Department for Business Energy and Industrial Strategy: Reforming Competition and Consumer Policy

UKCTA Response to the Consultation

October 2021

1. Executive summary: major industry players, joining to speak with one voice

1.1 This submission is made by the UK Competitive Telecommunications Association (UKCTA). UKCTA is a trade association promoting the interests of fixed line telecommunications companies competing against BT as well as each other, in the residential and business markets. Its role is to develop and promote the interest of its members to Ofcom and the Government. Details of membership can be found at www.ukcta.org.uk. Its members serve millions of UK consumers, employ many thousands and support investment and innovation to support the Government's fibre rollout ambitions.

1.2 We applaud the Government's focus on competition and consumer policy. We want to see the *Build Back Better*[1] plan succeed to the benefit of all. The proposed reforms raise important questions and would be consequential in many ways for the communications sector as we work to bring to reality the Government's Project Gigabit aspirations.

1.3 However, the proposals, as they stand today, are flawed in some respects. Some of the proposed changes would be radical and have far-reaching effects, and their true impacts have not been properly assessed in a focused way. Too many important points are assumed or simply asserted. There is not yet enough of the incisive, leading economic and policy thinking for which the UK government has been justly famed over many years. Basic principles of regulatory design, such as accountability, and the need for checks and balances, are not given proper expression.

1.4 To achieve the best results from this process, Government needs to ensure it marshals the resources required – time, expertise and independence – to take an expert, evidence-led view on these issues. No group of stakeholders, including the regulators themselves, has a unique view of the right path forward, unaffected by their institutional perspectives and concerns.

1.5 This submission is in addition to any submissions some members have made individually[2]. We do so to express **our support for the Government's focus** on this area and also, in equal measure, **our concern at the relative lack of evidence and rigour** in the current crop of proposals.

1.6 We are calling on Government to undertake deeper analysis, and more effective and less hasty stakeholder engagement, to further refine these proposals in line with the core principles of good policy design and regulatory qualities that the UK is justifiably famed for pioneering: independence, proportionality, accountability, transparency, consistent application and predictability, analytical rigour and stakeholder trust.

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968403/PfG_Final_Web_Accessible_Version.pdf

[2] The proposals raise a myriad of issues upon which members will have their individual views. Being a collective response this submission reflects the views of the majority.

1.7 We have set out five key submissions, that we ask you to keep in mind in planning the next steps:

(a) **There is no crisis, meaning that there is time to get this right.** At times, the tone in the Consultation implies that we are in a moment of crisis in relation to the competition and consumer law regime, or that the system is failing overall. This evidence is overcooked. Does the evidence cited really demonstrate evidence that the system is failing consumers? If so, what are the links between that failure and the specific concerns about detailed procedure that are often the focus of the Consultation? Government should be sceptical of calls that there is no time to analyse options and consider the evidence before committing to a course of action.

(b) **The value of stability is underestimated.** The government aims to have a 'world class' regime. We agree – but the performance of CMA, together with other institutions, such as the CAT and the members of the UKRN[3], ensures that the UK is *already* operating at that level. A common concern across the Government's proposals is that the harm caused by losing the value of what we already have is underestimated, and is a significant risk.[4] Regulatory certainty underpins investment and innovation – in consumer markets as well as in infrastructure markets. Changing the rules *always* has a price and knowing whether that price is worth paying is a vital question to consider before proceeding with any reforms.

(c) **Business confidence in the regime depends on quick and reliable correction of errors on appeal.** A fair, accessible and open appeals regime is a core element of a world-class regime. There is scope for debate (and we welcome) improvements in procedure to make appeals faster and less costly. But any move to dilute accountability or shift the standard of review in appeals of substantive decisions from review on the merits by an expert Tribunal to the more legalistic approach taken by a court in judicial review would be a mistake. If a case based on serving consumer interests for this change exists, it should be brought forward and opened up to scrutiny. The fact that it has not belies an uncomfortable truth: the calls for changing the standard of review in the appeals regime reflects the perspective of the regulators. We respectfully but firmly oppose diluting the regime by moving away from merits review. We support efforts to think about how appeals can be made more efficient, more focused and fairer to all parties.

