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REFORMING COMPETITION AND CONSUMER POLICY: DRIVING GROWTH AND DELIVERING COMPETITIVE MARKETS THAT WORK FOR CONSUMERS

PRESENTED TO PARLIAMENT
BY THE SECRETARY OF STATE FOR
BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
BY COMMAND OF HER MAJESTY

RESPONSE BY
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RESPONSE TO THE UK GOVERNMENT'S PROPOSED REFORMS TO COMPETITION AND CONSUMER POLICY

INTRODUCTION

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on "*Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers, July 2021*" (the ***Consultation***).

1.2 Freshfields is a leading international law firm. Our comments are based on our extensive experience of representing clients in the full range of competition and consumer law enforcement in the UK, and throughout Europe, the US, and Asia. We believe this experience gives us valuable insights into both institutional design and enforcement procedures.

1.3 We welcome the Government's commitment to strong and effective competition and consumer law regimes as key drivers of economic growth and consumer confidence. In particular, we welcome all measures which improve the efficiency, predictability, fairness and robustness of decision-making, whilst allowing the authorities to focus their resources on those cases which potentially cause most harm to competition and consumers. As the Competition and Markets Authority (***CMA***) is now conducting more complex and strategically significant investigations following the UK's exit from the European Union (***EU***), making sure the authority has the powers, procedures and resources in place to focus on the right cases is particularly important.

1.4 We have concerns, however, that some of the proposals may hamper the Government's key objectives of driving investment, innovation and productivity in the UK economy. We believe that serious consideration must be given to the rationale for some of the proposals in order to avoid a detrimental impact on overall regulatory certainty and investor confidence. In particular:

(a) the push for speed and efficiency should not undermine the procedural safeguards required to maintain the UK's international reputation for robust, fair and reliable competition and consumer law enforcement;

(b) new or expanded powers for the CMA to investigate, intervene or impose sanctions on companies and individuals must be proportionate to a legitimate concern that needs to be addressed. The basis of any perceived enforcement gaps should therefore be properly articulated; and

(c) the CMA must be properly resourced to ensure any new functions and powers are exercised efficiently and to the requisite standard.

1.5 We set out below our comments on the Consultation. Please note that these comments do not necessarily represent the position of any of our clients or any individual partners in our firm.

1.6 We would be happy to discuss any of our comments in more detail and to contribute to further thinking or analysis on these issues.

CHAPTER 1: COMPETITION POLICY

2. The UK's competition law and the state of competition and a new pro-competition strategy for the UK

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?

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?

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

2.1 We support measures which help ensure that the CMA's resources are focused on promoting competition and investigating mergers, markets and commercial practices which distort or restrict competition and harm consumers and other market participants. However, we believe that the following important principles are essential when considering the Government's current proposals:

(a) **Transparency and independence**. The CMA's use of its powers and its decision-making must be transparent, anchored in well understood principles of competition assessment and consumer harm, and free from political influence. Decisions to investigate and final decisions must be based on clear legal standards and evidence of weak or distorted competition, rather than being open to influence by particular interest groups or wider objectives.

(b) **Proportionality**. Any extension of the CMA's investigatory powers and sanctions must be assessed in the context of the CMA already having very extensive powers by international standards and the need to avoid any unintended consequences, including disincentives to grow or invest in the UK, by assuring business that any exercise of those powers will be proportionate to a legitimate concern.

State of Competition reports

2.2 In relation to the Government's proposal for the CMA to produce regular "State of Competition" reports, we urge the Government to consider the following issues:

(a) **Evidence of widespread decline in competition across the UK economy**. We question whether there is sufficient evidence of increasing market power and declining competition across the UK economy which would justify the proposed new "micro-economic role" for the CMA and the new information gathering powers.

(i) The Consultation refers to the CMA's finding in its November 2020 report[1] that market concentration is three percentage points higher than it was in 1998. However, it is important to note that this finding is based on the average combined industry share of the ten largest firms in each industry and not a measure of concentration across entire sectors. In fact, the report finds that "*average industrial concentration*

[1] The State of UK Competition, November 2020.

– aggregated to the level of the whole economy – has been relatively stable over time, though increasing during the financial crisis and the following recession".

(ii) The CMA also examined indicators of dynamic competition on the basis that greater dynamism is associated with competitive markets. Again, the CMA's findings were mixed, with the number of younger large firms increasing over recent years but churn among the very top firms falling during the financial crisis.

(iii) The CMA nevertheless reached the tentative conclusion that competition in the UK may have weakened over the last two decades and that further work would be useful, although one could argue that this was not warranted by its own research.

(iv) The Consultation also refers to the 2017 report by Corfe & Gicheva.[2] The authors examined ten consumer markets[3], all of which are subject to sector-specific regulation in the UK except for cars (which the authors found to be unconcentrated) and groceries (where the authors concluded that concentration has declined in recent years). In our view, before extending the role of the CMA and raising costs for industry across the entire economy, it is essential to examine the regulatory framework and the role of the sector regulators in each of the markets found to have high or moderate levels of concentration, as well as the particular drivers for concentration in each of those markets.

(b) **The skills and resources required to act as a micro-economic sibling to the Bank of England and produce regular State of Competition reports**. In the absence of a significant increase in budget and mandate to recruit sufficient highly skilled staff, we believe that the CMA's (already stretched) resources should be focused on making robust decisions against anticompetitive mergers and practices.

(i) As the Consultation draws a comparison with the Bank of England's (the ***Bank's***) "*well-established public macroeconomic role*", a detailed comparison with the Bank's role, resources and expertise as a central bank with a mission to maintain monetary and financial stability would be warranted to ensure that the CMA was equipped to deliver on this expanded mandate.

(ii) For example, we note that the Bank's Governor, Andrew Bailey, describes research as being "*crucial to what any central bank does. It forms a critical part of the analytical apparatus that guides policymakers' decisions*".[4] The Bank therefore has a sizeable research function with a strong reputation for attracting highly skilled

[2] Concentration, not competition: the state of UK consumer markets, 2 October 2017, produced by the Social Market Foundation (Scott Corfe and Nicole Gicheva).

[3] Cars, groceries, broadband, mobile telephony, landline-only phone contracts, electricity, gas, personal current accounts, credit cards and mortgages.

[4] https://www.bankofengland.co.uk/research/bank-of-england-agenda-for-research.

economists and other professionals. Notably, the Bank reports expenditure of £20 million on research and statistics[5], which represents almost 20% of the CMA's total budget in 2020-21 (£109.8 million).

(iii) Although their roles may not be directly comparable, if the Government proceeds with this proposal, we believe that it will be essential to properly scope the skills, resources and budget that the CMA will need to conduct its research and ensure that its reports are sufficiently robust to shape competition policy and future action.

2.3 In the absence of clearer evidence of declining competition across the economy, we are concerned that the proposals risk:

(a) over-engineering solutions to perceived problems which would be better addressed by the CMA's existing powers (including market studies and investigations) or by the relevant sector regulators; and

(b) increasing regulatory burden on business and the economy as a whole, creating a less certain and more costly environment without clear benefits.

Strategic steers

2.4 As the Government stated in its policy objectives at the time of the CMA's formation, "*it is vital that the CMA is independent and is seen to be independent*".[6] The Consultation appears to support the view that "*independent, evidence-based decision making remains crucial to effective competition policy*".[7]

2.5 Driven by the Government's objective for the CMA to be free from influence from Ministers, strategic steers were intended to be "*high level*" and to "*outline the long term goals of the Government in relation to competition and growth*" which "*the CMA can reflect upon, but is not bound by*".[8] It was therefore unsurprising – when the first draft steer singled out specific sectors for the CMA to assess whether enhanced competition could contribute to faster growth – that a large proportion of respondents expressed concerns that the steer risked crossing the line between high-level political goals designed to improve transparency and political influence over how the CMA prioritises its activities and resources.[9]

2.6 Since then, the Government has moved away from identifying specific sectors and focused more on the CMA's role in supporting the Government's industrial strategy (e.g. improving productivity and championing consumers). In fact, following consultation on the second steer in 2015, the Government noted that some respondents were keen that sectors were identified but decided that the steer should "*provide the*

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[5] https://www.bankofengland.co.uk/-/media/boe/files/annual-report/2021/boe-2021.pdf, page 41.

[6] Growth, competition and the competition regime: Government response to consultation, March 2012, paragraph 10.9.

[7] Reforming Competition and Consumer Policy, July 2021, paragraph 1.32.

[8] Growth, competition and the competition regime: Government response to consultation, March 2012, page 14.

[9] In response, the Government noted that the identified sectors – "*Knowledge intensive sectors, financial services and infrastructure sectors including energy*" – "*form a substantial portion of the UK economy*" and are key to the Government's reform agendas.

CMA with an outline of the Government's overall priorities in competition rather than identify particular markets. We are clear that the CMA should not feel restricted or limited in any way from looking at any market where it thinks competition could be improved".[10]

2.7 We are therefore concerned that proposals to identify sectors which should be strategic priorities for the CMA's investigations are a retrograde step. If carried forward, the Government should articulate the basis of the perceived current enforcement gap in the sectors concerned and its reasons for a more directive approach, particularly if those sectors are already directly regulated by sectoral regulators.

2.8 Since the steers were introduced in 2013, it has been well understood that they should last the length of a Parliament in order to create the certainty, stability and business confidence, which in turn supports a healthy investment climate. Proposals to issue more regular steers, as and when required, risk undermining long-term and deliverable objectives and driving resources to meeting possibly short-term political concerns. Such short-termism and inconsistency is likely to have a detrimental impact on overall regulatory certainty and investor confidence, increasing the level of risk (and therefore cost) of doing business in the UK – and therefore running contrary to the important objective of seeking to attract investment in our economy.

2.9 We note that the Government proposes that the steers will continue to be non-binding. However, given the CMA's accountability to Parliament and the Government's proposal to require the CMA to report annually on how it is responding to the steer and explain any reasons for departure, we question whether the steers will be truly "*non-binding*" in practice.

2.10 We are concerned that more directive and regular steers may lead to over-politicisation of the UK competition law regime, which would likely deter investors who would be concerned about unpredictability and excessive regulatory intervention and cost. It would also compromise the CMA's reputation as an independent authority at a time when it is vital for the CMA to establish itself amongst other leading authorities internationally.

3. More effective market inquiries

3.1 The Consultation recognises that the CMA already has a set of powerful tools to intervene in markets that it considers may not be working well for consumers. These powers, including the extensive remedies available to the CMA at the end of a market investigation process, are unusual for a competition regulator and exceed those available in any other advanced economy.

3.2 In our experience, the CMA has utilised its market inquiry tools somewhat inconsistently in the years since the current markets regime was introduced in 2002 (and following its amendment in 2013) and there should be more transparency and guidance for business as to when each tool available under the current framework will be considered appropriate and why.

[10] Government's response to the consultation, December 2015.

3.3 It is evident also that the CMA has, as the Government recognises, undertaken many more market studies than references in recent years. We do not necessarily consider this to be a problem where it leads to more efficient and proportionate outcomes for business and consumers. As such, to the extent the Government decides to adopt a single stage regime, it should ensure that sufficient flexibility is built into the regime to allow the CMA to conduct a curtailed review (akin to the current market study), where this is appropriate.

3.4 We generally welcome the Government's interest in reforming the regime in order to make the process more efficient. Any market inquiry will typically create a "cloud" of regulatory risk around the entirety of a sector. Given the potential duration of a full market investigation in particular, such concerns can endure for a potentially very long period of time, leading to potential hold-up of innovation, investment and pro-competitive transactions. As a result, any intervention needs to be well targeted, well managed and proportionate to the perceived issues. In particular, recognising that in a market inquiry context there will be in principle no evidence of wrong-doing or breach of anti-trust rules (where other tools would be more appropriate and proportionate), it is essential that the process for investigation and engagement is, and is perceived to be, fair. This includes ensuring appropriate transparency throughout the process, that there is access to decision makers for affected parties, that any conclusions are sound and relevant to the industry as a whole, and that remedies are properly tested and fit for purpose.

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

3.5 Market investigations typically involve a complex and time-consuming analysis of the way a market operates with a deep focus on the leading players who bear the burden of the CMA's inquiries. We would be concerned that in many markets it would be challenging for the CMA to have adequately understood the market and engaged sufficiently with affected parties to be in a position to impose remedies, particularly in novel and fast-moving markets. This is true notwithstanding the suggestion that remedy powers might not extend to structural remedies at the market study stage: even non-structural remedies can have unintended consequences particularly over time.

3.6 We agree that there would need to be an extension to any timetable in this scenario, primarily in order to ensure there is sufficient time for the CMA to have properly understood the market and engaged with affected parties before any remedies are imposed.

3.7 While undertakings in lieu of a reference (***UILs***) are rare, in our view, the reason for their current infrequency is that the authorities have found it difficult to achieve market-wide agreement on remedies within the market study timescale. We believe that addressing some of the deficiencies we have identified in main party engagement would lead to a greater likelihood of parties offering workable remedies at the end of a market study.

3.8 If the CMA were to have the power to impose remedies at the end of a market study, we would be concerned if the CMA's Board were also the decision maker unless the process is reformed in order to provide for more decision maker engagement with key market players who would be affected by the relevant remedy. As outlined above, we

do not believe there are currently sufficient opportunities for affected parties to be heard and feed into the CMA's thinking during a market study process. This concern would be much more acute were the CMA also to have powers to impose remedies at the end of a market study. In the absence of a process which involves more extensive main party engagement with the Board, we would suggest the appointment of a "mini" Panel which would be convened specifically to decide on remedies (again, with appropriate opportunities to engage for main parties). This "mini" Panel approach is currently deployed on investigations related to the variation/termination of existing remedies so would be well suited to the task.

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

3.9 We understand that the Government wants to improve the speed, flexibility, and frequency of effective use of market inquiries – not just in "*a small number of high-profile markets*" – but across the UK's wider economy. In particular, the Government is concerned that the CMA may currently be deterred from opening in-depth market investigations due to the lengthy and cumbersome nature of the process.

3.10 As such, a new single-stage market inquiry tool may lead to improved outcomes for business, subject to the inclusion of a number of important safeguards.

3.11 **First**, we are concerned that the proposed **threshold for intervention** is too low. The Consultation notes that under the current proposal for a single-stage regime: "*all that would be required for a market inquiry to be launched is a decision by the CMA that it should (a) consider the extent to which the features of a market may have the effect of preventing, restricting or distorting competition in that market or otherwise be adversely affecting the interests of consumers and (b) assess the extent to which steps can and should be taken to address those effects. The CMA could decide to launch a market inquiry* ***on the basis of its own prioritisation assessment****. This would retain the flexibility currently provided by the market study tool*" (emphasis added).

3.12 We consider that in order to initiate a detailed investigation, with all the powers this entails, the CMA should be required to demonstrate that it has a reasonable belief – supported by at least *prima facie* evidence – that significant and widespread problems in a market exist, that these are likely to lead to an adverse effect on competition and would be capable of remedy using the CMA's remedy powers. Recognising that in some markets, the issues will be complex and theories of harm difficult to articulate, the CMA should nonetheless be required to state its case for intervention and the issues to be assessed, including by reference to independent sources of information and analysis (e.g. academic studies, select committee reports etc.) where appropriate. This could be much like the current market study notice document.

3.13 However, we also believe that the CMA should be required to **conduct this public consultation** *before* formally opening an inquiry. Such a process would give affected market participants the opportunity to comment on the need for intervention (as well as the issues for consideration) *before* the process has commenced and provide input in order to assist the CMA with identifying the appropriate focus for the market study and areas of concern. This consultation, which could take place over a short period, could lead to a more focused inquiry from the outset. Under the current regime, the CMA has often done very extensive analysis in advance of its launch decision which then informs

the focus of the study: parties should be given an opportunity to comment on this framework for analysis before the inquiry commences.

3.14 **Second, in any new single market inquiry regime** the Government should seek to retain the benefits of the current flexibility that the market study regime offers. The market study process has, despite the significant burdens it can impose on businesses, allowed the CMA to flexibly conduct reviews of markets and propose reforms, provide guidance to business, or decide to use its powers under the Competition Act 1998 (the ***Competition Act*** or ***CA98***) where this is appropriate. This flexibility should be retained in order to ensure that "*lighter-touch*" market studies can continue to be pursued where appropriate and proportionate to the concerns at hand. For this reason, we would welcome some degree of flexibility to be built into the regime which would allow for a shorter inquiry where, on further analysis, no material concerns have been identified and/or an ability for businesses to offer binding commitments to conclude a process at any stage of a single-stage market inquiry process.

3.15 **Third**, the CMA should be subject to transparency **obligations to consult and engage** with affected parties throughout the process of any inquiry, through a combination of publicity and direct engagement. For example, the CMA could be required to set out its thinking – without prejudice to its final determination – at prescribed milestones in the inquiry and invite comment from affected parties.

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

3.16 We strongly disagree that the CMA should be allowed to impose interim measures from the beginning of a market inquiry. There should be a high standard to impose interim measures in order to avoid unintended consequences/unnecessary intervention and it is hard to see how an appropriate level of certainty justifying intervention could be reached if there has been no investigation. The Consultation does not provide any examples of situations where interim measures would have been an appropriate or necessary course of action.

3.17 Importantly, in a market study context, there is typically no immediate evidence of wrongdoing by individual market participants (otherwise enforcement action might be more appropriate). In this context, interim measures are unlikely to be appropriate for three reasons:

(a) **Complex, market-wide issues require investigation before remedies can be imposed**. Interim remedies are not appropriate for market inquiries given the types of complex issues they are intended to address – where, even after lengthy investigation, theories of harm may not be clearly formed.

(b) **High risk of errors in application of interim remedies**. There are many examples of clean bills of health after initial concerns – meaning interim measures could have been damaging had it been possible to impose them.

(c) **Potential appeals**. Any interim measures which are imposed without a proper understanding of the complex issues arising in any market inquiry may also be the subject of appeal.

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

3.18 In principle, we have no objection to giving the CMA the ability to accept UILs early. However, the key issue is the CMA's difficulty in getting market-wide consensus on remedies in earlier stages, which could be addressed by improving the administrative process and increasing opportunities for parties to engage with the case team and decision makers throughout the process.

