JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UK ON COMPETITION LAW

RESPONSE TO BEIS' CONSULTATION ON REFORMING COMPETITION POLICY

01 October 2021

A. OVERVIEW

1. The Joint Working Party ("**JWP**")[1] welcomes the opportunity to respond to the Department for Business, Energy and Industrial Strategy's ("**BEIS**") consultation on "Reforming Competition and Consumer Policy". In the time available, the JWP's response is focused on three areas of the competition policy section of the paper: market studies and inquiries; merger control; and competition enforcement (and more specifically within this area, incentives for leniency; interim measures; settlement regimes; and decision-making).

B. MARKET STUDIES AND INQUIRIES

A more efficient, flexible, and proportionate market inquiry process (Q.4-5, paras 1.45-1.67)

2. We recognise the criticism (at para 1.52) that the end-to-end process for market studies and investigations can be very slow at around 3 years, and we would support measures to reduce the overall timetable. However, it is crucial in our view that the role of the Competition and Markets Authority ("**CMA**") panel members, as independent decision makers, is preserved. This is particularly important given the highly intrusive nature of the remedies available to the CMA in a market investigation (e.g. requiring the break-up up of firms, imposing price controls, mandating third party access), and the fact that these remedies can be imposed even where the firms involved have not broken any laws. Institutional checks and balances therefore play a vital role in the markets regime. The role of CMA panels in providing a fresh pair of eyes, bringing their own professional experience to bear, and making companies that are subject to the investigation process feel "heard", should not be under-estimated.

3. We have a number of concerns about the proposal (at para 1.58 ff.) for the CMA Board to be able to impose remedies at the end of a market study (**Proposal 1**):

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

[1] The members of the JWP comprise barristers, advocates and solicitors from all three UK jurisdictions. The JWP is co-chaired by George Peretz QC of Monckton Chambers (GPeretz@Mockton.com, tel 020 7405 7211) and Brian Sher, Partner, CMS (brian.sher@cms-cmno.com, tel 020 7524 6453).

- For the same reasons we believe that parties likely to be affected by remedy proposals should have a sufficient level of access to the decision maker before final decisions are taken, to ensure that their voices have been properly heard. It is not clear to us how this concern would be accommodated if the CMA Board were to be the decision maker. Even if decisions were to be delegated to a committee of the CMA Board, we are sceptical – based on experience of other CMA processes - about the level of meaningful access that parties would have.

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

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

- Although the Consultation Paper suggests (para 1.61) that the CMA Board would provide a fresh review or 'second pair of eyes', we do not think this is in any way comparable to the level of independent review that a CMA panel would provide.

4. We believe the markets regime could be made more efficient if the CMA Board were to be more directional in scoping the terms of reference to focus on key issues, instead of effectively giving the CMA panel a blank canvas. Para 1.62 suggests that the regime could be made more efficient if the CMA had greater flexibility to do this, but it seems to us that the CMA already has this flexibility. The question in our minds is: why is it not being used?

5. We also think the regime could be made more efficient by scrapping the current market study phase and moving straight to a market investigation once the relevant evidential threshold (reasonable grounds to suspect that one or more features of a market are giving rise to an AEC) has been reached. Alternatively, certain of our members consider that if the market study phase is to be retained, there would be merit in doing away with the current requirement to reach a view on whether it is likely to make a phase 2 reference within the initial 6-month period, as this tends to make the second half of the market study process a somewhat formulaic exercise.

6. However, we do not support the proposal (para 1.63 ff.) to replace the current regime with a new single market inquiry tool, at least in the way suggested in the Consultation Paper (**Proposal 2**). In particular, we are concerned by the suggestion that CMA panel members would only be brought in at the Provisional Findings stage, if binding remedies are under consideration.

7. In our view, it is unrealistic to expect CMA panel members to be able to scrutinise the evidence in any detail and get fully up to speed with a complex case in the final months of

a market investigation from a standing start. In practice, we expect CMA panel members will have to rely heavily on summaries and advice from CMA staff members (who will inevitably be invested in a particular outcome), undermining the ability of panel members to play a truly independent hands-on role. The risk is that the CMA panel process becomes little more than a rubber-stamping exercise.