[3] The 13 institutions that make up the UKRN include Ofcom, Ofgem, Ofwat, Office of Rail and Road (ORR), Payment Systems Regulator (PSA), Information Commissioner's Office (ICO), the Pensions Regulator, Regulatory of Social Housing, Civil Aviation Authority (CAA), and the Financial Conduct Authority (FCA). The UKRN also has an independent expert panel, who advise, challenge and provide feedback.

[4] This is a concern that extends to the Government's consultation on Better Regulation, where similarly far-reaching proposals are considered, with the harm associated with regulatory uncertainty not sufficiently taken into account.

(d) **Business needs consumer rules that are clear.** Consumers benefit, above all, from innovation, and innovation is most likely when the rules for consumer terms are clear, reasonable and predictable. A move to a more discretionary mode of regulation by consumer enforcement authorities may create hidden costs and a range of problems, most of which may be invisible to regulators but not to the firms facing regulation.

(e) **Profound changes to the enforcement model should only happen for compelling, well-evidenced reasons.** The Government's proposal to move to administrative decision-making for consumer enforcement is a radical shift that does not solve any real-life problem, but risks creating a cascade of consequences, including unanticipated effects that may harm consumers. There is insufficient evidence of any major problem with today's model of consumer enforcement to warrant such a change. The existing model is worth working to improve, but it already does a reasonably good job to balance speed of action with arms-length judicial protection. To the extent there are perceived problems they can/should be tackled by more robust enforcement of existing rules.

2. There is no crisis in competition and consumer policy

2.1 Key points:

(a) The evidence of decreasing competition cited in the Consultation is overcooked. On the CMA's own findings, there is no evidence of any crisis in UK competitiveness. Even where there is evidence consistent with that view, there is little reason to believe that the speed and flexibility of the current UK regime (which is already world class) is the culprit. Many other factors affect that picture.

(b) That is not an argument for inaction – we strongly support efforts to find ways to improve the regime. However, absent a crisis, it is important to take time and care to filter out the proposals that will be true improvements from changes that are less impactful or counterproductive. It is equally important to be ready to reconsider regulation that is overtaken by events or changes in markets or technology.[5]

(c) Government should be sceptical of being rushed into reform. A key risk is losing the value of the excellent regime we already have. Reforms that will have the intended effect and that will help the Government build back better will emerge stronger from further consideration, not weaker.

2.2 The Consultation is unequivocal: competitiveness in the UK economy is falling. Over two decades, and to an accelerating degree since the 2008 financial crisis, things have worsened, demanding action:

> *... Unfortunately, there is increasing evidence that our competition and consumer policies are failing to keep pace with the challenges*

[5] 'Regulation' in this context means not only sector-specific rules but also competition law interventions such as undertakings or remedies.

> *of the 21st century. The leading firms in some markets have increased their market power in recent years.* ***There is evidence both internationally from the International Monetary Fund and domestically from the CMA which shows that overall levels of competition have declined in the decades since our legislative framework was last overhauled in 1998, and further since the 2008 financial crisis****…*[6]
>
> *The UK needs a commercial and regulatory environment that supports businesses to innovate, grow and compete on their merits. Unfortunately, there is growing evidence, including the CMA's own State of Competition report, that competition in the UK may have weakened over the last 20 years.* ***There appears to be an overall trend towards less competitive, more concentrated markets. The global financial crisis accelerated this trend*** *…* [7]

2.3 This claim is specific, eye-catching – and wrong. On the face of the same evidence cited by BEIS to support its view that competition is getting worse, and that this has 'accelerated' since 2008:

(a) The CMA's study showed a (modest) increase in concentration over the last two decades. However, over the last decade, and specifically since the financial crisis of 2008-09, the effect has been in the opposite direction (i.e. a decrease in concentration).[8] The CMA's actual finding from their 2020 report stated:

> *We find that average industrial concentration – aggregated to the level of the whole economy – has been relatively stable over time, though increasing during the financial crisis and the following recession.* ***Since 2011, we have seen a gradual reduction in concentration****, though not to the pre-crisis level. The average combined industry share of the ten largest firms in each industry remained three percentage points higher in 2018 than it was in 1998.*[9]

Therefore, at the end of the period considered in the CMA's 2020 study – and by extension, *right now* - levels of concentration in the UK are falling, not rising. In all likelihood, this evidence implies, our economy is becoming more competitive, under the current rules and regime.