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

3.19 We welcome increased openness and flexibility in considering and deciding upon remedies – implementation trials and cooling off periods are particularly important when seeking to design remedies to change consumer behaviour.

3.20 However, extended powers to monitor/vary remedies could be disproportionate and open to abuse. In order to vary an undertaking accepted or order made following a market investigation, the CMA is currently required to show a "*change of circumstances*" which must be such that the undertaking or order is "*no longer appropriate*" in dealing with the competition problem or adverse effects. This requirement provides an important element of legal certainty for market players who were either involved in the investigation or are active on the relevant markets. It is important that investigations are considered to be closed at some point, given the extensive duration of the UK process and the adverse impact that this can have on investment and innovation in the sector concerned (see paragraph 3.4 above). We are concerned that the Consultation proposes leaving the question of whether a remedy is effective entirely in the CMA's discretion. We believe that safeguards are essential and that a "*mandatory cooling off period*" is unlikely to be sufficient in the absence of a clear legal threshold for intervention.

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

3.21 **Other general improvements**. Even if not included as part of a single-stage process, we consider that the market study regime could be improved by introducing more opportunities for business to engage with the case team and have access to decision makers throughout the process.

4. Rebalanced merger control

4.1 The UK needs a merger control regime that is fit for international purpose, supports the CMA's increased role on the international stage and captures competitively material deals in order to make efficient use of the CMA's scarce resources. The current UK merger regime and the proposed reforms do not comply with international best practice in several respects, and the Government should take this opportunity to *Build Back Better* by implementing more ambitious changes to the CMA's merger control processes.

4.2 Post-Brexit the CMA will be conducting more merger investigations, including those that are more complex and of greater strategic significance to the UK economy. As a result, the CMA's jurisdictional thresholds must now – more than ever – effectively capture the mergers most likely to harm competition and exclude those unlikely to do

so. Rather than achieving this objective, the proposed reforms would expand the jurisdictional scope of the CMA to capture many more benign mergers whilst only excluding a small number of mergers that were already unlikely to raise competition concerns, while at the same time increasing the already high level of uncertainty businesses face in determining whether to notify transactions to the CMA.

4.3 While the UK merger regime is voluntary, businesses still need to conduct a risk assessment to establish whether or not to notify the CMA. That assessment is made harder and less certain by the broader jurisdictional thresholds proposed in the Consultation and is particularly challenging for international companies with investments in the UK and less well-resourced SMEs. The proposed new share of supply threshold, which does not require the existence of an overlap between merging parties' activities, is likely to create further uncertainty for businesses seeking to self-assess. These reforms, therefore, create the risk that the CMA will not "*have the right resources, powers, and procedures to deal with these cases effectively and efficiently to deliver the best outcomes for the UK*".

4.4 We understand that, alongside ensuring a more effective deployment of CMA resources, the objective of the reforms is to enable the CMA to investigate transactions of potential concern. However, the Consultation does not present evidence of material under-enforcement in the UK driving such an objective. Before implementing changes to the jurisdictional thresholds which affect the entire UK economy, the Government should consider carefully the anticipated effect of such measures in order to assess their proportionality – not only by reference to the number of transactions that have previously been reviewed by the CMA, but by reference to the wider UK economy and the number of businesses that would fall within the proposed revised thresholds. The Government should also take this opportunity to reassess the proportionality of the existing thresholds under section 28(5) Enterprise Act 2002 (***EA02***).

4.5 Whilst we do not consider that the additional merger review thresholds for firms with Strategic Market Status are needed (as explained in our separate response to the consultation on the proposed competition regime for digital markets), at least the proposed transaction value plus UK nexus appears to be an easier test to understand and apply than the prevailing share of supply test, the much needed reform of which is unfortunately unconsidered in the present Consultation.

4.6 If the Government is minded to retain the share of supply test, the determination as to whether a relevant merger situation has been created or is anticipated should be concluded as a preliminary matter and at the latest during Phase 1, rather than being provisionally determined at Phase 1 and only finally determined at Phase 2.

4.7 A concrete exemption for smaller players is a welcome development for those companies which fall within the thresholds, but the proposal can be significantly improved. As currently proposed, the global turnover thresholds are too low and this is likely to result in disproportionate effects on small- and medium-sized businesses which are above the safe harbour but still small businesses, and unlikely to avail themselves of the in-depth legal and economic advice required to make sense of the existing jurisdictional tests. The proposed *de minimis* exception should be significantly widened to enable more SMEs to affordably and confidently embark on business combinations that are not going to have a negative impact on competition in the UK.

4.8 More broadly, the current guidance on the exercise of the CMA's discretion to exercise the exception to the duty to refer for markets of insufficient importance should be reconsidered and revised – in particular, the policy not to apply the *de minimis* exception where the CMA makes an in principle assessment that UILs could be offered by the parties to resolve the competition concerns identified. *De minimis* should (as with jurisdiction) be assessed as a preliminary issue to avoid the costs and resources of a full investigation only for *de minimis* to be relied on in the end.

4.9 We cautiously welcome the proposal to allow for remedies to be offered and negotiated earlier in Phase 2, particularly where it allows parties and the CMA to avoid an extensive and costly Phase 2 process when both are ready and willing to adopt suitable remedies to address concerns identified. Allowing greater flexibility to the CMA in that regard is essential to allow the CMA to align better with other jurisdictions on remedies discussions, particularly in the context of global remedies where the CMA wants to be a thought leader. Unfortunately, the proposals do not address the question of how earlier remedies would fit within the existing sequential statutory framework of the questions which the CMA is required to address, and this will require careful consideration if this proposal is adopted.

4.10 Proposals to grant the CMA and the parties greater flexibility in relation to the review timetable, in the form of further extensions, is also to be welcomed – especially if it allows the CMA to better align its timetable to other international merger control reviews and for both the CMA and parties to give real consideration to remedies, subject to suitable safeguards to protect against over-use of extensions and the disincentive that gives to efficient case management.

4.11 While the proposals touch on the need for transparency towards third parties, it is unfortunate that at no stage is the question of CMA transparency towards notifying parties discussed. A fundamental flaw in the CMA's current investigation process is the absence of any right of inspection of the CMA's file at any stage in the review process, which is needed to bring the UK Phase 2 review process up to prevailing international standards, and to reduce litigation.

4.12 We are not convinced that, as presented, the proposed reforms to the CMA Panel (the ***Panel***) will have any material positive impact on the CMA's merger review process. While changes to the composition and size of the Panel may be beneficial, it is concerning that the proposals appear to suggest the Panel and the appointed inquiry groups should have a purely decision-making role, jeopardising the benefit of a separate investigatory and decision-making body, which was originally implemented in part in order to guard against confirmatory bias. We would urge the Government to consider whether any of the proposed changes to the Panel composition or process are warranted or of net benefit to the CMA, to businesses or ultimately to consumers.

4.13 The timing of these proposed reforms is far from ideal given the broader context of merger control reforms in the UK. The new National Security and Investment regime will come into force at the beginning of 2022, and only a few months have elapsed since the CMA became responsible for the UK elements of larger transactions in parallel with the European Commission (the ***Commission***). It is premature to speculate what changes might be necessary to improve the current merger control regime before there has been sufficient time to observe the effect of these other changes. Retrospective analysis of the effectiveness of these proposed reforms will also be difficult – with

many simultaneous changes to multiple regimes, it will be difficult to determine the efficacy of the changes in hindsight.

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?

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

4.14 We provide below our response to the issues raised in questions 10 and 11, which are appropriate to consider together.

Increasing the target turnover threshold from £70m to £100m

4.15 Increasing the target turnover threshold from £70m to £100m is a welcome change, but there are no proposals to mitigate the uncertainties created by the share of supply test. As detailed below, we consider the Government should take the opportunity to carry out a wider reassessment of the UK merger review thresholds given that the CMA will now be carrying out an independent review of many transactions that would previously have been reviewable only under the EU Merger Regulation.

4.16 When the EA02 was first introduced, there were extensive debates around the appropriate turnover threshold. The Government originally proposed a UK turnover test of £45 million as Government research indicated that this threshold would account roughly for the same number of companies as was the case under the worldwide assets test of £70 million in the Fair Trading Act 1973. Following concerns from business (notably the CBI) that the £45 million threshold was too low, the figure was amended to £100 million by the House of Lords. The threshold subsequently was reduced to £70 million by the House of Commons and was accepted by the House of Lords on the basis that the Government would keep the matter under review and learn from experience.

4.17 Section 28(5) EA02 requires the CMA to keep under review the turnover threshold and from time to time advise the Secretary of State as to whether it is still appropriate. The introduction of the turnover thresholds in the EA02 followed careful consideration of the number of businesses potentially caught by the review thresholds, based on Government and CBI data. There is no indication that there has been any such reconsideration in this Consultation – the only consideration in the Impact Assessment is how many mergers have actually been reviewed by the CMA and how this would change. If the threshold had been reviewed and updated simply in line with inflation, it would now roughly equate to £115 million, so the current proposal sets the thresholds at too low a level.[11]

4.18 The debate around the share of supply test when the EA02 was introduced in 2002 raised concerns about a divergence between the substantive test applied to reviewable transactions based on market shares and the jurisdictional test based on the legacy share of supply test from the Fair Trading Act. A proposal was introduced to bring in a market share test instead, although the share of supply test was ultimately retained. As the CMA's application of the share of supply test has evolved, it has become increasingly

[11] https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

difficult for merging parties to evaluate whether a transaction is reviewable, leading to an unacceptable level of uncertainty for companies carrying out domestic and international transactions.

4.19 The Government would need to address the fundamental uncertainties caused by the share of supply test for this increased turnover threshold to have a meaningful effect. It is notable that in cases raising jurisdictional issues the CMA determines jurisdiction as part of its formal review, rather than as a preliminary matter. If the Government is minded to retain the share of supply test, the determination as to whether a relevant merger situation has been created or is anticipated should be concluded as a preliminary matter, and at the latest during Phase 1, with no possibility of carrying the jurisdictional assessment over to Phase 2 (as is currently the default approach under sections 35(1)(a) and 36(1)(a) EA02).

4.20 Furthermore, the internal cost that Government has estimated for self-assessment as to whether a merger would qualify for review on share of supply test (£400) is far too low. The CMA has made it very clear that applying the share of supply test is not straightforward, so internal costs and external legal fees would be expected to be significantly more than £5,400 (see Impact Assessment, paragraph 81).

4.21 Given the CMA's expansive application of the share of supply test, raising the turnover threshold is unlikely to provide businesses with a higher degree of certainty when self-assessing. It may be that a slightly lower number of transactions are ultimately reviewed (the Impact Assessment indicates only one transaction out of those reviewed in 2020/21 would have been exempted from review by the change in threshold), but we would expect many businesses to submit briefing papers (or even merger notifications) given the uncertainty regarding the application of the share of supply test in individual cases. The costs, both to businesses to prepare briefing papers and to the CMA to review them, must be included in the Impact Assessment.

4.22 International best practice is that jurisdictional tests based on non-objective criteria are too uncertain.[12] However, if a non-turnover or non-transaction value threshold must be retained, it should be a market share test as generally understood, which is a tool that businesses, lawyers and authorities have been using for decades, and for which many sectors have established precedents.

The proposed new threshold

4.23 The proposed new threshold allowing the CMA to review a merger if any party has both (1) a 25% share of supply of goods or services supplied or acquired in the UK (or a substantial part of the UK); and (2) UK turnover of more than £100 million is unnecessary and would capture a disproportionately high number of benign or low risk mergers.

4.24 As noted in the Consultation, the proposed new threshold would in most cases be achieved by the acquirer alone, such that there is no requirement for a nexus with the target or consideration of the transaction itself. The ICN advises that "*Determination of a transaction's nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the*

[12] See ICN Recommended Practices for Merger Notification and Review Procedures (2018), page 6.

acquired business in the jurisdiction".[13] As such, "*Notification should not be required solely on the basis of the acquiring firm's local activities*".[14]

4.25 Given the CMA's flexible application of the share of supply test, many businesses would have legitimate concerns that the CMA would assert that they had a share of supply of 25% and open an investigation into the transaction concerned. Therefore, this proposed threshold would potentially catch many acquisitions, regardless of how likely they were to "*lead to harm to UK consumers*". These businesses will thus be likely to notify (*via* a briefing paper if not a full Merger Notice) almost all acquisitions to achieve legal certainty and to avoid the disruption of a CMA investigation opened after a transaction has completed. The CMA should therefore expect a significant increase in the number of merger notifications and briefing papers being submitted.[15] The proposed threshold would thus undermine the reforms' policy aim "*to focus the merger control regime on mergers which are most likely to lead to harm to UK consumers and to make clear the categories of lower risk mergers which will not be subject to CMA review*". A more appropriate test for jurisdiction would include a threshold requiring the target (and therefore the transaction) to have a nexus with, and impact on, the UK economy.

4.26 As explained above, the internal costs and external legal fees for self-assessment would be expected to be significantly more than the £5,400 cited in the Impact Assessment. Furthermore, the Impact Assessment does not estimate the costs to businesses and the CMA to prepare and review, respectively, the increased number of briefing papers and merger notifications, which would be expected to be significantly higher than just a self-assessment. This, coupled with the underestimate of the number of additional mergers that will require a briefing paper or may be subject to merger control review, suggests that the overall impact of the proposed changes on merging parties and the CMA have been underestimated significantly.

4.27 We appreciate the desire of the Department of Business, Energy and Industrial Strategy (***BEIS***) to ensure vertical/conglomerate mergers and so-called "killer acquisitions" are reviewable. However, if the Government is minded to retain the share of supply test in its existing form, this already gives the CMA significant flexibility in determining jurisdiction and it is not clear that any new threshold is required. The Impact Assessment does not present evidence of material under-enforcement that would be resolved by the introduction of these thresholds and merely refers to a general estimate that two to five additional transactions per year would be called in by the CMA, whilst ignoring the detrimental impact of the likely material increase in the notification of benign transactions.[16]

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[13] ICN Recommended Practices for Merger Notification and Review Procedures (2018), page 4.

[14] Ibid.

[15] The impact assessment estimates that this new threshold will result in an additional two to five cases being called in and 20-40 additional merger proposals undertaking self-assessments, which appears likely to be a significant under-estimate, and takes no account of briefing papers.

[16] Impact Assessment, paragraph 96.

4.28 For the reasons set out above, the proposed additional threshold is in any event not the right metric to capture these types of transactions, and its broad scope does not fit with the objective of being a more effective and focused use of taxpayer resources.

Safe harbour for mergers between small business

4.29 We welcome the new safe harbour for mergers where the worldwide turnover of each of the parties is less than a specified threshold. However, given the low level at which the worldwide turnover level is proposed to be set, we believe it is unlikely to have a significant impact.

4.30 The proposed £10 million threshold relates to global turnover and does not take any account of the extent of the UK presence of the merging parties. The test should be amended to include some requirement for UK turnover so that it takes into account the effect on the UK economy. If global turnover is to be included in the test, the threshold should be significantly increased.

4.31 Whilst the introduction of a concrete safe harbour should be welcomed and can give merging parties some certainty where the criteria are met, the introduction of such a safe harbour should not serve to distract from the reform needed to the existing '*de minimis*' exception to the duty to refer. The CMA has refused to exercise its discretion in a number of cases in recent years which has led to transactions being abandoned following a Phase 2 reference or unnecessarily cumbersome UILs being required to avoid a costly and protracted Phase 2 process. Therefore, in addition to the proposed safe harbour, the guidance on the *de minimis* exception and its actual use by the CMA should be examined and reformed to ensure that the CMA's resources are used proportionately to the scale of any potential competitive harm, in particular the policy not to apply the *de minimis* exception where the CMA makes an in principle assessment that UILs could be offered by the parties to resolve the competition concerns identified. *De minimis* should (as with jurisdiction) be assessed as a preliminary issue to avoid the costs and resources of a full investigation only for *de minimis* to be relied on in the end.

The Reforms to merger control impact assessment[17]

4.32 The Impact Assessment for the reforms to merger control significantly underestimates the impact on the CMA and merging parties. As already stated, the Impact Assessment does not include the cost to the CMA and the merging parties of the briefing paper process, which is being increasingly used by merging parties and would likely be even more frequently used following the proposed amendments to the jurisdictional thresholds. Although not a full Merger Notice, the preparation of a briefing paper and supplementary submission (if requested) requires a substantial amount of time and input from internal legal professionals and senior management. Omitting the preparation of a briefing paper from the scope of the Impact Assessment therefore likely significantly underestimates the impact of the proposed reforms.

4.33 Based on our experience working with clients to prepare Merger Notices (including gathering internal documents), responses to requests for information (***RFIs***) and other submissions as well as preparing for and attending issues meetings, site visits and hearings, the estimates in Table 3.2 and Table 3.4 significantly underestimate the number of total hours merging parties spend on the various activities. In particular, our

[17] Reforms to merger control impact assessment, 15 July 2021.

experience is that most RFIs require the collection of far more than ordinary course documents or data that can be collected by "an employee in company records", which apparently envisages some kind of central record keeping repository which likely only exists for Board and other governance documents, which are only a small subset of the documents routinely demanded by the CMA. Rather, RFI responses instead require detailed narrative responses and extensive production of documents going back over five years or more from various parts of the merging companies' businesses. This requires careful consideration from corporate managers and internal legal professionals to ensure their accuracy and completeness. Therefore, the distribution of hours in the tables underestimates the level of involvement and input from corporate managers and directors and internal legal professionals, who are intimately involved in many of these activities. Although many of our clients are some of the largest that would be involved in a merger control process, and their transactions are some of the largest which would be subject to CMA investigation, we expect that small/medium sized parties in smaller transactions would require similarly high numbers of hours, and a similarly high contribution from senior management – and potentially higher given the likely fewer layers of management and lower staff numbers. As a result, in our view the total expected costs in Table 3.3 and Table 3.5 of the Impact Assessment are only a fraction of the real costs faced by the merging parties for the listed activities.

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

Allowing the CMA to agree binding commitments earlier during Phase 2

4.34 Allowing the CMA to agree binding commitments earlier during Phase 2 (with the power to pause investigation while commitments are being considered) would create welcome additional flexibility which could eliminate the need for a full-length Phase 2 review when commitments can be agreed earlier and enable the CMA to better align its timetable with other jurisdictions – subject to appropriate safeguards.

