would be bound by those factual matters in any court proceedings, even if they have not given any admission as to the legal effect of such facts, limiting its ability to contest the claim. It is difficult to appreciate the extent of this risk on the basis of the present proposals, and further detail should be provided on the nature of the 'acceptance' is envisages and the form this document would take.

Given this risk and the possibility of "settlement payments" it is hard to see what benefit there would be for a business under investigation to enter into an early resolution agreement.

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?***

6.22 Whilst the proposal to protect documents prepared in order to seek approval for and operate a voluntary redress scheme from disclosure in civil litigation is welcome, we are not satisfied that this will increase the use of voluntary redress schemes as there remain a number of other impediments to their use.

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?***

6.23 We support the proposals for statutory confidentiality rings which should facilitate access to the file and standardise confidentiality claims, and we recommend that the use should be extended to merger control investigations where confidentiality can inhibit access to highly relevant third party submissions

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

6.24 We do not believe that it is necessary to remove the requirements from the CMA rules on the decision makers for infringement decisions in Competition Act investigations. The design of the internal decision-making structures inevitably involves trade-offs, but the existing requirements include important safeguards which should be maintained.

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

6.25 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 essential 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.

6.26 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 power, including information requests and remedies across its functions?

6.27 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.

7. STRONGER INVESTIGATIVE AND ENFORCEMENT POWERS ACROSS COMPETITION TOOLS

7.1 The Government is also proposing a range of reforms that would apply across the CMA's competition tools and are intended to remedy more harm more quickly. It is concerned that gaps in the CMA's information gathering powers may have developed over time, and is therefore seeking views on additional evidence gathering and enforcement powers to ensure the CMA's enforcement capabilities are in line with international best practice. A move to turnover based penalties will bring the UK regime in line with most leading international regimes but it will be essential that there is sufficient protection against unreasonable requests.

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?*

7.2 We recognise the importance for the CMA to have accurate information supported by appropriate sanctions and a move to turnover based penalties will bring the UK regime in line with most leading international regime. We do however strongly recommend 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.

7.3 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 in a submission..

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?***

7.4 We agree with the Government's proposals for alignment of the enforcement and penalties for breach of UILs and remedies in its markets regime with those of its merger control regime.

8. CONSUMER RIGHTS AND 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?*

8.1 If the Government proceeds with the proposal to allow for enforcement through an administrative model it should be 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.

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?***

8.2 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. We are 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?***

8.3 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 2002 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?***

8.4 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?***

8.5 As in respect of the CMA's information gathering powers across its competition tools, we recognise 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.

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?***

8.6 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", ie 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.

8.7 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.

8.8 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.

Herbert Smith Freehills LLP

1 October 2021