Interim measures in market investigations (Q.6-9, paras 1.73-1.88)

8. In previous discussions with BEIS officials in December 2019 we outlined our reservations about giving the CMA the power to impose interim remedies in the early stages of a market investigation (or still worse, at the market study phase). We offered some examples of cases where apparent competition concerns identified in the early stages of a market investigation subsequently turned out on closer analysis not to give rise to justifiable concerns, and we noted the risk of poorly targeted interventions and over-enforcement if the imposition of remedies is based on those early-stage concerns. That remains our view. We illustrate this concern with two examples:

    - In *Energy*, the phase 1 'State of the Market' study carried out by the OFT, CMA and Ofgem identified concerns about vertical integration and tacit coordination among the Big 6 energy suppliers. Indicators of tacit coordination were said to be the clustering of price announcements and the phenomenon of 'rocket and feather' pricing. But mid-way through the phase 2 market investigation, the CMA dropped both these issues. Had the CMA imposed interim remedies to deal with these apparent concerns, this would have resulted in unjustified over-enforcement.

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

9. In our previous comments to BEIS we also noted that allowing the CMA to impose interim remedies in a market study raises important issues of fairness. The market study process lacks the same level of formality or transparency as a full market investigation. Even though submissions from all parties are now routinely posted on the CMA case page, as a main party involved in the process one often has no real idea how the CMA's thinking is developing until the interim report stage; there are no formal hearings; and there is often very little (if any) access to the decision maker. So in summary, the concerns that we identified in 2019 remain relevant today and our answer to Q.6 is 'no'.

10. On the other hand, in cases with a predominantly consumer law focus, such as the recent case of *PCR Travel Tests*, we accept there is a need for the CMA to be able to act quickly, such as by making recommendations to Government, and taking action itself using its consumer law enforcement powers, to prevent consumer harm.

11. We also see the logic in allowing the CMA to accept binding commitments at any stage in the inquiry process (Q.7). That seems to us to be a sensible and relatively uncontroversial measure that would allow inquiries to be wrapped up more quickly where there is a clear consensus on appropriate remedial action. On the other hand, one should recognise that this will only work where all relevant market participants are willing to sign up to the commitments, which may not be straightforward to achieve.

12. We would also favour giving the CMA more flexibility to design and review remedies, and we see merit in requiring businesses to participate in implementation trials, provided these are kept within reasonable bounds and do not impose unnecessary costs on firms involved (e.g. in terms of new systems design and implementation) (paras 1.81-1.83).

13. Similarly, we think there is a case for allowing the CMA to review remedies e.g. to clarify their operation, release some of them, or modify them in a way that reduces their impact, without needing to undertake a further market investigation provided appropriate safeguards are put in place, such as cooling-off periods to prevent perpetual reviews (paras 1.84-1.87). However, we would be concerned about giving the CMA a free hand to devise new remedies to address historic problems without a thorough review by independent CMA panel members.

C. MERGER CONTROL

Revised jurisdictional thresholds for UK merger control (Q.10-11, paras 1.92 – 1.111)

14. **Increase in the current turnover threshold**. We regard the increase in the turnover threshold from £70 million to £100 million to adjust for inflation since the introduction of the current threshold as sensible and uncontroversial.

15. **Introduction of safe harbour for small business**. The introduction of a safe harbour for small business is plausible but given the low thresholds of £10 million worldwide turnover, we wonder whether this safe harbour will have any relevance in practice. Members of the JWP have come across very few if any cases in the last few years which would have benefitted from the safe harbour. The CMA will have better data to assess the right level of the threshold but we would suggest that the test should be focused on activities in the UK.

16. **Introduction of new share of supply test**. The Consultation Paper makes the claim that *"the share of supply test in its current form may not allow the CMA to reliably review [mergers which facilitate the leveraging of market power across different products or services]"* (para 1.103 and 1.104). We agree that, conceptually, the current share of supply test has a blind spot regarding vertical and conglomerate mergers for targets with a turnover in the UK below the relevant thresholds. However, in practice the gap has been closed to a large extent by the very extensive interpretation of "share of supply" which has enabled the CMA to catch vertical and conglomerate mergers.

17. The Consultation Paper is therefore correct in raising the question whether, in parallel, there is a need to "*clarify the share of supply test*" (see para 1.108). In our view, an extension

of the share of supply test to vertical and conglomerate mergers must go hand in hand with a tightening of the scope of the "share of supply" as a meaningful proxy for market power. In the absence of such corrective measure, the new share of supply test would result in an excessively wide scope with only two hurdles: (i) one company needs to have a £100 million turnover in the UK and one company (possibly the same company) needs to have a share of 25% "of something". In practice, this would mean the end of any meaningful jurisdictional test.