4.35 There are conceivable circumstances in which an ability to agree binding commitments earlier in Phase 2 would be beneficial to notifying parties and to the CMA, for example:

(a) In cases where the CMA has identified modifications to proposed UILs, which it deems may be sufficient to make the UILs acceptable to the CMA, but where the notifying parties have not had sufficient time to consider and make such proposed modifications (i.e. so-called "near-miss" cases) and are then faced with going to Phase 2, with the significant cost and time burdens that entails for all involved, and having to wait several months before they can make modifications to their remedy in circumstances in which the revised proposals would have been acceptable much earlier in the process.

(b) In cases where the notifying parties, after initially declining to offer suitable UILs to avoid a Phase 2 (based on the belief that their case for clearance in Phase 1 was strong), have decided not to incur the significant time and cost burden associated with a full Phase 2 review and would prefer to offer suitable remedies to obtain clearance.

4.36 Furthermore, the UK's Phase 2 timetable is very long – longer than almost all other jurisdictions – and prescriptive in terms of when in the process the CMA is allowed to engage on remedies. This results in the CMA often lagging behind other jurisdictions

and being unable to align with other jurisdictions on remedy design in real time. Allowing the CMA to agree commitments earlier in Phase 2 would at the very least enable the CMA to better align its timetable with other jurisdictions and thereby avoid the unnecessary expense and effort of proceeding through a Phase 2 when acceptable remedies are offered on a global level to address all concerns and allow the transaction to proceed.

4.37 In these circumstances it is clear that allowing the CMA to agree commitments earlier during Phase 2 would be welcomed as a way to reduce unnecessary work and cost. However, there is no explanation in the proposals as to how this would fit within the current step-by-step procedural framework within which the CMA is required to make decisions in Phase 2. At present, there is no scope in the process to allow for the CMA to judge the appropriateness of the remedies by reference to anything other than the concerns identified in the Phase 1 decision, since there is no new information or concern against which the remedies can be judged (or indeed proposed by the notifying party).

(a) In the scenarios described above, remedying by reference to the Phase 1 decision may be feasible and appropriate since remedies would likely be proposed very early on in Phase 2 and would have been largely conceived on the basis of the Phase 1 decision. However, it would still be necessary to clarify when the parties and the CMA would be able to engage in remedy negotiations and on what basis they would be assessed (i.e. by reference to the Phase 1 decision).

(b) If the intention is to provide for greater flexibility and allow the parties and the CMA to engage in remedies discussions at any stage of the Phase 2 process, then significant changes to the CMA's Phase 2 decision-making procedure would be required (including by way of legislative amendments) to allow the CMA to advance its assessment of the concerns identified, and to communicate its advanced assessment to the notifying party, well in advance of the current timetable for issuing its provisional findings, and to allow it to engage in remedies discussions on the basis of this ongoing assessment.

(c) In either case, there would also need to be clarity on whether engagement in early remedies discussions has any impact on the existing timetable (e.g. specified and potentially automatic extensions if remedies are formally offered at certain points in the Phase 2 review), in particular with regards to the issuing of provisional findings; and whether it would impact the contents or scope of the final decision if remedies were to be accepted.

Restricting the CMA to refer only the issues that are identified at Phase 1

4.38 We would welcome a narrowing of the scope of Phase 2 investigations to the issues identified at Phase 1 as this would effectively codify existing practice. Given the UK's very long and thorough Phase 1 process, the CMA should be able to achieve this to a considerable degree. However, there is a concern that in response to this limitation, the CMA might be overly broad in identifying issues in Phase 1 to preserve them for Phase 2. We hope the CMA would follow the spirit of this change so that it is not merely theoretical.

4.39 The CMA should also be required in this regard to provide in its Phase 1 decision at least *prima facie* evidence in support of its decision to refer each issue to Phase 2.

A new 'fast track' merger route

4.40 We would welcome the proposed new 'fast track' merger route allowing parties to request automatic reference to Phase 2 (without requiring parties to formally accept that the merger could result in a substantial lessening of competition).

4.41 This route would be particularly useful in cases where the parties are confident that they can obtain merger control clearance (with or without conditions), but acknowledge that clearance is unlikely in Phase 1 (e.g. in high profile transactions with many interested third parties or due to the sheer number of markets under investigation).

4.42 The proposed three-week extension to Phase 2 for such cases is acceptable. However, this should not be coupled with an eight-week extension at the end of Phase 2, except in truly exceptional circumstances or with the agreement of the parties, as this would otherwise defeat the purpose of having a "fast-track" route. To ensure that the shortened process would work efficiently and not simply result in a prolonged Phase 2, the procedure must be set out clearly, with set timeframes with specific and strict criteria for further extending Phase 2.

Reducing unnecessary delays at Phase 2

4.43 Giving the CMA greater flexibility to extend the statutory timetable in certain circumstances would be welcomed. Greater flexibility is generally desirable as it allows the parties and the CMA to extend the timetable as and when needed to progress the review. As the Consultation points out, additional flexibility would also be useful to enable the CMA to coordinate with other competition authorities, in particular to agree global remedies.

4.44 However, it should be subject to additional safeguards to avoid it becoming a disincentive to cost-effective review by the CMA. The CMA is ostensibly only able to extend the Phase 2 timetable for "special reasons", yet it has done so in approximately one-third of all Phase 2 cases and over 50% of fast-tracked cases since April 2014. This suggests that the typical grounds for extensions are not in fact "special". In particular:

(a) Extensions should be "*tied to specific stages of the merger control process such as a decision by the merging parties to offer remedies to address a competition authorities'* [*sic*] *concerns*". Extensions should be allowed only in certain circumstances and parties need clarity as to when an extension could be allowed. Extensions on submission of a remedies proposal, for example, should be allowed given the benefits to both the CMA and the notifying parties in having additional time to agree on the appropriate scope and format of acceptable remedies.

(b) Extensions should "*only be used with the consent of the merging parties*". Requiring the consent of the merging parties to any further extension of the timetable is a helpful way of preventing the CMA from over-utilising its right to unilaterally extend Phase 2 reviews. This approach, which has been used effectively in the EU for many years, acknowledges that the parties may require additional flexibility as well and allows the parties and the CMA to agree how the extension can be applied and how it can be best used for maximum

effectiveness. For example, they may agree that the parties will have additional time to respond to provisional findings or address issues identified in relation to remedies proposals and the CMA will have additional time to react to the parties' submissions (e.g. in response to the provisional findings) and consider remedies proposals.

Enhancing transparency of the CMA's decision-making towards the merging parties

4.45 While the Consultation discusses the need for enhancing transparency of the CMA's decision-making towards third parties, it makes no reference to transparency towards merging parties in the course of a merger review. The CMA's existing merger review procedure is significantly lacking in that regard, which hampers its effectiveness and raises the question of whether the process sufficiently protects the rights of defence of merging parties.

4.46 Giving merging parties the right – enshrined in statute – to inspect the CMA's file would be a hugely welcome step in addressing these shortcomings. At the level of principle, it is fundamental that a person has the right to examine the evidential basis of the case against him, and allowing the CMA to issue decisions without allowing merging parties the corresponding ability to inspect the CMA's file omits a critical check on CMA action and reduces agency accountability.

4.47 At the practical level, allowing access to file would enable merging parties to better understand the rationale for and context of the CMA's concerns and be better placed to respond appropriately (whether through the offering of appropriate remedies or otherwise). CMA staff currently spend a significant proportion of time reporting in summary what information they have taken into account in their review which could be avoided.

4.48 Allowing access to file is particularly warranted as the CMA seems to attribute greater weight than used to be the case to internal documentary evidence and to the views of competitors to merging parties where the third parties' incentives to provide skewed or partial information may be higher. Permitting inspection of the file would therefore likely increase the value of third-party contributions to the CMA's review as contributing parties would be aware that their submissions would be open to scrutiny and challenge.

4.49 By way of comparison, in the EU, parties are allowed access to the Commission's evidentiary file and the opportunity to address perceived gaps in the evidence supporting its case. As the CMA's role on the global stage expands post-Brexit, it should look to align itself with international best practice.

4.50 Allowing merging parties access to file should be coupled with appropriate safeguards to protect the legitimate interests and confidential information of third-party submissions to the CMA as well as potentially internal exchanges within the CMA. For example, use of confidentiality rings – as is very common in market investigations and CA98 cases – would provide a safe and efficient framework for the access to file process.

Inclusion of more specific procedural steps in which the parties are able to address the decision makers

4.51 The CMA investigatory process would benefit from the inclusion of more specific procedural steps in which the parties are able to address the decision makers (i.e. the CMA Panel) during the course of a Phase 2 review. Inspiration can be taken from leading authorities worldwide whose processes are closely aligned to the CMA, in particular the Commission, where formal State of Play meetings are required at regular intervals and in particular following the parties' response to the Statement of Objections.

4.52 Allowing the parties the opportunity to address the decision makers directly, and requiring the CMA case team to weigh up in "real-time" preliminary views from the decision makers and from the parties would, as it does in the Commission process, help the authority ensure it is focusing resources on the right areas and progressing the case efficiently, at the same time as respecting the parties' rights of defence. Ultimately the CMA's investigation would be best served by ensuring both objectives are met.

4.53 The issue of addressing the CMA Panel in real-time is particularly of relevance in the context of the Government's proposals for changes to the CMA Panel composition and role (as discussed further below).

Updated approach to internal documents

4.54 As the CMA has noted, "*Internal documents can be an important source of evidence in a merger investigation*".[18] Given the significant weight that internal documents carry in merger decisions, the CMA's existing approach to obtaining and reviewing internal documents of merging parties is outdated and significantly at odds with prevailing practice in other leading jurisdictions.

4.55 Requiring the merging parties to constitute search terms without providing any input or even acknowledgment of whether they might constitute appropriate search terms – especially given the CMA's readiness to fine merging parties for being misleading or incomplete if a document later comes to light which was not caught by such search terms – is an unsatisfactory approach which is inconsistent with effective international merger control procedure.

4.56 A comparison with the US and EU systems is instructive, where the authorities can either agree on or even actively propose themselves a range of search terms to apply to document collection, thereby providing comfort to all sides that internal document collection is done efficiently and effectively. Authorities are then equipped with adequate in-house capabilities to review internal document submissions in an efficient and timely manner to satisfy their review. Those procedures have been in place for many years without negative repercussions for the outcome of merger control reviews. In this context we would urge investment in the CMA's internal document collection and review processes.

[18] Guidance on requests for internal documents in merger investigations, 15 January 2019, paragraph 3.

5. Streamlining CMA Panel Decision Making

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

5.1 We consider it important that the CMA Panel is retained as the decision-making body for Phase 2 reviews, principally because the proposals do not put forward (and we are not aware of) any other mechanism as an alternative way of ensuring that decisions continue to be taken free from confirmation bias.

5.2 In relation to the proposed reforms, it is unclear what impact they would have when taken together on the decision-making process for merger reviews and whether such proposals would therefore be positive.

5.3 **Size and composition**: A smaller pool of dedicated Panel members for whom work on the CMA's Panel would be their primary employment could be a welcome change, depending on how the Government sees the Panel's current utilisation and the plans for future deployment of Panel members to inquiry groups, although it is unclear whether such changes are necessary.

(a) We are not convinced that having a smaller, more dedicated pool of Panel members would help to speed up cases and deliver more consistent and predictable decision-making. In particular we have not experienced particular delay in establishing new inquiry groups under the current arrangements.

(b) We are also concerned that the Consultation proposal for recruiting Panel members would not necessarily have the intended result of recruiting a more diverse talent pool. Currently, Panel members are able to serve on the Panel whilst maintaining their primary employment. We believe that increasing the workload for Panel members would require many to give up their primary employment, a sacrifice that many suitable candidates would not be willing to make. This approach is particularly problematic given that CMA pay scales are lower than those prevailing at sectoral regulators and in the private sector.

(c) This concern may be mitigated to an extent if accompanied with shorter term limits (e.g. five years), which would enable people to rotate in and out of other roles more easily.

5.4 **Role**: Based on our understanding of the proposals, we do not agree with the Consultation's proposal to reduce the role of the Panel members to making final decisions on theories of harm and remedies.

(a) Retaining Panel members' role in relation to both investigatory matters and decision-making is critical to ensuring that Phase 2 merger reviews are overseen by an independent body not subject to confirmatory bias, which was itself a key driver behind the existing framework. The desire to increase the speed of decision-making or the efficiencies of case transition between Phase 1 and 2 teams should not undermine this objective.

(b) We would be very concerned that such proposals would render the CMA Panel a quasi-judicial body rather than an inquiring, investigatory one.

(c) As noted above in response to Question 12, regardless of the changes to the CMA Panel size and composition, and whether or not its investigatory role is diminished as a result of these proposals, it is crucial that the CMA Panel acts as an appropriate check and balance to the CMA staff; which also necessitates regular access for the parties to the CMA Panel and regular guidance from the CMA Panel to the CMA staff.

(d) We understand that it is not proposed to reduce the size of inquiry groups appointed to each merger review, but if this were the case such proposals would exacerbate the risks identified.

6. Stronger and faster enforcement against illegal anticompetitive conduct

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?

Expanding the scope of the UK's prohibitions on anticompetitive conduct

6.1 The Government has suggested that it wishes to bring UK competition law more in line with that of its international partners by extending the jurisdictional reach of the Chapter I and Chapter II prohibitions 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. This represents a significant change to the current scope of the Chapter I and Chapter II prohibitions contained in the CA98.

6.2 In principle, we understand the desire to ensure that all anticompetitive conduct which harms competition or consumers in UK markets is capable of being enforced (whether by the CMA or its concurrent regulators, or *via* private enforcement). However, we consider the following issues should be taken into account if taking forward this legislative proposal:

(a) **First**, to ensure that UK businesses and overseas business are able to assess compliance with UK competition law, the legislation or related CMA guidance will need to articulate more precisely the meaning of *'direct, substantial and foreseeable',* given that this formulation appears to derive from the *'qualified effects'* doctrine developed through EU case law.

(b) **Second**, expanding the territorial reach of the Chapter I and Chapter II prohibitions may result in an increase in the number of parallel investigations with the Commission and/or other national competition authorities (as well as a potential increase in the number of claims being brought in the English courts). Therefore, it will likely reinforce the need for the CMA to continue with its efforts to enhance co-operation and co-ordination with other authorities regarding investigations relating to the same or similar alleged infringements so as to limit any duplicative enforcement efforts.

(c) **Third**, we note that in support of this proposal, BEIS refers to the jurisdiction of the Commission and its ability to consider conduct occurring outside its jurisdiction, which nonetheless has an impact on markets in the EU. Whilst this is true, the Commission's jurisdiction in the case of Article 102 is expressly predicated in the Treaty of the Functioning of the European Union on the undertaking in question having a dominant position *'within the internal market or in a substantial part of it'*. In other words, the dominant position must be in a market within the EU, not just 'any' market. As such, the proposal that the Chapter II prohibition should apply to conduct which amounts to the abuse of a dominant position in a market, "*regardless of the geographical location of that market"* is not consistent with the approach taken in the EU by the Commission, and is in fact considerably wider.[19] To the extent the CMA intends to extend the territorial reach of the Chapter II prohibition it should be made clear that the market in relation to which the undertaking in question is dominant must include a market *in the UK, or at least which includes the UK*. This is an important qualification of any new jurisdictional requirement.

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?

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?

Revising the threshold for immunity from fines for small agreements and conduct of minor significance

6.3 At present, a business which infringes the Chapter I prohibition, except for price-fixing agreements, currently has immunity from financial penalties when the parties to the agreement have a combined turnover of £20 million or less. This threshold was set in 2000 and broadly speaking, a threshold of £20 million equates to around £34 million in today's money, on the basis of inflation averaged at 2.8% a year.[20]

6.4 The Consultation suggests that the thresholds should now be reduced so that they apply only to businesses with an annual turnover of less than £10 million, in particular to account for an alleged trend in anticompetitive conduct arising in small and emerging sectors of the economy. The Consultation indicates that if this proposal were adopted, the Government would in due course review how the turnover is calculated for the purpose of applying these revised immunity thresholds.

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[19] We are not aware of any Commission decisions or appellate judgments from the EU courts where an Article 102 abuse of dominance was found in circumstances where the undertaking was only dominant in a market outside of the EU. Even in the Intel case where the "qualified effects" test for jurisdiction was further developed, and the relevant conduct related to an abusive agreement between a US company and a Chinese company, it was common ground that Intel had dominance in the relevant product market *worldwide*, i.e. including in the EU.

[20] See Bank inflation calculator available here: https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator.

6.5 We do not see a strong justification for reducing the immunity threshold to £10 million, absent further evidence of increased risk of anticompetitive conduct in small and emerging sectors. Specifically, it not clear that consumer harm would result in cases where the current threshold would apply, and BEIS has not explained in the Consultation why it considers the current threshold gives rise to a risk of consumer harm. In light of this we have concerns that the proposed threshold would lead to an increased risk of unfairness to SMEs, and further detail regarding how turnover would be calculated for applying a £10 million threshold is needed before the impact of the proposal can be properly assessed.

6.6 If the Government is minded to revise the turnover threshold, and absent further evidence that the threshold should be reduced to capture smaller businesses, we would suggest that it may in fact be more appropriate to revise the thresholds upwards to reflect the rate of inflation, as the CMA has proposed to do for agreements with associations of undertakings in the context of its consultation on a new UK Vertical Agreements Block Exemption Order.

Individual or combined turnover

6.7 In addition to lowering the threshold for immunity for penalties, the Government is also seeking views on whether the immunity should 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.

6.8 As regards which formulation of the exemption ought to be adopted, this depends on the intention behind the change. If the intention is to enable the CMA to take enforcement action in scenarios where large undertakings are considered to have coerced small businesses into anticompetitive agreements (and so, where it would be appropriate for the small business to be immune from fines), formulation (a) may be the preferred option. By contrast, it is unclear whether the threshold in formulation (b) requires that every party would need to have individual turnover of less than £10 million for the agreement to be considered to be of minor significance (and for any of them to benefit from immunity) <u>or</u> whether the combined turnover of all the parties would need to be below the threshold in order to benefit from immunity. Further clarification is needed, since, in theory, formulation (b) could lead to the very smallest players losing the benefit of immunity from fines if the relevant agreement is made with a large counterparty.