[6] Consultation, paragraph 0.3.
[7] Consultation, paragraph 1.7.
[8] This outcome is characterized in the Consultation as being 'the leading firms in some markets have increased their market power in recent years', which is true only if 'recent years' means the last twenty years, but not the last ten years - see paragraph 0.3. Paragraph 1.24 of the Consultation acknowledges that the concentration decreased after 2010.
[9] '*The State of UK Competition*' CMA, November 2020 (State of Competition Report), page 13

(b) Left unstated is an important context to this evidence: the striking results by US economists concerning falling levels of competition in that economy. For the most part, UK and European studies have *failed* to replicate the results of the US work – instead affirming stronger and more stable indicators of competitive intensity in UK and European markets than in the US - and that finding is more noteworthy than the modest and highly qualified result that the Consultation focuses on.[10] A primary reason for that result is widely believed to be the quality of the UK/EU competition regime as it stands today – an important reminder that what we already have is a world-class regime and calls for radical reform need strong evidence to justify risks to that regime.[11]

2.4 UKCTA also notes that this is also an economy-wide assessment, that offers little insight into specific markets – for example, the UK markets for fixed and mobile broadband that Ofcom has found, repeatedly and over many years, are amongst the most effectively competitive in the world. This reflects sustained action to ensure fair regulation that provides a level playing field, and a focus by Ofcom on evidence-based regulation.

2.5 Even where there are UK-wide economic indicators that might suggest reductions in competition (on margins, for example), other variables which have changed market dynamics over the past two decades, including globalisation, measurement issues and the exponential growth in online marketplaces, need to be considered.

2.6 Why does this abstract economic debate matter? The answer is that it matters to the extent that it is being offered to Government as a compelling case for reform. That claim deserves to be tested to see if it is robust. As the CMA's own evidence to the Consultation notes, such assessments are very difficult.[12] For the reasons set out above, that case is at best, not proven and at worst, risks being a false prospectus. What matters is that any implication of a crisis in UK competitiveness is not supported by evidence.

2.7 A better starting point is to focus on the performance of the existing regime, which is very good. The Consultation refers to analysis which it uses to illustrate that the evidence on the CMA's current performance is mixed. At the same time, it refers to evidence which indicates improvements in the performance of the CMA (including

[10] From the State of Competition Report at paragraph 2.35: '*In Europe, the evidence is mixed, with some papers suggesting increasing concentration, others finding stability, while others suggest concentration has been falling. In contrast, the majority of the literature on the US suggests an increase in concentration, with Gutiérrez and Philippon (2020) representing an exception to this.*'

[11] From the State of Competition Report, paragraph 2.39: '*…Gutiérrez and Philippon (2018) found stable to decreasing concentration in Europe, which they mainly attribute to a combination of stronger enforcement of pro-competitive policies in Europe, falling product market regulations, more stringent competition laws and lower levels of lobbying compared to the US. While the researchers found concentration increased in Europe during the financial crisis and immediately afterwards, the levels of concentration have been fairly stable since the early 2000s and have fallen since the late 1990s. The US on the other hand witnessed an increase in concentration over the same timeframe.*'

[12] 'Achieving a set of comprehensive and robust indicators with which to compare the degree to which different markets are both open and competitive is not straightforward'. CMA submission to the Consultation ('CMA submission') at 2.4.

handling a larger volume of cases and shorter average case times). Government concludes that the CMA is operating in line with the best practice of international comparators.[13]

2.8 That is not an argument for inaction – we support efforts to find ways to improve the regime. But absent a crisis, it is important to take time and care to filter out only the proposals that will be true improvements and disregard options that are less impactful or counterproductive.