18. Even with a tighter and more meaningful scope of the concept of share of supply, the fact remains that, under these proposals, the target does not need to have any nexus with the UK in terms of customers, revenue, employees etc, as all formal jurisdictional elements of the new share of supply test (turnover and share of supply) could be met by the acquirer alone. This means that the substantive SLC test would de facto act as the only nexus test. Given the low threshold for referral to Phase 2 ("reasonable prospect"), the risk of jurisdictional overreach is obvious. We would therefore advocate a separate nexus requirement (e.g., transaction value of the UK part of the target) to address this risk.

19. Given that vertical and conglomerate theories of harm require a higher degree of market power than horizontal theories of harm, we would also suggest raising the threshold for the new (vertical and conglomerate) share of supply test from 25% to 30%.

20. Finally, we think more attention should be paid to consistency between the general proposals for merger control reform in this consultation and the more specific, and far-reaching, proposals in the Digital Markets consultation. We would note certain inconsistencies in approach (the Digital reforms have a nexus text); duplication in policy objectives (both regimes are targeted at killer acquisitions); and we think further consideration should be given to ensuring that the combination of the two regimes does not introduce unnecessary complexity.

Changes to the merger investigation procedure (Q.12-13, paras 1.112 – 1.132)

21. **Merger investigation procedures: general comments**. The current procedural reforms focus on accelerating the overall merger investigation process. While it is helpful to make the process more efficient, there remains a trade-off between speed and diligence. Many merging parties in complex cases are willing to accept a somewhat longer process if this ensures that issues are considered carefully and diligently and are not unduly rushed. This may be one reason (along with the limited saving in time) why there has been limited take up for the 'fast track' merger route which the Consultation Paper discusses in paras 1.119 – 1.123. Changing the process so that the parties would not be required to formally accept, for the purpose of the Phase I investigation, that the merger could result in an SLC, is helpful, but does not change the fact that parties may wish to ensure that issues are considered diligently and that they are not rushed into Phase 2.

22. There are other critical issues in the UK merger investigation procedures which prevent an efficient review process, most importantly a proper and open discussion of the concerns which a particular transaction raises, similar to the Statement of Objections in the EUMR process. In the UK, the Issues Statement comes too early in the process to play this role while the Provisional Findings come too late, when the Panel's mind has largely been made

up – this is clearly evidenced by the evidence on the (lack of) rate of change between the Provisional Findings and Final Report. A reform at this level would have a more significant impact than the proposed changes which are merely aimed to reduce the time from start to finish.

23. **Allowing binding commitments earlier during Phase 2 (paras 1.115 – 1.117)**. Such a possibility exists in other jurisdictions, e.g., the EUMR and would add welcome flexibility to the process. That said, such an opportunity would normally be relevant for cases where things have not gone to plan, including because the parties were timed out by the tight deadline for offering UILs during Phase 1. Thought needs to be given how "early Phase 2" cases can be distinguished from "normal Phase 2" cases, including at what stage remedies could be offered. For the EUMR, this dividing line is the Statement of Objections; it is less obvious what the dividing line would be in the case of the CMA merger control process.

24. **Greater flexibility to extend the timetable (para 1.126 – 1.127)**. The Consultation Paper makes the point that *"in some cases greater flexibility in the CMA's statutory timetable might be to the merging parties' advantage"* (para 1.126), citing greater opportunities to coordinate with other regimes in the context of a global merger investigation. We agree with this view and would welcome a change to give merging parties the power to extend the timetable in certain circumstances. The experience under the EUMR with such a mechanism has been largely positive.

D. COMPETITION ENFORCEMENT

25. We deal in this section principally with (i) leniency incentives; (ii) interim measures; (iii) settlements; (iv) voluntary redress; and (v) decision-making.

Incentives for leniency applicants (Q.17, paras 1.159-1.164)

26. The consultation paper seeks views on the merits of providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel.

27. We agree that the CMA's leniency regime, and in particular the immunity from fines afforded to whistleblowers who meet the requisite criteria, is a valuable tool in tackling cartels. We also acknowledge that the increase in private damages claims pursued against cartelists are on the rise, that the sums sought can be very significant (and often eclipse the fines imposed by the CMA), and that a cartelist's potential exposure to such claims may be dissuading some would-be whistleblowers from approaching the CMA for immunity, to the detriment of public enforcement at least in theory, although we do not have evidence of this happening.