6.9 More broadly, whilst we recognise the Government's commitment to ensuring a robust enforcement regime across the whole of the UK economy, there may be alternative and more effective ways of ensuring companies active in small and emerging sectors comply with UK competition law. This in turn would also allow the CMA to focus its resources on larger, more complicated investigations. For example, rather than relying on *ex-post* enforcement of competition law in small, local markets in certain parts of the UK economy, the CMA could consider focusing on educating smaller companies and their directors on compliance with competition law. Indeed, much of the CMA's enforcement in this area has meant that directors of small companies, perhaps less aware or more poorly informed of competition law, have felt the full force of the

CMA's enforcement weaponry through disqualification. In such cases, prevention may be better than cure.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigations? 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?

Extending immunity in cartel investigations to liability for damages caused by the infringement

6.10 The Consultation asks industry stakeholders to consider the merits (if any) of providing holders of full immunity in the public enforcement process with additional immunity from liability for damages caused by a cartel. The stated intention of this reform is to address concerns that firms are not coming forward with leniency applications due to the threat of subsequent damages actions. In the Government's view, this proposed reform may therefore incentivise more leniency applications in the future.

6.11 The proposal would, if implemented, represent a significant revision of the UK's leniency programme and competition damages regime and raises several material concerns. Most notably, the Consultation does not provide sufficient detail about the harm which it is seeking to remedy. In particular, we do not consider it to be established (and no evidence has been presented to demonstrate) that there exists a significant body of hardcore cartel activity that is not being reported for fear of exposure to follow-on damages. In our experience, this is not the case. Whilst exposure to follow-on damages is undoubtedly a concern for any company involved in a hardcore infringement of competition law, we have not encountered to any material extent companies being advised against self-reporting to competition authorities, or deciding not to self-report, because of the existence of that follow-on damages exposure. The reason for this is that the exposure would be very unlikely to be avoided by not making a self-report: it would be a highly unsafe assumption that no other party to the conduct would choose to report the conduct, or that the competition authority would not uncover the conduct on its own initiative. Instead, our perception is that awareness of what constitutes unlawful cartel activity, and the deterrence arising from competition authority fines and follow-on damages exposure, has improved over recent years, with the result that 'traditional' hardcore activity has become less prevalent. We are, however, seeing a greater proportion of cases involving more nuanced areas of potential competition law infringement, in particular relating to information exchanges, where it is often difficult for companies to self-assess with legal certainty whether or not conduct of this nature actually constitutes a cartel capable of attracting immunity or leniency from fines. Uncertainty as to whether the conduct would qualify for immunity or leniency from fines is a legitimate reason, in cases of genuine doubt, for not self-reporting (the potential fear is that infringing conduct would then have been reported to the competition authority without any possibility of the fines flowing from that self-reporting to be abated). If the Government is seeking to incentivise the use of leniency applications then it may therefore wish to consider alternative mechanisms, such as an upfront process for the provision of confidential guidance on an anonymous basis, or the ability to conclude Chapter I investigations through the use of binding commitments, which may be more appropriate and/or effective as methods of incentivising self-reporting.

6.12 Aside from this overarching concern, we also note the following issues with the proposal:

(a) **First**, the proposal may make investigated parties other than first-in whistle-blowers (assuming damages actions immunity is limited to a first-in applicant) less inclined to apply for leniency or to co-operate with the CMA, given that those investigated parties would likely be exposed to larger damages claims on a joint and several basis as a result of the whistle-blower having follow-on damages immunity. (In other words, those parties would be aware that their damages action exposure resulting from a CMA infringement decision would be larger as a result of one party having immunity from follow-on damages claims, making the other parties less likely to co-operate with the CMA in its investigation.) Such a reduction in the co-operation incentives for alleged co-cartelists is likely to have a negative impact on the CMA's ability to obtain corroborating evidence from non-immunity parties.

(b) **Second**, blanket immunity from follow-on cartel damages claims may result in an "over benefit" for the immunity recipient, particularly if the financial exposure faced by co-cartelists – increased as a result of granting one player in the market complete immunity from follow-on damages – is so great that it could lead to market distortions if other firms end up exiting the market or are insolvent. This in turn may have a detrimental impact on the ability of claimants to seek compensation from those involved and compound the effect of any anticompetitive practices in the market.

(c) **Third**, such an approach may have significant impacts on consumers and other victims of cartel behaviour, including the rights of redress that consumers and businesses may have against companies where they have engaged in anticompetitive conduct, particularly if they are prevented from seeking damages from the leniency applicant with full immunity. For example, a situation might arise where immunity is granted to a firm which might otherwise be the anchor defendant in a relevant jurisdiction or to a firm which holds the most relevant documentary evidence of the anticompetitive behaviour. In addition, and more broadly in respect of UK enforcement, any case that extends beyond the UK (e.g. pan-European conduct, which will be very common), the effect of this proposed change could be to drive some competition litigation following on from the infringement to other jurisdictions outside the UK (e.g. Germany and the Netherlands) – for example where the party granted immunity from follow-on damages claims is the only UK-domiciled defendant. This may make it more challenging for claimants to bring their actions for damages in the English courts.

(d) **Fourth**, the proposal raises questions around implementation. Such a change would need to be put on a statutory footing as such immunity from damages cannot simply be granted by the CMA. A key question would be whether such immunity will be granted as a question of substantive English law (which would therefore need to be applied by foreign courts if the applicable law of the claim is English law pursuant to the Rome II Regulation and other relevant conflict of laws rules) or whether this would be a question of English procedural law to be applied by the English courts (which would limit the scope and effectiveness of this proposal). Similarly, it would need to be clear whether

the cause of action is extinguished or only the remedy is barred. Claimants may in any event seek to circumvent any legislation by bringing claims under different causes of action that are not explicitly competition law-related (such as economic torts, or bribery laws for bid-rigging cases), and companies may be exposed to other types of action including shareholder litigation. Unless all such issues are fully addressed, undertakings that are first-in leniency applicants would still likely face uncertain civil litigation risks. Ultimately, the position is unlikely to be clear enough to encourage additional leniency applications in the manner intended (leaving aside for this purpose the point made in paragraph 6.12(a) above as to whether there is in reality a material body of cartel conduct that is not reported due to concerns about follow-on damages action exposure).

6.13 More broadly, we note that this proposal would involve the UK going further than any other jurisdiction globally – including the US, where immunity recipients are granted amnesty from treble damages, and from joint and several liability for other parties' infringements but are not granted full immunity from civil damages claims. Indeed, whilst we are aware that similar approaches are being tentatively considered by other competition authorities (specifically, the Commission and the German Federal Cartel Office), we are not aware of any precedents in other similar areas of law where self-reporting to an authority could make a party immune from civil damages claims.

Prohibition on the disclosure of an individual whistle-blower's identity unless the CMA relies on their evidence in an infringement decision

6.14 The Consultation seeks views on whether improvements can be made to the current legal framework to give greater certainty over the handling of whistle-blowers' identity across the enforcement process. In particular, the Consultation proposes an absolute prohibition on the disclosure of a whistle-blower's identity unless the CMA relies on the whistle-blower's evidence as part of its infringement decision. Even if the whistle-blower's evidence is relied on by the CMA in its infringement decision, the courts would still be required to protect the whistle-blower's identity to the fullest extent possible.

6.15 In principle, we recognise the importance of greater protection of the identities of employees or former employees of a business who act as whistle-blowers to the CMA and do not object in theory to making improvements to the framework to give greater certainty over the handling of whistle-blowers' identity across the enforcement process. However, consideration must be given as to how this proposed reform would be implemented in practice. By way of example, the rights of defence of the business being investigated may require the identity of the whistle-blower to be disclosed in certain circumstances, either during the investigation or in subsequent litigation. Similarly, the rights of redress of a claimant may also require that the whistle-blower's identity should be disclosed. Given many of these issues will be fact specific, the Government may wish to consider formulating different categories of protection for different categories of individuals. For example, a distinction may need to be made between those who are involved in the conduct and those who have only observed the conduct (as is already made with respect to financial rewards). In addition, provision will need to be made for how any such whistle-blowers would be protected from the threat of criminal proceedings in other jurisdictions.

6.16 In relation to the statement contained in the Consultation that: "*If an anonymous whistle-blower's evidence is relied on by the CMA in the CMA's infringement decision, the courts would still need to have regard to the importance of protecting the whistle-blower's identity to the fullest extent possible without undermining the defendant's procedural rights*", we note that there may be circumstances where both claimants and defendants could require witness evidence of the whistle-blower in order to flush out issues in proceedings and therefore careful consideration is needed with regard to the framing of any duty on the courts to take into account the importance of anonymous whistleblowing to competition law enforcement.

6.17 We also note BEIS has not indicated the extent to which the current absence of such a formal protection negatively impacts the CMA's ability to identify and prioritise investigations. It would therefore be helpful for businesses and individuals if BEIS would clarify the circumstances and manner in which this proposal would apply.

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?

6.18 The Consultation suggests improvements may be desirable to the ways in which the CMA uses its interim measures powers, while still providing sufficient protections for the interests of the businesses under investigation. The current options it has considered include: (i) changing the rules regarding access to file in relation to interim measures; and (ii) changing the standard of review if a decision is appealed. Notwithstanding the reference in the Consultation to a potentially wider set of changes[21] these are the only two changes set out in the Consultation.

6.19 In short, we oppose the proposal to dilute the procedural standards that the CMA must adhere to when using its interim measures powers. In particular, interim measures are a highly invasive enforcement tool, which can have a significant impact on the commercial and reputational interests of the business concerned.

6.20 Our concerns about this proposal extend to both the first proposal to remove access to file and the second proposal to lower the standard of review by the courts of interim measures decisions. We consider the cumulative impact of the two proposals is likely to be highly detrimental to the fundamental rights of defence of businesses in circumstances where the CMA has not identified that either access to file or the appeals process has in practice been a barrier to the CMA imposing interim measures or slowed this down substantially in the past. We briefly consider each factor below.

Procedure for issuing interim measures decisions – Access to file

6.21 We are concerned that the proposal to amend the rules regarding access to file in relation to interim measures, such that the CMA is only required to provide the business with notice of the proposed decision and reasons for it (but not the CMA's underlying file of evidence), would negatively impact the rights of defence of businesses and indeed could potentially infringe parties' rights under Article 6(1) of the European Convention on Human Rights (***ECHR***), if any interim measures were imposed without adequate disclosure of the evidence on which they were based. In particular, it is critical that businesses are able to establish definitively the evidential basis upon which the

[21] See the use of "include" at paragraph 1.168.

CMA has decided to issue interim measures so that they can properly defend themselves. In addition, allowing the CMA to impose interim measures without the ability for the business to inspect the CMA's file threatens to result in fewer checks and balances on CMA action, thereby reducing agency accountability.

6.22 By way of comparison, in France – a jurisdiction in which interim measures have been imposed frequently by the French Competition Authority – an undertaking facing the potential imposition of interim measures is permitted access to the request for interim measures as well as any supporting evidence that the applicant may have submitted to the French Competition Authority. That undertaking is also afforded the opportunity to oppose the interim measures request before the Board of the French Competition Authority takes its decision. Likewise, any appeal of the interim measure decision involves a full merits appeal before the Paris Court of Appeal. Insofar as the CMA is looking to align itself with international best practice, in light of the significance of this proposal, we consider it prudent to consider those jurisdictions that currently make more use of this enforcement tool and the tried and tested processes that they adopt.

6.23 Moreover, we consider it appropriate to note the approach adopted by the English courts when determining whether to grant interim relief. Recognising that interim injunctions are draconian remedies, there is a requirement in English civil procedural rules for the applicant seeking an injunction either: (i) to give notice to the respondent and allow them to make representations at the injunction hearing; or (ii) to give "full and frank disclosure" of the relevant facts to the judge (where there is such urgency and risk of evasion that the applicant is making its request "without notice"). Importantly, the applicant must also give a "cross undertaking in damages" (i.e. a legally binding promise to the court to compensate the respondent to an injunction for any loss or damage they might suffer if the interim injunction is granted at the initial hearing, but is later found to be wrongly granted after a full trial). This is an additional safeguard against unsubstantiated claims in court proceedings for interim injunctions. As such, the proposal to remove the obligation on the CMA to provide companies with access to file in relation to interim measures significantly runs contrary to analogous procedures which are required in litigation in the English courts and significantly undermines the ability of businesses to defend themselves properly.

6.24 If the Government is nonetheless minded to revise the rules in this way, it would be helpful if the legislation or guidance from the CMA could articulate more clearly the types of cases in which the CMA would be likely to impose interim measures. Moreover, the Government's proposal states that it would provide firms with the reasons for its decision in lieu of access to file. This point is presently broadly framed and requires significantly more detail to enable companies to understand properly any reforms which might replace the existing procedural safeguards.

Standard of review for appeals of interim measures decisions

6.25 Separately, we do not agree with the Government's proposal to change the standard of review of appeals against interim measures decisions or regarding to CA98 decisions more generally (see further question 24 below). The Government has provided no justification for changing the standard of review, and this proposal is in circumstances where the substantive test for the imposition of interim measures has already been

lowered in 2013.[22] The standard of review of appeals against interim measures decisions should therefore remain consistent with generally accepted international standards. The standard of review of CMA interim measures decisions is an important safeguard in circumstances where there is no cross-undertaking in damages (which, as discussed above, is required for court-ordered injunctions).

6.26 Moreover, to propose changing the standard of review in light of the CMA's proposal to deny access to the CMA's file in interim measures cases compounds the detriment faced by appellants: not only would they no longer be afforded access to file in respect of the imposition of interim measures, they would, in addition, lose the possibility of a full merits review by the Competition Appeal Tribunal (***CAT***). We do not consider such a fundamental shift as justifiable or desirable, and consider that it would, by reducing procedural fairness and the degree of judicial oversight of intrusive investigative steps, be likely to damage the international standing of the UK's competition enforcement regime.

Conclusion

6.27 The greater the power of the authority, the more important is it for that authority to be accountable. The imposition of interim measures is a significant power, which can have considerable adverse consequences for the finances, reputation and commercial conduct of business over the long-term. Only a full merits appeal, which allows the evidence and basis of the decision to be tested, provides an appropriate level of scrutiny in these circumstances. Any diminution in the standard of review in interim measures cases would seriously undermine the objective of regulatory accountability.

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?

6.28 The Government has suggested a menu of different evidence gathering powers which are intended to strengthen the CMA's investigative powers. These changes include wider powers to interview relevant witnesses, more effective requirements for businesses to preserve evidence and more flexible powers of inspect for domestic premises.

6.29 Broadly speaking, we have reservations as to whether the proposed reforms are likely to improve the effectiveness of the CMA's evidence gathering, whilst at the same time adequately preserving the rights of defence and/or privacy. We set out our comments on each of the proposed reforms below.

Interview powers

6.30 The Consultation suggests broadening the CMA's powers to interview individuals as part of Competition Act investigations so that they align with the existing powers in the EA02. Practically speaking, the effect of such a change will be to allow the CMA to interview an individual irrespective of whether they have a connection to a particular business under investigation. This could in theory – as noted by the Government – lead

[22] Enterprise and Regulatory Reform Act 2013 c.24 Pt. 4 c.3 s.43.

to the CMA interviewing customers and suppliers of businesses who under the current Competition Act only need to attend such interviews on a voluntary basis.

6.31 We consider that at present the proposal to extend the CMA's powers in this way has not been properly explained nor justified. In particular, further detail is required to understand the motivation behind the need to broaden the CMA's powers in this way, which may have the effect of imposing a significant burden on legal persons who have no connection to a specific business under investigation. While we recognise that the CMA has existing powers of this type for the purposes of mergers and market investigations, the context and consequences of CA98 investigations are different and the appropriateness of this power should be examined in light of those differences.

6.32 If the Government is minded to extend its powers to be able to compel an individual with no connection to the business under investigation (e.g. employees of a customer, supplier or competitor of the business under investigation) to be interviewed, clear guidance needs to be given as to when the CMA can exercise this power and, in particular, the right of the individual to obtain proper legal representation before any such interview.

Seize-and-sift powers in domestic premises

6.33 The Government has suggested that it is considering whether to give the CMA powers to 'seize-and-sift' evidence when it inspects a domestic premises under a warrant. At present, such 'seize-and-sift' powers only apply in respect of inspects of business premises under warrant.

6.34 A key driver for this change appears to be the Government's assessment that extending seize-and-sift powers to domestic premises may allow the CMA to conduct more efficient and timely inspections. Absent further detail about this proposal we cannot comment definitively on the proposal, but note the following concerns:

(a) **First**, we query whether extending the CMA's powers in this way will enhance efficiencies. In particular, domestic premises – unlike business premises – are less likely to house such a significant volume of documents that the CMA is unable to decide on-site whether they are relevant and should be seized. Given that the majority of material in domestic premises is likely to be irrelevant, it seems more likely that exercising 'seize-and-sift' powers in domestic premises would in fact risk creating inefficiencies with excessive volumes of irrelevant material, which the CMA would have to review and could significantly increase the length and efficiency of a CMA investigation.

(b) **Second**, the proposal raises serious concerns about the impact any extension of sift and search powers may have on individual's rights of privacy and family life under Article 8 ECHR. If the intention is to afford the CMA the same seize and sift powers as set out in section 50 of the Criminal Justice and Police Act 2001[23], this would constitute a very significant potential invasion of privacy and rights to a family life. For instance, the CMA could in theory seize personal devices on a 'seize-and-sift' basis, noting that people often used shared devices when at home. Such an approach would also go beyond the limit of searches

[23] That currently may apply only to CMA searches under warrant of business premises pursuant to section 28 CA98.

and disclosure from personal devices that the courts have considered appropriate.[24] As such, any desire to extend the CMA's powers in this way should be properly articulated in an evidence-based impact statement given the privacy implications.

(c) **Third**, the Consultation has not explained why such powers are necessary and how such an approach would align with existing powers of other sectoral regulators.