2.9 Government should be sceptical of being rushed into making changes absent proper consideration of their impacts and without taking the time to build support from a wide range of stakeholders, including the industries that must apply and operate under the revised rules. Reforms that will have the intended effect and help the Government build back better will emerge stronger from further consideration, not weaker.

2.10 There is a clear risk of 'groupthink' in lumping together different sources and assuming they all contribute to some wider pre-established position. Seeking to offer an overview, the Consultation risks conflating different sources, to produce the impression that there is a consensus for specific types of change that goes beyond the true position. The Consultation frames that point in these ***terms***:

> *Independent reviews including the National Audit Office's review of the UK's competition system, the Furman review, John Penrose's report, stakeholder feedback, and the CMA's own recommendations have all suggested the UK's current policy framework and enforcement regime needs updating.*

2.11 However:

(a) The NAO study, which is more than five years old, was concerned with the CMA's own performance – and the recommendations it made have largely already been implemented.[14]

(b) The Furman Review's recommendations were specifically concerned with digital markets (and to the extent it focused on competition law, a primary focus was the merger regime). That is the subject of a separate consultation, and should rightly be considered there. Government must not conflate the evidence base for regulation of digital markets with that for changes that are intended to have a whole-economy effect.

(c) The Penrose Report begins by the author's account that '*In September 2020 I was asked to write an independent report on how the UK's approach to competition and consumer issues could be improved in future.*' Predictably, the report reflects its terms of reference, duly proposing reforms. It is not an assessment that is reached separately from, for example, the CMA proposals or the Furman Review: it expressly captures and reflects them, as it was required to

[13] Paragraph 1.136
[14] NAO Report – The UK Competition Regime, 5 February 2016 ('NAO Report').

do in its terms of reference. It was scoped to be, and is, at best only a high-level sketch, and, on its face, simply consolidates many existing proposals or ideas.[15]

(d) That leaves the CMA's recommendations which are, of course, a clear request for reform. Yet, Lord Tyrie's letter expressly asked for others to assess whether change was needed, precisely because the CMA is not well-placed to be the 'judge in its own case' on these questions. To his credit, Lord Tyrie therefore emphasised the need for 'open and rigorous external scrutiny' for the reforms.[16] It is an odd way to honour that call for rigour by treating the fact that a request has been made as evidence itself that the request should be granted, without considering any evidence about whether the change will be for the better, or worse.

2.12 Each of these reports may have been 'independent' in the sense of not being Government policy, but they are not necessarily independent of each other. For example, the Penrose Report's terms of reference explicitly required Mr Penrose to consider the reforms called for by Tyrie. He duly considered and adopted many of them, in terms that are largely uncritical and, in many cases, for no more fleshed-out reason than essentially because the CMA asks for them. That may be an endorsement that an issue merits further consideration, but it is not evidence for change.

2.13 Our concern is that there is a great deal of circularity and mutuality between the most recent evidence sources, and a sense that the debate is being driven from within the system without anyone taking stock and asking the hard but necessary questions about whether each proposed reform actually solves any real-life problems for consumers or the companies that serve them.

2.14 By this submission, we are asking the Government to set the bar higher for these consequential reforms and provide them with the 'open and rigorous scrutiny' that Lord Tyrie hoped for, to ensure that only the proposals that will truly help us build back better are those taken forward.

[15] The Penrose Report terms of reference explain that '*An earlier set of reform proposals, outlined by the outgoing CMA Chairman Lord Tyrie in February 2019, considered potential changes to the competition and consumer protection regimes. In June 2019, the BEIS Smart Data Review examined how to accelerate the development and use of new data-driven technologies and services to improve the consumer experience in regulated markets. In February 2020, HM Treasury and the Department for Business Energy and Industrial Strategy commissioned the CMA to produce a report on the 'State of Competition' in the UK*.' The scope of the Penrose Report is required to be '*A short independent report building on and adding to the recent competition policy developments set out above*.'