28. A policy whereby immunity from fines is extended to immunity from liability for damages would be a very generous prize for immunity recipients – and, we anticipate, an additional incentive to blow the whistle on cartel behaviour. But it would come at a cost to both the businesses and consumers impacted by the cartel, and to the co-cartelists whose exposure

to damages claims would increase as a result. The proposal therefore warrants careful consideration.

29. We make the following observations.

30. First, the notion that a tortfeasor would not be liable to those to whom it has caused harm is anathema to the usual tortious principles of liability in English law. The right to recover damages from parties engaged in unlawful anticompetitive activity specifically, has been clear since at least *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130, and there is now a very substantial body of both UK and EU law on the issue. Any departure from this principle should not be taken lightly.

31. Second, we are not aware of many damages claims brought as follow-ons from CMA cartel decisions. Accordingly, some members believe that there is no clear and obvious evidence that the threat of private damages claims is currently disincentivising immunity applications to the CMA. It might on this basis be inferred that Government's concerns regarding tension between an effective leniency regime and private enforcement stem from the prospect (post-Brexit) of the CMA undertaking cartel investigations in parallel with the European Commission, from which follow-on damages claims tend to be brought, and the anticipation that immunity applicants could be deterred from approaching the CMA going forward. Other JWP members take a different view and believe that companies considering leniency do not differentiate between jurisdictions in thinking about follow on risk and that the disincentive effect is real. The CMA is, of course, best placed to comment on whether immunity applications are already down on previous numbers. If they are, it is likely the reasons for that are many and varied. We would caution against an assumption that damages claims are the only reason, although our experience is that they are often one significant reason.

32. Third, shielding immunity recipients from liability in damages will result in some (perhaps many) businesses or individuals who suffer loss as a result of the cartel conduct being unable to recover compensation. In circumstances where the immunity recipient has deep pockets and its co-cartelists are smaller companies without the means to pay compensation (as was the case, for example, in *Construction Recruitment Forum* (2009)) the upshot of the proposed reforms would be to protect the cartelist at the expense of the victims. This is, of course, a policy choice – but the consequences for those who suffer loss as a result of the conduct are potentially severe if follow on claims from CMA decisions increase as UK enforcement increases post-Brexit.

33. Fourth, if they were good for the money, the proposed reforms would impact on the co-cartelists' damages exposure. That is because, notwithstanding cartelists' joint and several liability, in practice they would usually expect to settle claims based (more or less) on their value of sales to the claimant. In a world where the immunity recipient is shielded from liability for damages, it would fall to the co-cartelists to compensate the claimant for its damages derived from the immunity recipient's "share" of the value of commerce. This may be intentional: it could certainly serve as an added incentive to blow the whistle. But – in the context of potential expansion of CMA competition enforcement and consequent

follow-on damages post-Brexit - it raises questions of fairness vis-à-vis those co-cartelists that should be fully explored.

34. Fifth, the Damages Directive[2] (and the 2017 Regulations transposing it into UK law[3]) already contain provisions seeking to balance the public policy objective of protecting immunity/leniency recipients with the desire to promote private enforcement as a complementary tool to deter cartel activity. Specifically, the Directive includes two important provisions protecting immunity/leniency recipients in damages claims: Article 6(6), which protects their corporate statements and any settlement submissions from disclosure in damages claims, and Article 11(4) which limits immunity recipients' liability for damages to its direct or indirect purchasers, and protects immunity recipients from joint and several liability in certain circumstances. As a result of a long transitional period, the impact of these protections has not yet had much (if any) chance to be felt; we are aware of several instances where the Article 6(6) protections have been invoked to avoid disclosing corporate statements and settlement submissions, but we are not aware of any cases in which Article 11(4) has featured. It is therefore arguably premature to conclude that the balance struck by the Damages Directive, and the provisions of Articles 6(6) and 11(4), are insufficient to protect immunity recipients.

35. Sixth, we anticipate that the CMA will, post-Brexit, begin to conduct cartel investigations in parallel with the European Commission. We do not understand immunity recipients to be shielded from damages claims in other European jurisdictions – in any event they are not so protected as a matter of EU law. As such, it is not clear whether the proposals (which relate only to liability for damages in the UK) would be sufficient to incentivise a whistle-blower to come forward to the CMA in circumstances where they would still face the prospect of damages claims in other European jurisdictions.