Legal duty to preserve evidence

6.35 The Consultation suggests extending the legal duty to preserve evidence that exists in the context of investigations into the criminal cartel offence to all Competition Act investigations. It has noted that under the criminal cartel offence in section 201 EA02, it is an offence to falsify, conceal or dispose of documents that a person knows or suspects to be relevant to an investigation, unless a person can prove that they had no intention of concealing the facts disclosed by the documents from the investigating authorities.

6.36 In principle, we have no objection to having a legal duty to preserve evidence in administrative CA98 investigations, and not just criminal investigations relating to the criminal cartel offence. We welcome BEIS' suggestion that any such obligation would be proportionate and only apply where it could be shown that the person knew that there was an ongoing investigation or suspected that an investigation was likely to be carried out.

6.37 However, we would note that it is often unclear what the scope of a CA98 investigation is, particularly in the early stages of the investigation. Any explicit statutory obligation "*not to destroy evidence which a person knows is relevant to a Competition Act investigation, but where the CMA happens not to have asked for it yet*" may be difficult to apply in practice, unless the CMA is willing and able to give significantly greater clarity to businesses throughout CA98 investigations on the subject and scope of such investigations. In our experience businesses already use their best endeavours to preserve evidence which they understand is relevant to a CA98 investigation and the proposed obligation would be unnecessary and unlikely to increase the preservation of evidence. As such, we consider that the legislation underpinning this obligation should take into account this lack of clarity faced by businesses and define how "relevant" issues in a CA98 investigation are to be determined, if the proposal is taken forward. In addition, the Government should consider the inclusion of a defence based on a "reasonable excuse" in light of such uncertainty.

6.38 More broadly, we would suggest that the Government avoids seeking to apply section 201(4) EA02 – which concerns the destroying evidence relevant to a criminal cartel offence investigation – without amendment. This provision is broadly framed, and it does not appear appropriate for the same language to be introduced wholesale with respect to CA98 investigations without adaptation. Instead we would suggest that any duty to preserve evidence for CA98 investigations is expressed in positive terms, e.g. requiring parties to take "reasonable steps" to preserve documents in their control –

[24] See e.g. *Phones4U v EE and others* [2021] EWCA Civ 116.

noting this is the approach taken in the new Practice Direction 51U of the Civil Procedure Rules for the disclosure pilot in civil litigation.

6.39 Such a broad obligation in conjunction with the proposal to apply civil and/or criminal penalties for breach does carry serious risk of harm to parties' rights of defence in CA98 investigations. Nevertheless, to the extent the CMA seeks to establish penalties for breach of the evidence preservation obligation, these should be civil as opposed to criminal in nature.

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?

Settlement process*: *Binding admissions, short form decisions and removal of the CMA's rules on settlement process

6.40 The Government has proposed a range of measures to try and create greater efficiencies in respect of the CMA's settlement process. These include: (i) making admissions of facts or liability by a business who entered into settlement with the CMA binding on that party as evidence of the facts admitted to; (ii) introducing short form settlement decisions; and (iii) removing certain rules on the CMA in relation to its settlement process.

6.41 Broadly speaking, we welcome the Government's objective of streamlining the CMA's settlement process and maximising the potential efficiencies to be gained by this process. However, the reforms proposed require close scrutiny. Taking each reform in turn:

(a) **Binding admissions**. The proposal regarding the introduction of binding admissions of "fact or liability" by a business engaged in settlement discussions has not been clearly articulated and its efficacy in achieving the CMA's aim of streamlining is questionable. Further detail is needed on how such binding admissions are intended to work in practice in order to distinguish them from the overall admission that there has been a breach of competition law required in the current regime for settlement and to circumscribe the types of "facts" that would be required to be admitted. We understand that the aim of this proposal is to enable the CMA to shorten the process of finalising a settlement decision, as in such cases the binding fact that has been admitted can be used in the decision without needing other evidence such as documents or evidence from another party to corroborate it. However, it is not clear how significant a benefit this would achieve in terms of streamlining. The extent to which such admissions would be binding in follow-on competition damages claims is also unclear as is how (if at all) this would differ from existing case law restricting defendants in follow-on damages claims from seeking to resile from admissions made in competition authority settlement decisions.[25]

(b) **Short form decisions**. We support the use of short form decisions by the CMA so long as those decisions remain in a form by which the conduct subject of the settlement is clearly reasoned and explained. It would be helpful to receive

[25] *AB Volvo (Publ) & Others v Ryder Limited & Another* [2020] EWCA Civ 1475.

guidance from the CMA as to what such short form decisions may contain in terms of facts and substance relating to the infringement.

(c) **Streamlining settlement process**. We understand that the proposal to remove the procedural requirements in the current SI regarding settlement procedures is to give the CMA the autonomy to implement a robust settlement procedure. It would be important for the CMA to consult with the business community when preparing any future new settlement procedure given its importance within the enforcement toolbox, and whilst we do not object to greater flexibility on the part of the CMA, there is a need for predictability, transparency and certainty, which could be satisfied through the use of guidance.

Early resolution agreements for Chapter II investigations

6.42 It is difficult to opine definitively on the benefits of introducing early resolution agreements for Chapter II investigations given the limited detail shared in the Consultation regarding its proposed operation. Whilst there may in theory be benefit in expanding the menu of procedural avenues available to parties in any Chapter II investigation, the effectiveness of any such proposal will depend on how this reform is intended to be implemented. In particular, the following would need to be explained in more detail:

(a) similar to the point made above in relation to proposed binding admissions (see paragraph 6.41(a)), what kinds of factual matters a business would be required to "accept", and the effect accepting certain factual matters relevant to the conduct would have in relation to follow-on claims. We consider businesses would likely be concerned about entering into any type of Early Resolution Agreement unless it has reassurance that the scope of any factual matters to be accepted is limited due to the high risk of facing subsequent civil claims; and

(b) how the Government anticipates Early Resolution Agreements to work in the context of multi-national investigations, where the company under investigation may be subject to a number of parallel investigations. In such cases, the Early Resolution Agreement regime may not be sufficient to incentivise a business to settle with the CMA, particularly if the very fact that a business has entered into an Early Resolution Agreement signals that it has engaged in potentially unlawful conduct.

6.43 In addition, the proposal seemingly seeks to apply a tool which is generally more appropriate in cartel cases, where types of infringing conduct are relatively well-established, to Chapter II cases. In our experience, it is often difficult for a business to ascertain whether it is dominant in a market, let alone whether its particular conduct in that market could be considered to be abusive given that it is well established that the list of acts that may be considered abusive in section 18(2) CA98 is non-exhaustive. A business is also exposed to potentially wider claims from third parties if it appears to accept that it might be dominant in a certain market. As such we query the likelihood of businesses engaging in settlement-type procedure when facing a Chapter II investigation, even if this procedure is adapted to remove the requirement for a formal admission of liability.

6.44 Aside from these concerns, the proposal does not consider whether there are already sufficient benefits of the current settlement procedure with the CMA to make settlement an attractive option to businesses (including shorter form decisions, procedural cost savings etc.), even if not appropriate for every case. The proposed changes may not create the intended efficiencies and could have unintended consequences in follow-on litigation.

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?

Voluntary redress schemes

6.45 The Consultation seeks views on whether to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation in an attempt to encourage the use of these redress schemes going forward.

6.46 In principle, we consider that protecting documents prepared by a business in order to seek approval for and operate a voluntary redress scheme from disclosure in civil litigation would be a positive step in helping to encourage the use of such schemes.

6.47 The CMA may wish to consider additional measures to incentivise greater use of such schemes, including for instance by providing greater certainty as to the weight to be given to a voluntary redress scheme when applying reductions to fines in step 6 of the CMA's penalties guidance or the level of fine discount to be associated with a scheme.

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?

Confidentiality rings

6.48 The Consultation seeks views on the merits of new legal arrangements to deliver more efficient use of confidentiality rings in Competition Act investigations. In particular, it is considering having a prescribed legal framework for such confidentiality rings so that the CMA would not be required to negotiate the terms of the ring with the parties in each case. It is hoped that these changes will speed-up the CMA's access to file process and lead to the more rapid conclusion of the CMA's investigations.

6.49 Broadly speaking, we are supportive of the Government's proposal to use confidentiality rings in CA98 investigations as a way of speeding-up the CMA's access to file process, and by extension the more rapid conclusion of the CMA's investigations.

6.50 In our experience, confidentiality rings work well and are able to be used in quite sophisticated multi-party/multi-adviser scenarios in both investigations and litigation. The formalisation of a prescribed legal framework may bring benefits to both the CMA and the parties to an investigation in terms of efficiencies, avoiding extensive negotiations on the provisions of the rings. In particular, we agree that any such frameworks should:

(a) be open to use by both legal and non-legal advisers. We have a positive experience of using confidentiality rings for both legal advisers and economist advisers;

(b) permit confidential, commercially sensitive information to be disclosed into the ring without the need to seek confidentiality representations / prior specific consent. In our experience this works well and avoids any confusion. We have also found that using 'layers' of confidentiality rings (e.g. (i) one for lawyers only and one for all joint advisers, including lawyers and economists; or (ii) having 'inner' and 'outer' rings for external advisers and in-house counsel respectively) allows information to be shared as appropriate; and

(c) permit some bespoke confidentiality protections that go beyond the generic framework to be agreed between the parties and the CMA should the situation require it.

6.51 Point (c) above is of particular importance. Whilst a prescribed legal framework should help create efficiencies in streamlining the access to file process, any such changes should also include – at a minimum in certain prescribed circumstances – specific scope for the CMA and other parties to agree more detailed, bespoke arrangements where it is appropriate to do so. Similarly, any such legislative change should include the capability for the CMA to adjust confidentiality ring arrangements in the future to account for relevant legal and good practice developments.

6.52 Alongside the establishment of new legal arrangements to deliver more efficient uses of confidentiality rings, the Government is also considering whether civil sanctions should also be made available if the rules for a confidentiality ring are breached and proposes these could be imposed upon either the individual that breached the ring and/or their employer. In respect of this proposal, we agree that it is sensible to have a process pursuant to which parties can inform the CMA if there has been a breach of the confidentiality ring and further clarification on the process and consequences of such breach. To the extent the Government is considering the imposition of sanctions for breach, then we agree that civil penalties are a more effective and proportionate tool for regulating compliance with confidentiality rings.

6.53 However, we question whether it is appropriate for any such sanctions to apply not only to companies, but to its employees. Whilst this could in theory incentivise individuals to protect the integrity of confidentiality information in the ring, in our experience the more appropriate method might be for any sanctions to be imposed on companies rather than individuals, which would permit companies to deal with any breaches of a confidentiality ring *via* their own internal governance systems.

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

Case Decision Groups

6.54 The Government is considering whether to remove the requirements from the CMA Rules on the decision makers for infringement decisions in Competition Act investigations. Those rules require that once the CMA has completed its investigatory work, it should notify the parties of its provisional findings *via* a statement of objections and then appoint a new decision maker to make the final decision in the case. This new

decision maker must have had no previous involvement in the case and the final decision in a case must be determined by at least two individuals to act as the final decision makers.

6.55 In principle, we appreciate the merit in seeking to streamline and speed up the decision-making process in Competition Act investigations. However, we have concerns about the potential removal of the requirements on decision makers from the CMA Rules. In our assessment, it is critical to a fair and impartial process that there are checks and balances throughout the investigatory process to ensure that final decisions are free from confirmatory bias. There is a real risk that if the CMA is given the autonomy to determine the most effective decision-making processes for CA98 investigations, it may prioritise speed and efficiency over due process, which would be an unwelcome result for UK businesses.

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

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?

Judicial scrutiny of CMA decisions

6.56 The Consultation seeks views on the appropriate level of judicial scrutiny of the CMA's decisions in Competition Act investigations. At present, decisions taken by the CMA in relation to Competition Act investigations can be appealed to the Tribunal "*on the merits*" (see paragraph 3(1) in Part 1 of Schedule 8 to CA98). Whilst this does not constitute a re-hearing of the decision, this approach provides for an in-depth review of the law and of the facts by the court. The Tribunal can hear fresh evidence, including where appropriate fresh evidence not before the CMA, and make findings of fact and law.

6.57 The Government has acknowledged that businesses and practitioners appear, in general, to remain supportive of the current system, which they believe is well established and understood. It has also noted that the CAT itself argued strongly that the current standard of review was appropriate in response to Government consultation in 2013.

6.58 We acknowledge the objectives listed by the Government in the Consultation, which state that the scrutiny and powers exercised by the courts should ensure that:

(a) the overall competition law enforcement system functions efficiently, with the competition authority able to ensure competition law is followed throughout the economy, minimising overall delays to the final resolution of cases, and ultimately tackling competitive harms;

(b) appropriate deference is given to an expert regulator's decisions on matters of technical judgment and expertise;

(c) the appeals framework respects the procedural rights of businesses and provides an effective oversight of the administrative decision-making process; and

(d) the courts provide robust quality assurance of the CMA's interpretation of competition law.

6.59 We also note that the Government has expressly stated its intention to keep the level of judicial scrutiny under review in light of those objectives whilst acknowledging that to justify departing from the current system any reforms would need to deliver a more efficient enforcement process. The Government has not expressly stated what level of judicial scrutiny it is considering in the Consultation, so we have proceeded on the basis that the Government is considering a standard akin to judicial review.

6.60 In short, we have significant concerns regarding any proposals that will reduce fundamental appeal rights that are widely regarded as an essential feature of a robust, effective and fair competition regime. In particular, the Consultation provides no persuasive evidence suggesting either (i) that the current regime does not operate effectively; or (ii) that the proposal to reduce the level of judicial scrutiny would be likely to improve it. We are particularly concerned by the proposal to dispense with the full merits review standard in Competition Act appeals, which in our view would be unjustified, contrary to the interests of justice and would significantly undermine the Government's stated aims for the appeal framework. We set out further detail in this regarding below.

Effective oversight of decision-making

6.61 The competition and economic regulators in the UK have particularly extensive powers under the CA98, including the power to impose large financial penalties and to take decisions which have long-term effects on a business's commercial conduct. A finding of infringement of a competition law prohibition is a very serious matter with potentially drastic consequences for the undertaking concerned.

6.62 An effective appeal mechanism is therefore essential to ensure that undertakings have an opportunity to put their case to an independent tribunal and hold the regulators to account on the merits (including the factual assessment of the decision maker). It is a matter of basic justice and an avenue of redress which should continue to be available for undertakings who are the subject of adverse findings of infringement.

6.63 Moreover, the relevance of Article 6 ECHR must be considered. Restricting the grounds on which a company can appeal against an adverse infringement finding made by an administrative body acting as investigator, prosecutor and judge, could run counter to the requirement under Article 6 of providing legal persons with a fair hearing before an independent and impartial tribunal established by law. It is questionable that a competition enforcement framework that provided affected parties with only judicial review or defined grounds of appeal would be compliant with Article 6 ECHR.

6.64 In addition to ensuring respect for parties' rights of defence, an effective appeal regime incentivises the competition and economic regulators to take robust and well-founded decisions on the basis of reliable evidence. In turn, this contributes to the credibility and global reputation of the end-to-end decision-making process for competition and regulatory decisions in the UK. Contrary to the position set out in the Consultation, we do not agree that such an approach leads to "*exhaustive investigations and . . . lengthy 'gold-plated' decisions*".

6.65 In terms of efficiencies, our experience is that the current appeal regime for competition cases works well. The CAT has gained the respect of business, regulators, the legal profession (both domestically and internationally) and the Court of Appeal. As BEIS notes in the Consultation, "*the CMA has a strong success rate before the Tribunal*". In most cases the authorities' decisions survive appeals to the CAT, which suggests that the CMA is in general taking robust and well-founded decisions.

6.66 The fact that it has been necessary for the CAT to overturn certain decisions on appeal is not a sign of a problem with the appeal process. On the contrary, valuable lessons on the importance of carefully scrutinising evidence and testing legal and economic theories have been learned. Indeed, in our view, certain competition law infringements can be highly complicated and require the ability to digest extensive factual and econometric evidence (which the CAT does well). This is particularly the case in relation to 'rare' infringements (e.g. excessive pricing, as in the *Phenytoin*[26] case referred to in the Consultation) and 'novel' infringements (e.g. in digital markets, or in pay for delay cases like *Generics*).[27]

Reducing the level of judicial scrutiny

6.67 We consider there is no compelling case for changing the standard of review and doing so would be likely to undermine a number of the Government's objectives for the appeals framework. An infringement finding has serious adverse consequences for the business, potentially including very significant fines, reputational damage, liability for substantial damages and long-term impact on its commercial conduct. It is essential for entities subject to a quasi-criminal process to be accorded full rights of appeal on the merits.[28]

6.68 Whilst we support the minimisation of delays and the timely resolution of cases, the Consultation does not present any evidence showing that appeals are taking too long or that the contemplated reduction in the level of judicial scrutiny would lead to shorter or less costly end-to-end decision-making processes. Rather, timeliness is more a point about active case management (which the CAT already has the requisite powers to do and exercises them effectively) and should not be conflated with issue around the appropriate standard of review:

(a) It is important to recall that an appeal is only one part of the overall end-to-end regulatory process. A fair comparison between full merits appeals and different level of judicial scrutiny would need to take account of the fact that the CAT can generally substitute its own decision for an unsound agency decision on a full merits appeal, while on a judicial review the CAT or court must remit the case back to the agency for a new decision to be taken. This may result in the overall regulatory process being considerably longer under a judicial review system, which requires fresh decisions to be re-taken by the agency if quashed,

[26] *Competition and Markets Authority* v *Flynn Pharma Ltd* [2020] EWCA Civ 339.

[27] Case 1251/1/12/16 *Generics UK Limited v Competition and Markets Authority*.

[28] See the CAT's judgment in Case 1001/1/1/01 *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* where it confirmed that proceedings and fines under CA98 proceedings may be classified as "criminal" for the purposes of the ECHR.

likely requiring further consultation of potentially affected parties and additional rounds of evidence gathering and submissions.

(b) In addition, it is generally the exception rather than the norm that the appeal process is particularly long or complex. One often cited example is *Albion Water*[29], which involved an appeal by Albion Water against Ofwat's decision that certain common carriage charges imposed by Welsh Water were not abusive. That case, if properly understood, supports the maintenance of a full merits review standard. Where the case would have been reviewed to a narrower standard than a full merits review, important policy issues for the application of competition law may not have been tested and flushed out for the first time, and it is questionable whether a small business like Albion Water would have been able to secure any effective redress.

6.69 We agree that an effective appeals framework should provide adequate oversight of the administrative decision-making process and that the courts provide robust quality assurance of CMA's decisions. A "robust" decision is one based on good evidence and sound legal and economic reasoning. The current system of merits appeals under the CA98 supports this objective, encouraging robust decision-making that can withstand challenge. In our view, reducing the scope of judicial oversight weakens the incentive of regulators to make robust and well-supported decisions and is therefore likely to lead to decisions that are <u>less</u> robust. Any reduction in the quality of regulators' decisions is also likely to harm predictability and confidence in the regulatory regime.

6.70 In addition, if it is envisaged that the standard would be akin to a judicial review standard, the Consultation fails to take account of the fact that the judicial review standard is not necessarily fixed and may be reduced in the future. In particular, following the UK's departure from the EU and recent debate, it may be the case that the current judicial standard is narrowed meaning the level of judicial scrutiny and recourse available to appellants in the future is further curtailed. This may lead to a further deterioration of rights for firms and consumers alike.

Appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers

6.71 In addition to requesting views on the appropriate standard of judicial scrutiny when reviewing infringement decisions imposed by the CMA, the Government has also requested views on the appropriate level of judicial scrutiny for decision by the CMA in relation to non-compliance with investigative and enforcement powers. This concerns circumstances where a business fails to comply with the CMA's investigative and enforcement powers, including issuing binding information requests and imposing remedies across the CMA's functions.

6.72 No explanation has been provided as to the reasons for adopting this legislative change, and absent further evidence there appears to be no obvious reason to lower the judicial scrutiny for decisions by the CMA in relation to its investigative and enforcement powers. Drawing a distinction between any CA98 decision and the CMA's accompanying investigative and enforcement powers appears difficult to justify given

[29] Cases 1046/2/4/04 and 1166/5/7/10, *Albion Water Limited & Or v WRSA*; *Albion Water Limited v Dwr Cymru Cyfyngedig*.

the inter-relationship between such powers and the ultimate infringement decision that is taken. Further detail would, however, need to be provided by the Government to understand the reasons for the proposed approach in this regard.

6.73 It is also noted in a footnote of the Consultation that the Government is considering the appropriate level of judicial scrutiny in respect of interim enforcement orders in merger control investigations. The statutory provisions do not specify a standard of review to be applied by the Tribunal in respect of initial enforcement orders. This was discussed by the CAT in *Electro Rent*[30] where it was considered that the Tribunal is not restricted to a judicial review standard and could, if necessary, quash the decision if it considered that there was a good reason to do so. The Government has not explained the basis for making this change, and given the small number of appeals concerning initial enforcement orders in merger control investigations, there does not appear that there is any sound justification for taking this approach.

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?

6.74 We have no additional comments and refer to our submission made on 10 May 2021 to the CAT Rules consultation, which can be provided on request.

7. Stronger investigative and enforcement powers across competition tools

7.1 The CMA already has effective investigative and enforcement powers, and the Government has put forward little evidence to suggest that its current powers are insufficient and that reforms are necessary.

7.2 The Government's grounds for its proposals in relation to investigative and enforcement powers seem to be based primarily on the very general statement that post-Brexit the CMA's caseload will grow and become more complex and therefore it must upgrade its information gathering and enforcement powers. However, it is unclear how increased volume necessarily requires the reforms the Government has proposed, such as higher penalties or personal declarations, especially in light of the lack of evidence of a material issue with the accuracy or timeliness of submissions.

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?

7.3 The new investigative powers proposed will not help the CMA to conclude its investigations more quickly and may well indeed have the opposite effect. Citing the Penrose report, the Consultation states that "*effective investigations depend on parties co-operating with the CMA and responding in a full, timely and honest way to requests for information*". Fulsome responses take time; therefore, any measures designed to incentivise more comprehensive responses – like those proposed in this Consultation – will result in longer response times. As the Government has provided little evidence to

[30] Case 1285/10/12/18 *Electro Rent Corporation v Competition and Markets Authority*.

suggest that incomplete responses are a persistent or material issue for the CMA, it seems that the Government is proposing a solution to a problem that may not exist – and this solution could well have the resulting effect of delaying investigations.

Tougher penalties for non-compliance with information gathering requests

7.4 The Government has proposed that the CMA should be able to impose fixed penalties of up to 1% of a business' annual turnover as well as the power to impose an additional daily penalty of up to 5% of daily turnover while non-compliance continues. The Government has suggested the current penalties level is lower than its European counterpart and that in line with international best practice it should be able to impose tougher sanctions on parties who allegedly slow down or obstruct cases.

7.5 In short, the Consultation contains very little evidence to suggest that companies are intentionally choosing *not* to comply with CMA investigations and electing to be fined as a result, simply because they can afford to do so. On the contrary, our experience is that companies wish to avoid an adverse decision against them indicating they have misled an authority or failed to comply, irrespective of whether or not they can support the financial penalty involved. As such, there appears to be no obvious need to increase the maximum fixed penalties that the CMA can impose for non-compliance, as this is very unlikely to make any difference to companies' incentives to comply.

7.6 In our experience, businesses tend not to deliberately slow down or obstruct investigations. Indeed, most companies actively want to co-operate with the CMA in order to preserve an effective working relationship. Sometimes, however, the burden on businesses in terms of complying with information requests can be extremely high. The current rules were designed in an era in which hard copy documents were the norm and the appropriate processes for retrieval were well understood. Now, internal documents are almost entirely electronic and collected *via* e-searches of inboxes and network folders, typically requiring consultations with clients' IT specialists and outside forensic experts. The result is that requests for internal documents yield orders of magnitude more documents than before, and these documents require review to ensure responsiveness and the exclusion of privileged materials. The CMA then expects the response to be submitted with logs and indices presented in a prescribed manner, often with very short deadlines. These steps all add materially to the time required for parties to respond. Our experience is that companies exercise their best efforts to comply, but such requests often need to be dealt with by individuals 'on the ground' engaged in running the business, which can prove challenging.

7.7 Finally, we note that it is unclear how this tougher regime, which is proposed to apply to scenarios where the CMA believes a company or individual has "*concealed, destroyed, or falsified evidence*", would interact with the proposals regarding a "*legal duty to preserve evidence*" and associated fines proposed.

7.8 In light of the above, we consider that CMA processes lag behind the times and that concerns about delay need to be reviewed against the changed investigatory techniques landscape. The Government should examine in more detail the necessity and proportionality of this reform and consider potential unintended consequences which could run contrary to the overall objectives of the Consultation and impact on businesses' fundamental rights.

Personal accountability for the provision of evidence

7.9 The Consultation also seeks views on whether a false declaration by a director should attract the same civil penalties as supplying false and misleading information to the CMA.

7.10 In our assessment, civil penalties (the same as those for supplying false and misleading information to the CMA, including director disqualification for flagrant breaches) for a director providing a false declaration are also unnecessary and disproportionate.

7.11 Our experience is that directors take their responsibilities seriously and ensure that dedicated teams and systems are in place to verify the accuracy of any information provided to the CMA. Directors also instruct and work closely with internal and external legal counsel who have professional duties to ensure appropriate verification and compliance with information requests made to their clients. However, it is not feasible in practice for a director to verify every single piece of information they are given by the business and there will inevitably be circumstances when things go awry. Even if this reform resulted in businesses adding further verification measures, such declarations could only ever be to the best of a director's knowledge; therefore, it would still be disproportionate for directors to assume personal accountability. For the same reasons, director disqualification is a disproportionate sanction in this context. It is also unnecessary, given the CMA is already able to impose penalties on the company for false/misleading responses.

7.12 Finally, we consider that requiring directors to make personal declarations with every response to an RFI from the CMA will unnecessarily prolong investigations and cut across the other objectives of this Consultation to speed up investigations. Making directors personally liable for the accuracy of responses to information requests will result in additional verification measures which will take further time and will not necessarily be proportionate.

7.13 Therefore, where there is no evidence to suggest that false or misleading submissions are a significant issue in competition investigations – as is the case here – such measures appear to be aimed at solving a problem that does not seem to exist to a material extent and would result in longer investigations. When considered in light of the proposal to increase penalties for providing misleading information, this proposal is particularly unwarranted.

A wider prohibition against providing false or misleading information to the CMA

7.14 The proposal under consideration seeks to extend obligations not to provide false or misleading information to the CMA such that fines could be imposed when the CMA receives incorrect or misleading information even if it is not exercising statutory functions, e.g. when making an informal call for evidence on a matter of general relevance to consumers and markets.

7.15 The Government has provided no evidence that false or misleading evidence in voluntary responses is a significant issue. Therefore, the proposed reform appears to be unnecessary.

7.16 In any event, the proposed penalty is disproportionately severe, given it would be imposed in circumstances where parties are not suspected of committing an

infringement but are voluntarily providing information to aid CMA work outside of its enforcement, market investigatory and merger control functions.

7.17 Such an extension of penalties to the provision of voluntary information would likely *disincentivise* businesses from responding to informal voluntary calls for evidence. This in turn would undermine the overall objective of the CMA in identifying issues of concern for consumers or the markets. In our experience, businesses take their relationship with the CMA seriously and would be unlikely to seek to actively mislead it.

7.18 The Government should consider approaches taken in other jurisdictions by way of comparison. For instance, the EU position under Regulation 1/2003 is that an undertaking can be fined for not responding to a binding Article 18(3) RFI and can also be fined when providing misleading information when responding to a simple, voluntary Article 18(2) RFI. But for any Article 18 request, the Commission needs to have a legal basis to make the request, i.e. the request must be within its formal investigative powers.

7.19 As such, the proposal to have fining powers even if the information is requested outside of the CMA's statutory functions, is quite a noticeable departure from the EU position.

7.20 In light of these concerns, we do not consider that this is a proposal that would be appropriate to take forward.

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?

Stronger penalties for companies that fail to comply with remedies imposed or accepted by the CMA

7.21 If adopted, such penalties should not have retroactive effect. Penalties should only apply to businesses which agreed to remedies with full knowledge of the consequences for non-compliance.

7.22 The level of penalties is also too high, particularly for commitments given in circumstances where there is no infringement of competition law (e.g. after a market study or investigation). Indeed, such high penalties will likely have a chilling effect on the willingness of businesses to agree to, or show flexibility in relation to, commitments.

7.23 The Government has stated that taking a company to court to obtain an enforcement order is a lengthy and costly process. Although the proposed regime would allow the CMA to impose penalties without going to court, it does not remove the possibility of court time because many fined parties will appeal their penalties. If this proposal is taken forward, BEIS should undertake to estimate the costs saved by allowing the CMA to impose fines without going to court, including estimated offsets to these savings for appeals.

7.24 Since allowing the CMA to impose penalties for non-compliance without going to court would make the CMA's power more difficult to check, implementing this reform would necessitate careful consideration – and corresponding detailed guidance – about how and when this power could be used.

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

Stronger powers and tools for more effective international co-operation

7.25 We recognise the importance of international co-operation and encourage the CMA to co-operate and co-ordinate its investigations with competition authorities overseas. We also acknowledge that the expectation of reciprocity means that the CMA may not currently be able to take advantage of regimes in other countries for foreign authorities to assist the CMA with compulsory information gathering without having equivalent formal powers itself.

7.26 As the CMA notes, investigative assistance powers must be subject to certain conditions so as to ensure fairness and transparency to business and protection of fundamental rights. At a minimum, we would expect the CMA to safeguard the following conditions when assisting a foreign authority, namely that:

(a) the CMA obtains approval from a designated decision maker;

(b) there is reciprocity/mutual legal assistance;

(c) assistance can be sought only in relation to conduct/behaviour that would otherwise be unlawful under UK competition law;

(d) there are no more onerous obligations on business than would otherwise be imposed/expected under UK competition law (i.e. limited to identical enforcement tools as for breaches of UK competition law). In particular, we would expect:

(i) scrutiny by the CMA of the foreign competition authority's request to ensure it is limited in scope to matters which are relevant and does not amount to a "fishing expedition"; and

(ii) scrutiny by the CMA of the proportionality of the foreign competition authority's request and measures to limit disproportionate requests; and

(e) there are suitable confidentiality protections regarding commercial business secrets and personal data, to the same standards as those in the UK, when information is passed to an overseas authority; and

(f) the CMA would maintain a role in supervision of the information request and any challenges to the scope of the foreign authority's request.

7.27 Given the potential impact on businesses if the CMA were to have compulsory information gathering powers on behalf of foreign authorities, we consider that the CMA should take heed of international best practice in both the competition and other spheres, and undertake a careful and balanced assessment of the needs of businesses in terms of legal certainty, rights of defence and protection of fundamental rights when enacting a proposal of this type.

8. Other reforms to the UK's competition law

Enhanced use of 'assisting offenders' in criminal cartel enforcement

8.1 The Consultation proposes to amend SOCPA so that the CMA is a 'specified prosecutor' and can use the SOCPA 'assisting offender' process to enhance its criminal cartel enforcement.

8.2 We consider that businesses and individuals would benefit from more detail around the proposed application of these powers by the CMA, including the circumstances in which they may be used and any proposed amendments to the legislation when applied to the CMA.

8.3 Further, we suggest that given the nature of the proposal the defence bar for individuals may be well positioned to detail the practical impacts for individuals in the context of criminal cartel enforcement.

A mechanism for the CMA to require repayment of discounts to penalties

8.4 Government is seeking views on the merits of allowing the CMA to reclaim discounts to penalties if a party fails to carry out a promise for which a discount was granted.

8.5 We understand in principle the Government's position that a party who fails to honour its promise, for which its penalty was discounted, should no longer enjoy the benefit of that discount. However, there are a number of practical questions related to the CMA's ability to reclaim discounts to penalties that need to be addressed if such a power is to be granted. For instance:

(a) who will determine whether a party has failed to carry out a promise for which a discount was granted?

(b) what should the evidential standard be for proving that a party has failed to carry out a promise?

(c) how much of the discount can be reclaimed in the case of partial performance (given it is unlikely in most cases that a company will have failed entirely to carry out its promise)?

8.6 Such assessments may be challenging in practice and will require time and effort on the part of the CMA.

8.7 BEIS should therefore consider whether there are alternative measures that could deal with such situations, including fines for non-compliance, for example. In any event, an appropriate appeals process would need to be established and articulated.

Enabling the CAT to issue declaratory judgments in private action cases

8.8 We are supportive of extending the CAT's jurisdiction to grant declaratory relief to assist with resolving disputes regarding the application of competition law to a set of facts, given its status as an expert Tribunal in this sphere. This lacuna in the CAT's existing powers ought in our view to be addressed, and this could be done by way of amendment to the CA98.

Extended deadlines in public interest interventions in media mergers

8.9 Granting the Secretary of State the ability to extend the deadline for referral to Phase 2 by a period of 28 days where the Secretary of State has issued a PIIN in relation to a completed media merger effectively and significantly extends existing the four-month review period.

8.10 We have concerns that this represents a considerable extension of the Secretary of State's already wide discretion in such transactions. In particular, when a PIIN is issued and the length of time the Secretary of State gives Ofcom to prepare the report are entirely with the Secretary of State's control, and this proposal would tend to incentivise the Secretary of State to delay issuance of a PIIN.

8.11 At the very least, we consider that BEIS should set out in which circumstances and how it foresees using this power in practice.

8.12 As a separate but related point, in our experience there is a need for more defined statutory timelines in public interest cases, particularly in anticipated transactions. By way of comparison, we welcome the statutory timetables in national security screening under the National Security & Investment Act and would prefer a consistent approach as regards statutory deadlines.

CHAPTER 2: CONSUMER RIGHTS

9. Summary of our views on consumer rights and law enforcement

9.1 The Consultation proposes various changes both to substantive consumer law and to the means by which it is enforced in the UK, which appear in large part to be intended to address potential harms in online markets. It is intended that these changes would '**strengthen and update consumer rights while balancing this with proportionate requirements for businesses** who must continue to develop innovative products and services.' (paragraph 2.3 of the Consultation). However, we consider that certain of the proposed changes are not as proportionate as they should be, and may lead to unintended consequences, as will be seen in our responses below. Many of these changes, if adopted, could be costly and challenging in engineering terms for businesses of all sizes to implement[31], introducing burdens on UK businesses that competitors in other global markets would not face. It is therefore crucial that changes are only made where there is clear evidence of harm; that new requirements are properly costed and designed to be effective in practice; and that sufficient time is allowed for implementation of any new rules that do meet the bar.

9.2 A key point to remember in this context is that, **in law, UK consumers are considered to be reasonably well informed and reasonably observant and circumspect**.[32] In other words, they take reasonable care over their own interests and do not make manifestly unreasonable decisions when transacting with traders. The Consultation does not propose changing this legal definition of the "average consumer", which is the bedrock of UK (and EU) consumer law. This important legal definition colours many of our responses below. In general, given that the average consumer can be taken to respond reasonably to information they are provided with, and the evolving nature of online markets, we consider solutions which focus on the transparency of that information (rather than requirements to introduce changes to the fundamental design of companies' business models), are more likely to be consistent with wider consumer law and less likely to lead to inconsistencies and unforeseen consequences.

9.3 In relation to **enforcement of consumer rights**, the Consultation proposes significant changes to the current regime that would, if implemented, allow the direct enforcement against businesses which the CMA or another designated enforcer believes to have infringed consumer law, without needing to obtain a court order to do so (as under the current regime set out in Part 8 of the EA02). In large part, this is on the basis that, in the Government's view, the current processes are time consuming. However, in the context of parallel proposals to significantly expand the CMA's competition law powers, coupled with plans also to introduce a "pro-competition" regime for digital markets, it is important that the government adopts a holistic approach which avoids

[31]The need to redesign websites and applications could impose significant costs on UK SMEs. Even for global online traders that operate across many different markets globally, this could require the introduction of UK-specific/geolocated sites that could pose logistical and administrative challenges.