36. Finally, if immunity from damages were to be adopted, additional demands might be made of the immunity recipient beyond those required under the CMA's leniency regime. For example, until recently the US provided for de-trebling of damages an immunity recipient must pay to claimants <u>provided that</u> they cooperate with the claimants,[4] inter alia by handing over relevant documents to assist in the claim. Similar expectations for cooperation with the claimants could be considered in the context of this proposal, in return for the generous prize of complete immunity from fines and damages that is in contemplation.

37. As these comments indicate, there is much to be considered in the context of this proposed reform. If adopted as proposed in the consultation paper, it would (we believe) make the UK's leniency programme among the most generous in the world, overtly prioritising the whistleblower's protections above those who might have been harmed by the cartel conduct, and potentially leaving them without meaningful redress. If such a policy is to be adopted, arguably more exacting cooperation (with private damages claimants) might be expected of the immunity applicant. And consideration should be given to a carve-out

[2] Directive 214/104/EU

[3] Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017. See Regulation 15.

[4] Antitrust Criminal Penalty Enforcement and Reform Act 2004, section 213.

for cases where full compensation cannot be achieved from the other cartelists. We would welcome further discussion on this topic before legislation is adopted.

Strengthening the CMA's interim measures powers (Q.18, paras 1.165-1.169)

38. We agree that the CMA's interim measures powers in CA98 cases, as set out in section 35 of the CA98, are unsatisfactory as they stand. That is so despite the amendments to section 35 made by ERRA13 (which allowed the CMA to act in cases where it regarded action as necessary to prevent "significant damage" to particular persons as opposed to "serious and irreparable" damage).

39. As the paper points out, the obvious issue with the section 35 power is its almost complete lack of use. Further, our own experience of advising clients who are at risk of imminent serious harm as the result of conduct by an undertaking that is likely to be in breach of the Chapter 1 or 2 prohibitions is that, if they have the necessary resources and willingness to accept risk, they are far better advised to seek interim injunctions or interdicts in the courts than to approach the CMA.

40. The essential reasoning behind that advice is that the courts in all UK jurisdictions are well-used to granting urgent relief in days or even in hours, and have a flexible set of rules, procedures, and principles that enables them to do so both swiftly and fairly. Those rules and procedures include the ability, in suitably urgent cases and subject to compliance with strict duties of full and frank disclosure and presentation of relevant facts and legal principles, to obtain interim injunctions or interdicts without notice to the other side, or on very limited notice, followed by a return hearing at which the decision to grant interim relief is fully reviewed. In contrast, our experience is that the CMA is unable to move at anything like a comparable speed (and also that delaying proceedings while seeking to engage with the CMA prejudices the claimant's/pursuer's case on urgency in a court application).

41. However, though it is well-established that such remedies are available in cases where a claimant or pursuer is at risk of harm as a result of conduct by the defendant or defender that contravenes the Chapter 1 or 2 prohibitions, the ability of private claimants or pursuers to get such relief still leaves a very substantial enforcement gap. First, in many cases, conduct or threatened conduct contrary to the Chapter 1 or 2 prohibitions will, though risking very significant economic damage to consumers or across the economy, not have a sufficiently adverse effect on any one commercial party for it to be attractive to that party to bear the risks that surround applications for interim relief. Second, the risks that face a private pursuer or claimant are substantial: they include costs or expenses risks but also the necessity, at least in England and Wales and outside the fast-track procedure before the CAT (a procedure that is not available in many cases), to give the defendant a cross-undertaking in damages (in essence, an undertaking that if the conduct at issue turns out at trial not to have been unlawful, to compensate the defendant for the losses it incurred as a result of having to comply with the injunction). The scale of loss that may be incurred under that head is frequently too great or uncertain for potential claimants to be willing to give such an undertaking (and some are simply incapable of doing so, given their resources).

42. We therefore agree that there is a need for the CMA to be in a position to obtain interim measures. We also agree that, as we have already noted, and even moving at speed, the procedural constraints that surround the issue of interim decisions make it impossible for the CMA to move swiftly – and certainly not to do so at the speed at which the courts can move.

43. The paper suggests two reforms to address this problem. We are not attracted by either, and instead suggest a different approach.