[32]Regulation 2(2) of the Consumer Protection from Unfair Trading Regulations 2008; see also *OFT v Purely Creative Ltd* [2011] EWHC 106 (Ch) (Purely Creative) at 62, where Briggs J commented that "[t]he requirement to assume that the consumer is reasonably well informed, observant and circumspect reflects the common sense proposition that the UCPD exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer".

over-burdening businesses in a way that risks stifles innovation and investment in the UK, and which creates consumer harm which does not otherwise exist today.

9.4 Further, and while we note the Government's desire for additional powers and speedier processes in this sphere, it would be crucial to ensure that additional resources would be made available so that such additional functions are carried out expeditiously and to the requisite standard which should be expected given their importance. The Consultation is silent on this point, but we believe that it should be seriously examined before final decisions are made. Further, the need for processes to be speedy should not be at the expense of businesses having the proper time to respond to RFIs and defend substantive allegations made against them. Of course, as the Consultation makes clear, it is also critical that robust mechanisms are available to allow firms to challenge decisions which they disagree with.

9.5 It appears to us from a number of statements made in the Consultation that financial services products (such as bank accounts and insurance) are intended to be excluded from the proposed new regulation. We agree with this approach on the basis that product design, promotions, documentation and sales of financial services products are already heavily regulated by the financial services regulators such as the Financial Conduct Authority (the ***FCA***) and Prudential Regulation Authority (the ***PRA***). However, we believe that the regulation in the financial services sector provides some helpful touchpoints against which the proposals can be considered and so we have noted these at various points in our response. It is also important that as companies in all sectors continue to digitalise, that only a handful of businesses are targeted in relation to concerns that are common practice across several businesses and sectors – particularly in relation to online markets (e.g. online reviews, transparency and consent in relation to terms and conditions for the use of online services, etc.).

9.6 To the extent that there is strong evidence of some concerns being of particular application to particular businesses, we consider that in relation to some of the proposals there needs to be more clarity about whether they should apply across the board or only to certain sectors, and the interplay with sector regulators' powers.

10. Modernising consumer rights and subscription contracts

10.1 As a starting point, we note that while the Consultation does briefly acknowledge that subscription models can be beneficial for consumers (paragraph 2.10), the proposals largely proceed on the basis that such models cause harm to consumers and that changes in the law are therefore required.[33] Little evidence is provided of harm and scant consideration appears to have been given as to whether the existing consumer protection regime is adequate. For example, the Consultation does not address the fact

[33] For example, it is not clear the Consultation adequately considers the benefits of subscriptions and their increasing popularity and familiarly in the UK market. The success of any subscription product will depend on how much customers value the benefits that this model offers, having regard to: (a) the ongoing nature of products, i.e. when they are not ordinarily consumed on a one-off basis but over a period of time with no specific end-point (e.g. software); (b) the importance of continuity of service or potential harm through interruption in service; and (c) the convenience of consuming the product on a continuous basis without the need to order and pay for it each time. Care should be taken to avoid unintended effects that could diminish the benefits that UK consumers obtain from such models.

that there are already pre-contractual information requirements that apply to providers of subscription services, or that the CPRs already ban traders from providing misleading information to consumers about the products (including subscriptions) that they offer, or omitting material information about them.

10.2 That said, it is clearly in both businesses' and consumers' interests for there to be clarity about what consumers should expect when entering into, renewing, or exiting a subscription contract – that is consistent with our view of transparency-based obligation, as expressed above. We question, however, whether this could be better achieved by the provision of statutory guidance, rather than by changing the law. Subject to that caveat, we have responded to the various questions in relation to subscription contracts below.

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

10.3 This appears to be a reasonable definition but we note that it does not make it clear that the description is referring to subscription contracts as opposed to any other contract (which we understand is intended, but care must be taken to use the term precisely).

11. Giving consumers a clear choice on what they are signing up for

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

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

11.1 It is hard to (and we do not) disagree with the proposition that consumers should be provided with key information, clearly displayed, when entering into a subscription contract (or indeed, any contract) or at any other stage where they make a key transactional decision. That is indeed what the law already requires[34], and is consistent with the existing long-established tenet that the average consumer is reasonably observant and circumspect – i.e. that they pay attention to the information that is provided to them and act in their own best interests.[35]

11.2 It is unclear from the Consultation precisely what "subscription information" would need to be provided by the trader to the consumer under the proposed new regime. We

[34] In the case of contracts made at a distance, including those for online purchases, Regulation 13 CCRs requires traders to make certain information available to the consumer in a clear and comprehensible way before the consumer is bound by the contract. Regulation 14 CCRs requires online traders to make certain of this information available directly before the customer places the order. The pre-contractual information requirements under the CCRs were intended to be exhaustive because the Consumer Rights Directive 2011/83/EU (which they implement) is a maximum harmonisation measure. The information to be provided by a trader to a consumer before the latter is bound by a distance or off-premises contract is "mandatory and should not be altered." The pre-contract information requirements for distance contracts are set out in Schedule 2 to the CCRs. The additional information to be provided for subscription contracts is set out in paragraphs (h) and (s) of that schedule.

[35] There are of course, quite rightly, additional protections in law for "vulnerable consumers", but the proposals outlined in the Consultation would apply to all UK subscription contracts, and not just those made with vulnerable consumers.

assume that this would be limited to the specific categories of information set out in paragraph 2.17 of the Consultation.[36] If so, it is likely the case that many traders will already provide this information to their customers, in line with the current law. They are, however, prescriptive and it may be better to have a more generic requirement such as "key terms" (which are not prescribed by the CMA, but as understood by the trader) so that should products (and by extension their key terms) develop and evolve, the requirements track the changes. Otherwise there is a risk that prescriptive requirements will become unfit for purpose as the way consumers interact with technology continues to evolve. A one-size fits all approach may have unintended consequences.

11.3 If these changes were to be introduced, then it would be important that any requirement to display subscription information in a "clear and prominent manner" would not prevent traders from choosing the most appropriate ways of providing this information in light of the realities of website design (such as limited space to put forward key messages), or hinder their ability to innovate and compete (in adherence with existing laws) in a way that responds to customer demand. For example, some traders might wish to include this information *via* "hover over" displays or *via* hyperlinked pages, while others might wish to include explanatory video content. Indeed, what is "clear and prominent" to the consumer may vary depending on the type of product and whether the consumer is purchasing *via* a desktop browser, on their mobile phone, or *via* an app. It would doubtless be helpful, in time, for the CMA or another body to publish guidance on how these legal requirements can best be fulfilled. But, in our view, any guidance should not be overly prescriptive as to the way in which subscription information is clearly and prominently displayed, with any dispute on the issue ultimately to be settled by the courts. It is also notable that design and feature differentiation is one of the ways in which many online players compete with one another and therefore plays an important role in enhancing the overall consumer experience.

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?

11.4 We do not agree with this proposal, as currently framed. A requirement to offer consumers a non-auto-renewing alternative product will require many businesses fundamentally to change their business model. Traders are entitled to have as their main/primary offering, an auto-renewing product. Requiring them to offer up a non-auto-renewing product in addition, is essentially asking them to add a completely different offering. The proposal, as framed, could also potentially adversely impact certain businesses which sell a non-auto renewing product as a point of differentiation to their competitors. Putting strict requirements on traders' product offerings inevitably has the effect that there is less natural variety in the market.

11.5 The Government does not appear to take issue with auto-renewing contracts in themselves, and the evidence set out in the Consultation does not seem to us to support the introduction of such a requirement. If the Government has concerns about whether

[36] That is, information that the "order or agreement is for a subscription contract and specific information on explaining or indicating the minimum contract terms and price per billing period; whether the contract will auto-renew or auto-extend at the end of the contract term; and any minimum notice period for cancellation."

consumers understand the nature of auto-renewing subscriptions, the more proportionate solution is transparency. If the Government's other proposals about transparent information and/or express consent (including the additional reminders that would need to be given to consumers before a subscription automatically renews[37]) are adopted, should that not be sufficient to mitigate the Government's concerns in this area? Transparency-based solutions of this sort are also more consistent with the existing UK concept of the average consumer, as we have explained.

11.6 If the Government does proceed with these proposals, further clarity as to the extent of the requirement is required. It is, for example, unclear to which subscription contracts this would apply: would this requirement apply to monthly subscriptions, where the premise for the product is that a rolling subscription is offered and the price per billing period may be small?

12. Long-term inactive subscriptions

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

12.1 The Consultation provides no evidence that "long-term inactive subscriptions" are a significant problem, or that – if they are – that this justifies market intervention. There are various assertions in paragraph 2.25 of the Consultation to this effect, but no references to supporting evidence are provided. For example, while it doubtless is the case that it can be distressing to dependants where "deceased individuals continue to be charged subscriptions while the trader is uninformed of their passing", no information is provided as to the scale of the problem or as to how the issue is currently addressed in practice.

12.2 The proposal also seems to us to ignore the differences in subscription models that exist. While some subscription products may well demand active interaction by the consumer with the relevant service (for example, a subscription to a TV streaming service where the viewer regularly selects programmes to watch or download), others do not (for example, a subscription for a physical magazine or newspaper, which is posted to the consumer's address). Even in the case of digital products, some are designed to "run in the background", without making significant demands for user engagement or on system resources. Others may, by design, only be intended to be accessed infrequently (for example, a subscription to an online prescription, medical advice or GP service, which the consumer will only access if they have a problem but which the consumer may, nonetheless, want the comfort of knowing they have a subscription for whenever it may be needed).

12.3 It is also the case that certain companies might not have the ability to detect inactive customers or, if they are able to identify them, to contact them (which relies on the consumer having provided the trader with up-to-date contact information and the company holding that personal data, in compliance with the law).

12.4 It follows that, before any broad-brush requirement in relation to "inactive" consumers is adopted, serious consideration needs to be given to what constitutes inactivity across

[37] Paragraphs 2.19 to 2.24 of the Consultation.

different markets for subscription products, and what such a requirement would mean, in practice, for each. Would, for example, a newspaper or magazine publisher be required to carry out checks to confirm that a subscriber was still receiving their daily or monthly publication (e.g. that they had not changed their address)? How would that work in practice? For digital subscriptions, particular thought needs to be given to situations where (i) individuals have chosen to bundle subscription products and/or (ii) products are not intended to have constant user engagement (e.g. anti-virus software or cloud storage services which run in the background). In our view, before new legal requirements are introduced, sector studies should be undertaken to ascertain whether there should be sector specific rules on this issue. It may well turn out, based on such a review, that action is not required, or that more proportionate/tailored solutions are appropriate, as the Government intends to adopt in relation to its tailored "codes of conduct" for certain digital businesses.[38]

12.5 Separately, the proposal, as we understand it, is that a trader should have to "give notice of suspension of service and to stop charging money for the consumption" in circumstances they had detected that a subscription was "inactive". The termination of a subscription service could have harmful consequences for the consumer in some situations (for example, where this resulted in the consumer being denied access to healthcare services for which they had subscribed). This could, in turn, expose traders to the risk of liability for problems which then arose from the cancellation of the service (for example, in the case of a patient who no longer received the medicine that she was expecting, or whose laptop was hacked because software was not updated). Please see our response to Q41 below regarding exemptions to the proposed rules.

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

12.6 Please see our preceding answer in relation to our general concerns with this proposal.

12.7 Inactivity would likely depend on the product used and the term length. For example, inactivity for a monthly subscription will likely be shorter than inactivity on an annual product, but there are likely to be more notifications of renewal provided to monthly customers, and such products may have characteristics that lend themselves more to regular customer engagement.

12.8 Again, the answer may depend on the sector.

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)?

12.9 The scale of this issue and level of difficulty consumers experience in cancelling contracts is not clear from the evidence presented in the Consultation. However, we note that entering into a contract and cancelling a contract are different processes entailing different considerations (see further below).

[38] For example, to address the specific concern outlined in the Consultation regarding deceased individuals continuing to be charged for subscriptions that they took out while they were alive – if this is genuinely felt to be something that requires market intervention – then a new requirement could be introduced requiring a trader to provide prompt cancellation and refund where a family member or other dependent of the deceased gets in touch.

12.10 We further note that traders are required by law to ensure that a 14-day cooling off period is provided for consumers to cancel the contract and be refunded. Many traders extend the statutory cooling off period in their own terms and conditions or *via* voluntary refund policies. During the cooling off period, it should be straightforward for customers to cancel the contract. Once the cooling off period has expired, businesses should be entitled to account for the transaction as a sale and to rely on average consumer understanding what they have signed up for. Further additional protective measures are not necessary.

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?

12.11 The proposal is that traders should be required to offer cancellation mechanisms that are automated, which require the consumer to input only the information essential to process their refund (assuming payment has already been taken), and which are simple, straightforward ("with a minimum number of clicks") and easy to find. Again, it is important that a balanced approach is taken which does not diminish the potential long-term benefits for consumers that certain additional information for businesses may enable. For example:

(a) Businesses often seek to understand why a customer who has chosen to terminate or not to renew a subscription had made that choice. This is legitimate and helps businesses design better products. Any requirement that the consumer input only "essential" information should not prevent this. Businesses may also seek to offer a consumer who is planning to terminate a subscription a better deal in order to stay. Again, this seems to us to be a legitimate practice that can operate to consumers' benefit (by allowing them to access an ongoing service at a better price or on better terms). Provided that the effect of doing so is not to make the exit process unnecessarily complicated, we would again recommend that this be allowed to continue. The bottom line is that against the backdrop of also the efficiencies introduced by subscription-based digital services that are demanded by customers, traders should be given the opportunity to offer their customers a better deal and/or seek to address their concerns/reasons for exiting; a fully automated solution may not allow for this.

(b) We consider that focusing on the "number of clicks" to exit is unduly simplistic and therefore not an appropriate standalone measure of how easy it is to exit as compared to enter a contract and is overly prescriptive. Unwinding a contract may well involve technical and product specific elements which require more considerations and "steps" to protect both the consumer and the trader.

(c) More generally, introducing automated systems could require significant engineering and web design work that could take some time for traders to implement. It could prove to be technically challenging and expensive, especially for smaller businesses. If such requirements were introduced, then there would need to be a substantial implementation period to allow relevant businesses to adapt their current practices.

12.12 In addition, we note the following:

(a) Some consumers, particularly older consumers (who may be vulnerable), may prefer to call customer support to cancel their contract. The focus on an automated solution is likely to be more suitable for certain sub-categories of consumers and is unlikely to be suitable for all.

(b) The Government needs to be clear on the difference between exiting a contract and claiming a refund; these are two distinct processes. There may be legitimate reasons for a customer to claim a refund for a previous term, without the customer also wishing to cancel an upcoming term. Paragraph 2.28 of the Consultation appears to conflate these processes, i.e. that processing a refund should be part of the same process as cancelling.

(c) Again, automated systems may be better suited to some products than others – so a one-size fits all approach is likely to create unintended issues for traders.

13. Scope and exclusions

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

13.1 We consider that the exemption should be broader to include potentially small businesses, monthly subscriptions, and products where uninterrupted supply could cause consumers inconvenience or harm (e.g. healthcare applications, password protectors, drop boxes, anti-virus software). The Consultation refers to exclusions for certain insurance products, for example home and motor insurance. We believe that all regulated financial services products and activities should be excluded from the scope of these proposals.

14. Fake reviews

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?

14.1 The definition of "fake consumer review" is central to this question.

14.2 We consider that "fake consumer review" should be defined to cover a review that is not an actual consumer's honest and impartial opinion on a product, service or business, or does not reflect a consumer's genuine experience of a product, service or business. Also, it should cover incentivised reviews for which the consumer has received (or will receive) payment, reward or other inducement on condition that they leave a review; in each case, where this may lead to consumers being misled.

14.3 However, we do not consider that the definition of "fake consumer review" should include reviews by technical experts or endorsements by online influencers which will be clearly labelled and identifiable as paid-for content. In general, there are already

transparency-based protections in place to make it clear that this kind of content is in return for some incentive, so the risk of consumer harm is already addressed.

14.4 Assuming that "fake consumer review" is defined in the way we have identified, we do not think that (a) ("*commissioning consumer reviews in all circumstances*") is proportionate for the reasons cited in the Consultation (i.e. not all commissioned reviews are "fake").

14.5 We think that (c) ("*commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services*") is preferable given the safeguards that the review must in fact be "fake" and may lead to consumers being misled; it captures all potential malpractice by including "incentivising".

14.6 However, this is subject to an important caveat. In our view, it is important that the focus of any new prohibitions is on traders which actively commission or incentivise such reviews. Conversely, we do not agree with the proposal that "*Hosting consumer reviews of a good or service without taking reasonable and proportionate steps to ensure that they originate from consumers who have actually used or purchased that good or service*" should be added to the list of prohibitions in Schedule 1 to the CPRs, for the reasons explained in response to Q44 below.

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?

14.7 The response to this question depends on what is meant by "fake reviews" – see comment above.

14.8 If, for example, paid endorsements by influencers or reviews by technical experts, which are transparently disclosed as such, are not excluded from the definition, that is likely to have a negative impact on, in particular, smaller businesses who rely on social media mentions to promote their business and products. This is disproportionate to the 'harm'. As above, we do not consider that such reviews should fall within the definition of "fake reviews"; there are already protections in place to make it clear that this kind of content is in return for some incentive, so the risk of consumer harm is already addressed.

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?

14.9 The Government is proposing that businesses that host consumer reviews must take reasonable and proportionate steps to ensure that the reviews originate from consumers who have actually used for purchase that good or service. In our view, this would be a significant departure from the status quo, imposing strict criminal liability[39] on intermediaries in respect of third-party content hosted on their sites and, accordingly, introducing an effective legal obligation to monitor and remove fake reviews from their sites and applications – an obligation which, as explained below, may in practice be impossible to discharge. Such a decision would be inconsistent with the long-

[39] Although enforcers of the CPRs often prefer civil enforcement routes to tackle business practices which they consider to be non-compliant, it must be remembered that the CPRs create criminal offences; and, in the case of breaches of Schedule 1, these are effectively strict liability in nature.

established requirements for intermediary service providers under the E-Commerce Directive (2000/31/EC) which, pursuant to Article 15(1) of that Directive, are under no general obligation to monitor the information which they transmit or store, nor actively to seek facts or circumstances indicating illegal activity.