44. We note at the outset that fair process is as critical in the case of interim measures as it is in the case of final measures (albeit that interim measures would not be regarded as quasi criminal for Human Rights Act purposes). In particular, the risk of bad decisions – decisions that damage consumer welfare – as the result of failing to hear what is said by the parties concerned is a very substantial one in interim as in final cases: interim measures, in many cases, have permanent consequences, and those consequences can be harmful to consumer welfare as well as beneficial.

45. The first suggested reform is to limit access to the file by defendants. We consider that that reform would not resolve the fundamental problem, while leading to issues of its own. The fundamental problem is that any paper-based administrative procedure, to be fair and – of equal importance – to avoid the risk of bad decisions (see above), has to involve giving the defendant some indication of what is proposed and some window within which to comment. Further, by denying the defendant the opportunity to see the file, the proposal simply encourages appeals in order to obtain such access – and, since claims of procedural error and unfairness will be a basis for a judicial review, such appeals would not be affected by the proposal to restrict the grounds of appeal to judicial review.

46. That brings us to the second proposal, which is to limit appeals against interim measures to "judicial review" only. A very large amount has been written on the extent to which merits appeals in CA98 cases differ, in reality, from judicial review appeals: we would refer in particular to the CAT's paper written in response to the Coalition Government's original proposal before ERRA13 to replace all CA98 merits appeals with a judicial review appeal. But, in essence, we would make the point that it is hard to see that altering the basis of appeals would make much difference in practice: as we noted above, procedural and fairness points will always be able to provide grounds for judicial review (and if successful, are grounds which will almost inevitably lead to quashing of the decision rather than re-making it, the latter course not being appropriate for a judicial review court). Moreover, the question of whether the conduct at issue is capable of being a breach of the Chapter 1 or 2 prohibition is likely to raise questions of law which are within the jurisdiction of any judicial review court.

47. That leads us to our proposal. We suggest that, instead of attempting the (we suspect) impossible task of devising administrative procedures that are both robust against appeal (even one limited to judicial review) and swift enough to compare with what the courts can do, it would be far better and simpler to take advantage of the well-established and familiar principles and procedures on and by which the ordinary courts (and the CAT) grant swift interim relief in CA98 cases: that is achieved by simply conferring power on

the CMA to apply to the ordinary courts and/or to the CAT to obtain interim relief (just as various public bodies, including as a matter of last resort the Attorney General, have power to apply to the court in order to protect the public interest against unlawful conduct or threatened conduct). We suspect that, given the existence of section 35, such a power would have to be set out in legislation in order to remove any argument that Parliament had implicitly denied the CMA such a power by giving it the powers that it has under section 35.

48. We note in passing that the CMA is already familiar with the process of applying to the courts for urgent orders on a without notice or ex parte basis, as it routinely does so in cases where it seeks warrants for entry and search of premises. We also note that, under established principles (see *Kirklees MBC v Wickes Building Supplies* [1993] AC 227), as a public body acting in the public interest, the CMA would not be required to give a cross-undertaking in damages.

49. One objection to our proposal was put to us by the CMA in a meeting we had with it in September 2021: that objection was that it was inappropriate to involve a court in a case which would not then be pursued to trial before that court but which the CMA would then take up itself under its own powers. In response to that objection we note, first, that that possibility already exists: it is entirely possible for a claimant or pursuer to obtain an interim injunction or interdict and then, instead of pursuing the case before that court, to invite the CMA to take up the matter itself. If the CMA does so, the claimant or pursuer would typically be able to persuade the court to stay or sist the proceedings pending the CMA's investigation, leaving the interim injunction or interdict in place. Second, we would suggest that any provision that gives the CMA power to apply to the court or CAT for interim measures also makes it clear that the CMA is not required to take any further step in the proceedings after the injunction or interdict has been obtained and that those proceedings should be stayed or sisted, subject to liberty to apply, provided that the CMA opens and maintains an investigation into the matters at issue under the CA98 (though we would suggest that the CMA should be under a duty to inform the court if it either closes the investigation or comes to the conclusion that the interim order should be revoked or varied).

50. More generally, we do think the CMA should pursue its investigation efficiently and expeditiously if it has the benefit of an injunction or interdict, and consideration should be given to providing for some form of obligation on it to do so, as a *quid pro quo* for the grant of the injunction or interdict. This could be imposed by the court, but consideration should be given to whether provision for it should be made in the legislation.

51. In our view, that proposal would be a far more effective and simple route to achieve the aim of enhancing the CMA's ability to obtain urgent interim relief and to protect consumer welfare than the proposals set out in the paper.

A more effective settlement regime (Q.20, paras 1.175-1.178)

52. The consultation paper proposes, at paragraph 1.178, three ways of improving the efficiency of the existing settlement process. We are broadly supportive of those proposals. We limit our comments to the second proposal, namely that there be the

possibility of preparing short-form decisions in cases where all parties have chosen to settle.

53. We agree that the short-form decisions would be a useful innovation which ought to free up CMA resources for deployment elsewhere. Whilst the trade-off is that victims of the anti-competitive conduct in question may have less material to rely on in subsequent damages actions, overall the CMA ought thereby to be able to investigate and punish a greater number of cartels, in turn bolstering deterrence and bringing to victims' attention their right to redress.

54. It seems to us, however, that the CMA is already in a position to do this: there is nothing in the CMA Rules which requires a 'long-form' decision setting out all of the facts. Provided that the decision is sufficiently reasoned that interested parties are in a position to understand why the case was decided as it was and what conclusions were reached on the important issues: see the cases discussed in Fordham's *Judicial Review Handbook* (7th ed), paragraph 64.3.

A new settlement tool for abuse of dominance investigations (Q.20, paras 1.179-1.182)

55. We are less convinced by the proposal for a new settlement tool for abuse of dominance cases.

56. The consultation paper floats the idea of a settlement pursuant to which the firm under investigation would not contest the proceedings, would accept "certain factual matters", give commitments as to its future conduct and agree to make a "settlement payment" in return for the termination of the proceedings (paragraph 1.180). There would, however, be no requirement on the business to admit to an infringement of competition law; and, despite having accepted some facts for the purpose of the CMA's investigation, the firm would not be bound by those admissions in any subsequent civil claims (paragraph 1.181).

57. The consultation paper expresses the hope, at paragraph 1.182, that settlement payments in such cases would assist in deterring abuses of dominant positions. We are unsure whether this would be the case. The fact that the firms in question would avoid any finding (or admission) of infringement (or even of dominance) would be likely to limit any deterrence effect of such decisions; indeed, it is possible that at least some firms may see such payments as a cost of doing business, at least in circumstances where they adjudge that it would be difficult for the CMA to establish the extent to which they have benefitted financially from the conduct[5] and where, in any event, the payment would presumably (at least in theory) be lower than that which would arise in a standard settlement context (i.e. up to 20% off the financial penalty calculated in accordance with the CMA's penalty guidance).[6]

58. Overall, it seems to us that the existing mechanisms available to the CMA are adequate: in less serious cases, where there is a clean-cut remedy the CMA can accept commitments

[5] Even in the unusual cases where it may be more straightforward to ascertain the extent of financial benefit, setting the level of payments at the level of such benefit will not result in optimal deterrence, given that the chances of being caught must be well below 100%

[6] See Guidance on the CMA's investigation procedures in Competition Act 1998 cases, CMA 8, para 14.31.

without a finding of infringement; in cases of serious abuse of dominance where commitments are less likely to be appropriate,[7] the CMA's resources will be usefully deployed, and deterrence enhanced, in pressing the case to an infringement decision; and in other (less serious) cases, the CMA can close the investigation on administrative priority grounds. Whilst we do not rule out that a mechanism of this kind could be useful – perhaps in some excessive pricing cases where the CMA considers that serious price-gouging has taken place but where the application of the law is notoriously complex – it would be useful to understand further the Government's thinking as to whether there is a real gap in the CMA's enforcement toolkit and how likely it is that this proposed tool would fill it.

Encouraging businesses to offer voluntary redress (Q.20, paras 1.185-1.186)

59. In the more than six years that the voluntary redress mechanism created by section 49C CA98 has existed, no such scheme has been put into effect. Whether that is itself evidence that firms do not have sufficient incentive to put a scheme in place is debateable, given that the collective redress regime in general is still in its infancy and there has thus far been just two CPOs granted, in *Merricks v Mastercard*[8] and *Justin Le Patourel v BT,*[9] and only very recently at that. However, the fact that no schemes have been established thus far is consistent with our own doubt as to whether such schemes will ever be particularly attractive to firms for as long as it remains open to those who have suffered loss to bring their own claims for damages and, significantly, for applications for CPOs to be brought. To be clear, we do not suggest restricting the right to commence proceedings in cases where a voluntary redress scheme has been put in place; we simply query how widespread one can realistically expect voluntary redress schemes to be.