14.10 There would be a risk of creating diverging obligations on international businesses operating in the UK and in EU Member States if such businesses were required to monitor the information which they transmit or store, or actively to seek facts or circumstances indicating illegal activity.

14.11 The imposition of strict criminal liability in such cases is especially problematic, because in many cases an intermediary service provider will have no, or only a very limited, ability to assess whether a review is genuine or not. If a consumer posts a review on an online marketplace, how can the operator know what motivated the content of that review?

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?

14.12 If this is intended to cover traders actively offering or advertising the trading of fake reviews, then this is already likely to breach of the CPRs. It is therefore unclear to us why Schedule 1 needs to be amended. In any case, such a requirement should not cover traders whose sites are being used by others to host or facilitate the trading of fake reviews, given that, in UK law, intermediary service providers cannot be subject to general monitoring requirements.

15. Preventing online exploitation of consumer behaviour

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?

15.1 As a starting point, we repeat that the average consumer, as defined in law, is reasonably well informed and reasonably observant and circumspect. They are aware of the need to be careful when purchasing goods and services. This definition is a bedrock of UK consumer protection law, and the Consultation does not disclose any intention to rewrite it. That being the case, the concepts discussed in relation to Q46 are inherently problematic.

15.2 This proposal raises issues around how behavioural techniques would be defined and enforced – i.e. what is permissible and what is manipulative? Some sort of causal link would need to be established between the technique and consumer behaviour, and then proven to cause detriment. This would require the specific evidence to be presented (i.e. specific to the product and market and not merely having regard to experimental psychology, which often has no salience beyond the particular context in which an "experiment" was conducted). It is apparent, as accepted in the Consultation, that more research in this area is required. We consider transparency-based solutions would be preferable – for example, around the use of algorithms – particularly in the case of online markets in which given the array of choice available, businesses may be more

focused on being able to offer customers efficient and targeted services that are meaningful to them as a way of enhancing the overall consumer experience (and which are also therefore pro-competitive).

16. Balancing burden on business

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

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?

16.1 The patchwork of regulators with consumer powers creates a risk of inconsistent approach and makes the general consumer enforcement landscape more confusing for consumers, as there is no single answer as to who might take action on particular conduct. Some traders may be caught between action threatened by more than one regulator.

16.2 Potential impacts of the proposals include additional red tape, onerous compliance requirements, disincentive for investment in UK and investment in innovation to benefit consumers in the UK, particularly in circumstances where the Government is seeking to 'build back better' and level up. Certain proposals (requiring business to design their website within narrow parameters or adopt automated process) could have a disproportionate impact on small or new businesses – particularly in the case of online businesses competing at a pan-European or indeed global level.

CHAPTER 3: CONSUMER LAW ENFORCEMENT

17. Empowering the Competition and Markets Authority to enforce consumer law directly

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

17.1 It is difficult to answer this question without the detail of the proposed appeal process and how it would operate in practice.

17.2 In principle, empowering the CMA to enforce consumer protection law directly rather than through the civil courts may make certain aspects of enforcement more flexible and efficient. However, the proposals – taken at their broadest – would give the CMA a level of power which demands robust judicial checks and balances. It is therefore unclear whether such additional powers and the resulting additional regulatory burden on business when required to engage with those powers – particularly when considering the full suite of Government's proposals also to increase significantly the CMA's competition law powers and to introduce a separate regulatory regime for certain digital businesses – will actually help to bring infringements to an end more quickly.

17.3 At the very least, the need for fair, transparent and open processes is clear, in which businesses are fully able to justify their conduct and appeal the CMA's decision.

17.4 On a practical level, the CMA would also need to be properly resourced to enforce consumer protection law directly and effectively – and in a way that is not simply an unnecessary extension to what is already a very powerful competition law regime.

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

17.5 A clear and transparent process is key, ideally with indicative staging posts, open communication with the target company as part of the decision-making process, and clearly stated expectations from the start of and throughout the process. The scope and provision of information requests (and any resulting penalties) needs to be commensurate with the scale of the proceedings and the investigation timeline. The ability for the CMA to enforce consumer law directly through an administrative system needs to be balanced with procedural protections for defendants, and an appropriate appeal mechanism.

17.6 By way of comparison, certain safeguards are built into the FCA enforcement regime to ensure fair decision-making. For example, contested decisions are made by the Regulatory Decisions Committee (***RDC***) (which operates separately from the FCA's enforcement division, and comprises practitioners and non-practitioners drawn from a spectrum of business, consumer and industry backgrounds). The separation of the RDC from FCA enforcement ensures that final decisions are not made by FCA staff who are recommending action against a firm or individual. A subject of an FCA enforcement decision has the right to refer the matter to an independent tribunal for a full hearing (rather than just challenges on points of law). Settlements are reached in the majority of FCA enforcement actions without recourse to the full enforcement process, but there is also the option for a subject to reach a partial "focused" settlement based on the factual background, or liability, or some (but not all) of the alleged breaches, whilst

referring remaining issues to the independent tribunal to determine. The Government should consider whether a separate unit within the CMA should similarly be set up.

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?

17.7 The consumer law regime includes criminal penalties, and so appeal rights and scope of judicial scrutiny should be strong. This is all the more important if the CMA operates under an administrative model.

17.8 We consider that the appeal body should be able to: (i) review issues of law and fact relevant to the appeal before it; (ii) admit fresh evidence (not before the CMA); (iii) quash decisions of the CMA on legal and factual issues relevant to the appeal before it; (iv) substitute its own decision for that of the CMA or to take any other step that the CMA could have taken. Similar points to those made in response to the appeal of the CMA decisions in relation to non-compliance with investigative and enforcement powers apply in response to this question. Further, we consider it is important that the enforcement of any decision against a trader is suspended pending the outcome of the review/appeal process – otherwise, given the size of the fines that are envisaged, a business could take a very significant financial hit (and maybe even go out of business) in circumstances where the appeal tribunal ultimately found that it had not breached the law. Likewise, careful consideration would need to be given to the extent of publicity, pending any appeal or review.

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?

17.9 A specialised tribunal may be more efficient given existing pressures on the High Court. However, many of the same issues of law arise in private actions by individual consumers (relying on, for example, the Consumer Protection from Unfair Trading Regulations 2008). Therefore, having the High Court hear appeals of administrative decisions by the CMA could facilitate consistency in the interpretation of consumer protection law. We note that the High Court (a generalist court) has previously grappled with challenging questions of consumer law, providing clear and reasoned judgments that have been important for both regulators and the regulated when it comes to understanding firms' legal obligations.

17.10 Consideration needs to be given as to who bears the cost of an appeal. It is not clear from the Consultation whether it is envisaged that the normal costs rules (costs follow the event) would apply in circumstances where a business appeals a decision by the CMA. If the costs are to be borne by the appealing business, this will create unfair disincentives on businesses to challenge the CMA and could, in particular, result in significant financial hardship for SMEs.

18. Strengthening sanctions for breaking the rules

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?

18.1 Currently, the contempt-based sanctions carry the ultimate threat of criminal fines and individual imprisonment, which likely serve as an effective deterrent against non-compliance. It seems likely that companies would prioritise compliance in any case, without the need for additional fines.

18.2 In our experience, businesses do not deliberately slow down or obstruct investigations; they actively want to co-operate with the CMA in order to maintain positive relations and reach a mutually satisfactory outcome. Sometimes, however, the burden on businesses in terms of complying with information requests can be extremely high, given the very short deadlines coupled with very extensive requests that may entail input from a large number of individuals from diverse areas of the business. The issue is all the more acute given the significant parallel proposals for reform envisaged by the government in its competition, digital markets and consumer law proposals. Our experience is that companies exercise their best efforts to comply, but such requests often need to be dealt with by the same individuals 'on the ground', engaged in running the business, which can prove challenging.

18.3 Therefore, the introduction of fining powers would not necessarily have any positive impact on the timeliness of investigations: on the one hand, this could result in parties sacrificing comprehensiveness or quality of response for speed. On the other, parties may take even longer to provide responses due to the additional time needed to verify responses. Furthermore, the penalties are potentially extremely disproportionate and could create perverse incentives for the CMA. It is doubtful whether such an approach is in fact proportionate to the nature of the breaches in question.

18.4 The civil penalties based on a turnover to a maximum of 1% annual turnover and a daily additional penalty of 5% daily turnover while non-compliance continues seems significantly disproportionate in the case of a failure to comply with information gathering powers. Information requests and the process for document gathering and review can be extremely time-consuming and complicated in a large organisation, even when reasonable efforts are being made to provide a response as efficiently as possible.

18.5 In the financial services sector, the FCA does not usually use its fining powers to deal with a failure to comply with information requests, although the FCA could view the failure as a failure by a firm or individual to cooperate with its regulators (which would be a breach of a FCA and PRA rules). A failure to comply with a compulsory information request can be dealt with as a contempt of court or, in some circumstances, a criminal offence under the Financial Services and Market Act 2000. Use of these powers are extremely rare. In practical terms, the FCA typically seeks to negotiate the scope and timeframes of information requests.

18.6 It is also unclear why the Secretary of State is to decide how turnover is to be calculated when ordinarily it is possible for others to do this.

18.7 The introduction and use of such powers must be proportionate to remedying identified concerns. This proposal would give the CMA a level of power which demands a robust appeals process. Again, the need for fair, transparent and open processes is clear.

18.8 As above, on a practical level, the CMA would need to be properly resourced to enforce consumer protection law in the way proposed. Further, our experience is that, on occasion, information requests received from the CMA in consumer cases have not always been as well targeted as they might have been, which can render compliance with the terms of the request very difficult (especially on tight timelines). Although now increasingly uncommon also in competition cases, the sharing of draft information requests with businesses in appropriate circumstances is to be encouraged, and would become even more important in circumstances where non-compliance with the letter of an information request could result in a significant fine being imposed directly on the trader.

18.9 In light of the above, we consider that the Government should examine in more detail the necessity and proportionality of such a reform and consider potential unintended consequences which could run contrary to the overall objectives of the Consultation and impact on businesses' fundamental rights.

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

18.10 We do not think there should be a formal process for agreeing undertakings that include an admission of liability. In practice, we suspect that any mechanism to agree undertakings that included such an admission would not be well-used:

(a) An agreement by a trader to an undertaking does not mean that they acknowledge that there is any liability, nor should it. In many cases where undertakings are agreed as a way of resolving a matter, there nonetheless remains a genuine disagreement between the enforcer and the trader as to whether consumer law has been breached; so why would a trader agree to the inclusion of an admission?

(b) From a trader's perspective, there is the threat that admissions of liability would open the door to direct consumer claims and/or cause serious reputational harm (headlines about admission of non-compliance), both of which might again deter agreement and/or the use of such a mechanism.

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?

18.11 It is unclear why this would need to go further than enforcement for a breach of an undertaking without an admission of liability if the effect of the undertaking (i.e. what the trader promises to do/not do) is the same.

19. Supporting consumers enforcing their rights independently

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

19.1 It would be helpful to define what is meant by "vulnerable consumers".

19.2 In the UK financial services sector, the FCA has considered consumer protection in the context of vulnerable customers in detail. Firms are obliged to treat all customers fairly in the regulatory regime and have been told to consider any characteristics that make particular customers vulnerable. The FCA considers that a vulnerable customer is someone who, due to their personal circumstances, is especially susceptible to harm – particularly when a firm is not acting with appropriate levels of care. The FCA views vulnerability as a spectrum of risk. All customers are at risk of becoming vulnerable, but this risk is increased by having characteristics of vulnerability. These could be poor health, such as cognitive impairment, life events such as new caring responsibilities, low resilience to cope with financial or emotional shocks and low capability, such as poor literacy or numeracy skills. Similar criteria could be used in relation to any CMA consumer legislation.

19.3 In the context of financial services, the concept of vulnerable customers in the FCA scheme is quite fluid – there are no hard obligations to treat vulnerable customers in a particular way relative to 'non-vulnerable' customers, but it is a factor to be taken into account in all aspects of firms' conduct.

19.4 In the financial services context, there is rarely any need for alternative dispute resolution (***ADR***), as consumers can complain and have their complaint dealt with within a framework set out in the FCA rules, and if they do not like the outcome they can refer the matter to the ombudsman. The Financial Ombudsman Scheme is free for all consumers to use and firms are obliged to inform all customers of the firm's internal complaints handling process and the option of the Ombudsman. Both these features help vulnerable consumers to benefit from ADR.

19.5 From our *pro bono* work, we know how difficult it is, even for those who are not vulnerable, to know what ADR is available for which businesses. This is a real barrier to being able to seek redress. However, the proposals do not address this issue and will still result in a patchwork of coverage. An answer would be to streamline the process across all sectors for consumers. This may be especially relevant in the case of online markets in which consumer "sign-up" processes are necessarily likely to be more automated and applicable to all businesses in any given "sector".

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?

19.6 We agree that there are some complaints that are complex and may take businesses longer to resolve, and that referring a complex case into the ADR process prematurely before the facts are established could introduce delay later in the process. We consider that the eight-week period should be retained for certain industries where complaints are likely to be complex (e.g. telecommunications).

19.7 We do not consider that it is possible to find a one-size fits all solution to this issue.

20. Collective redress

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?

20.1 It is unclear on what the Consultation is seeking views in this question. Is it referring to the regime under the Consumer Rights Act 2015 (***CRA***) or to representative actions under CPR19.6, or to group litigation orders or other means of collective redress?

20.2 Although there are good reasons for collective redress such as enabling individuals to seek redress where otherwise the cost and process may be a deterrent, collective redress may not always help consumers receive compensation, and certainly not quickly. Collective redress poses its own issues, for example: (1) the time involved in the process, which could take up a number of years; and (2) involvement of third-party funders and the use of conditional fee agreements by claimant law firms, which can affect how much compensation actually reaches consumers at the end of the action, and will affect which claims are brought.

20.3 To the extent the Government is considering extending the collective proceedings regime under the CRA from competition to consumer law, we consider that this would be premature prior to a proper assessment of whether and the extent to which the existing regime is meeting its underlying policy objectives (including in light of key recent judgments such as that in *Merricks v Mastercard*[40]). Only following any such assessment could an informed decision be taken about the costs and benefits of any potential extension of the regime to consumer law or other areas. It may be more efficient and effective for any such assessment of the current competition regime to be conducted once proposed collective proceedings that are currently before the CAT are further progressed, particularly beyond the "certification" stage (with the CAT expected to give certification decisions in many of those cases over the remainder of this year and into 2022). In particular, those pending competition collective proceedings include several that have been brought on behalf of proposed consumer classes and/or that relate to alleged infringements of competition law for which there is no separate competition infringement decision and which allege novel consumer-facing theories of harm. Allowing the time to take into account these developments would ensure that an assessment of the existing competition law procedure can be undertaken on an effective and efficient basis before any consideration is given to expanding it.

20.4 We also note that, looking at the issue more internationally, the EU's Representative Actions Directive (***RAD***) will be in force across all Member States by the end of 2022. That will mean that all EU countries will have some form of consumer redress in a wide range of areas and that cross-border "opt-in" class actions will be permitted across the EU. However, having left the EU, the UK is not bound to implement the RAD into its own legal system and is obviously at liberty to reach its own decisions about how to secure access to justice for consumers, and to balance that against the potential impacts for business and the economy.

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?

[40] *Merricks v Mastercard* [2020] UKSC 51.

20.5 Again, it is unclear what the proposal is here. Representative actions are already possible in English law in certain areas provided that they meet the same interest test set out in CPR 19.6.

20.6 Making it easier for private and consumer organisations to bring collective redress cases in addition to public enforcers could:

(a) enable consumers to have greater choice potentially of organisations who can help to bring claims. However, more choice may lead to more uncertainty as to whom a consumer should turn to. Where third party funders are involved and/or where claims are brought on a contingency fee basis, there may be concerns as to how much compensation will actually reach consumers at the end of the action; and

(b) place a higher burden on businesses if this leads to a higher volume of claims for collective redress, unless appropriate checks and balances are integrated to avoid unmeritorious claims. This is a particular concern for "opt-out" claims (where all consumers who meet a certified class definition automatically form part of the class/the claim unless they positively choose to remove themselves from it). Such checks and balances could include minimum standards that claimant bodies must meet, in order to avoid conflicts of interest (see below); the use of "opt-in" rather than "opt-out" mechanisms; clear criteria for the certification of a class action, with these assessed at an early certification hearing (allowing unmeritorious or non-qualifying claims to be rejected at an early stage); and controls on funding.

20.7 We note that the Supreme Court is currently considering issues of this sort, for certain types of representative action, in the case of *Lloyd v. Google*.[41] It could therefore be premature for the Government to introduce any changes at this stage.

20.8 The competition collective proceedings regime that was introduced in 2015 does not expressly limit which private individuals or organisations or consumer bodies could be "Proposed Class Representatives". This is unlike the previous opt-in competition regime in the CAT, which was limited to approved consumer bodies, the only one of which was the Consumer's Association, also known as Which?. However, the CRA regime nevertheless requires, as a condition of certification, that it is "just and reasonable" for the applicant to act as a class representative, and sets out a number of factors for the CAT to consider in this regard (e.g. no material conflict of interest, ability to pay the defendant's recoverable costs if ordered and whether the applicant has a satisfactory plan for the proceedings in respect of notification, governance, consultation and other important matters). The interpretation and application of those and other factors is being considered by the CAT in a number of pending cases. As noted above in respect of Q72, there may, therefore, be a benefit in undertaking a broader review of how the competition regime is working before considering whether, and if so how, it can or should be expanded and/or adapted to consumer law.

20.9 Finally, we note that that RAD imposes minimum standards for "Qualified Entities" which are permitted to bring claims under the new EU regime:

[41] [2019] EWCA Civ 1599.

(a) it must be a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation;

(b) its statutory purpose must demonstrate that it has a legitimate interest in protecting consumer interests as provided for in the provisions of the law annexed to the directive;

(c) it must have a non-profit-making character;

(d) it must not be the subject of insolvency proceedings and is not declared insolvent; and

(e) it must be independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers.

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1 October 2021