60. Having said that, we can see that providing protection to documents prepared by a business solely for the purpose of seeking approval for and operating a redress scheme may provide some limited additional incentive to establish such a scheme: we see a parallel here with the protection from disclosure of settlement submissions in the context of the CMA's settlement regime,[10] which is likely to encourage firms to make use of the settlement procedure (which, like the voluntary redress mechanism, is something to be encouraged in the public interest).

Decision-making (Q.13, paras 1.129-1.132 and Q.23, paras 1.191-1.195)

61. The consultation considers matters relating to the decision-making process in two places. First, there are proposals to streamline CMA Panel decision-making by creating a smaller, dedicated pool of Panel members and a more limited role for the Panel in the decision-making process: see paragraphs 1.129-1.132 and Q13. Secondly, there is a proposal to remove the requirements in the CMA Rules relating to 'Case Decision Groups', i.e., the decision-makers responsible for deciding whether to take an infringement decision in a Competition Act 1998 investigation. This proposal is intended to allow the CMA more flexibility as to whether it is necessary to appoint at least two individuals not previously

[7] Ibid, para 10.19.
[8] [2021] CAT 28.
[9] [2021] CAT 30
[10] See the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, para 28.

involved in the case to take the final decision, as currently required under the CMA Rules: see paragraphs 1.191-1.195 and Q23.

62. Both of these proposals provide further examples of the importance of procedural safeguards and the need to strike a balance between achieving quicker decisions versus ensuring that the decision-making process remains robust. Concentrating on the former at the expense of the latter will likely prove a false economy since decisions which are not robust will be vulnerable to (lengthy) challenges and the net effect of changes to achieve a quicker 'first instance' decision could therefore be a longer and slower process overall. More haste may result in less speed.

63. We are not convinced that sufficient justification has been offered, still less evidence provided, for the proposals to reduce the role for the CMA Panel or for removing the express requirements in the CMA Rules regarding the composition and independence for Case Decision Groups. In our view, the CMA Panel plays an important oversight role which offers crucial checks and balances in the decision-making system. Involving Panel members later or less frequently in the process is likely to undermine their ability to fulfil that role, or slow the process up because the Panel members will not be sufficiently familiar with the facts and issues in the case to make a properly informed decision in a timely manner. Similarly, the current requirements under the CMA Rules may be considered basic and necessary for procedural fairness, and no proper explanation has been given for why or how the CMA would wish to take a different approach.

64. It is important in this regard to recall that the introduction of Case Decision Groups and the CMA Rules relating to them was recognised by HM Government as a crucial factor in justifying the move to a unitary competition authority in the consultation that led up to the ERRA 2013. More specifically, a major debate took place between Government, industry and private practice regarding three different competition enforcement models consulted on at the time, of which the two most heavily discussed were (i) the prosecutorial model; and (ii) the model we now have. The virtues of the model we now have were explicitly presented as being the separation within CMA of the case team from a new group of decision makers, the Case Decision Group, that would take over that role post-SO. It was those features (together with merits review) which were presented in discussion and debate as building in sufficient safeguards to allow an administrative system to work fairly and effectively. In addition to this, our subsequent experience is that clients value having a new decision-maker at that point, and one with whom they can have a fair hearing and to whom they can appeal directly. This takes us back to the start of this submission where we made similar points in respect of the Panel in Markets Inquiries. For all these reasons we would be very concerned at any watering down of the current role of the Panel within the Administrative model. To respond to a particular point put to us by BEIS during our meeting, we do think that the position needs to remain within the legislative architecture, as opposed to giving the CMA the discretion to run what it regards as a fair procedure in the way it wishes to do so.

Appeal (Qs. 24-26, paras 1.196-1.212)

65. The JWP's strongly-held views on the desirability of reform of the present system to move to from administrative decision-making followed by an appeal to a prosecutorial

system are already well-known to BEIS: see for example our response to the Penrose inquiry. We do not repeat those views there, but they remain our position.

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On behalf of the

JWP

01 October 2021

[11] With thanks to JWP members who participated in the three meetings the JWP has had on this topic with (separately) BEIS and CMA and/or commented on this submission.