[16] '*If you agree with the approach, a number of the proposals will require a good deal of further work. Some are at an early stage of development but can nonetheless form a basis for discussion. And wider consultation will, in any case, be required: the package as a whole – and indeed any fundamental reform of the regime – should, in my view, be submitted to open and rigorous external scrutiny*.' Tyrie letter, page 4.

3. A stable regulatory regime is vital to promoting long-term investment- one of three keys to Build Back Better (investment, skills, innovation)

3.1 Key points:

(a) Regulatory stability and independence from government is critical to the quality of the regime. Whilst well-intentioned, frequent strategic steers risk undermining regulatory certainty. A better approach would be to keep such steers infrequent by design, but to embed principles of good regulatory practice more deeply in the statutory regime.

(b) The case for reducing the current distinction between market studies and market investigations has not been made on evidence, and risks increasing uncertainty.

(c) Lack of oversight on interim measures and over-use of commitments brings the risk of chilling competitive behaviour and could lead to 'informal enforcement' that is counterproductive. The risk is that it encourages companies to focus on lobbying regulators, not pleasing customers.

3.2 The Consultation draws a clear link between competition policy and the promotion of a sustainable innovation-led economy, one of the principal aims of the Government's *Build Back Better* plan for growth.[17] The Consultation also acknowledges that competition policy should be evidence-based and enforced by independent regulators, but that it should respond to the strategic needs of the UK economy in order to be truly effective.[18]

3.3 **Frequent strategic steers undermine regulatory certainty.** The Consultation asks whether Government should take a more active approach to setting the CMA's "strategic steer", updating it more regularly as required, as opposed to just once a Parliament and potentially setting metrics to "*measure the state of competition in the economy and the CMA's performance*."[19]

3.4 The answer to that question is, straightforwardly: No. The current approach has not been shown to be wrong, and strategic steers which are undertaken with a frequency greater than once a Parliament undermine regulatory stability and certainty. This is consistent with Government's approach to ensuring regulatory stability in other contexts - for example, it is a principle which the Government itself recently acknowledged when it expressly supported Ofcom's move to a 5-year interval for market reviews.[20] More importantly, there is no pressing need to increase the frequency of the strategic steer.

3.5 We agree with the CMA that this is an area where Government should be cautious.[21] There is no direct evidence of any problem caused by the existing arrangements. There are many benefits associated with it. For example, there is a natural and logical link

[17] Paragraph 1.6
[18] Paragraph 1.35
[19] Paragraph 1.42
[20] Government response to the public consultation on implementing the European Electronic Communications Code, 22 July 2020, page 27
[21] CMA submission, paragraph 2.12.

between the priorities set out by the Government at the commencement of each Parliament and the 'cascading' of those priorities to the CMA, where they are relevant to its duties.

3.6 **Conflating market studies and market investigations would increase uncertainty.** The Consultation expresses concern with what the Government perceives to be the cumbersome and under-utilised nature of the current UK market study and investigations regime. It suggests a number of reforms to address this.

3.7 We strongly endorse the Government's view that the market inquiry regime as it stands today "*can contribute to the UK being the best place to start and grow a business and ensure the interests of UK citizens are being protected by opening up markets to greater competition*".[22]

3.8 This innovative regime is in good health, and good hands. As the Consultation notes, it has produced close to one billion pounds per annum savings for consumers in recent years.[23]

3.9 But the Consultation then asserts that:

(a) The regime '*[is] overly cumbersome and significantly underused*'[24]

(b) The regime's processes are '*not delivering their full potential*'[25]

(c) '*To realise the benefits of its market inquiry tools properly, the CMA needs to complete more market investigations, not just market studies*'[26]

(d) '*the time and cost of running both a market study and a market investigation may deter the CMA from opening market investigations and using the powerful pro-competitive tools that market investigations provides*'[27]

3.10 These criticisms are not backed up by any analysis or evidence, and there is significant evidence that they may be illusionary. The suggestion that the use of market investigations is declining is unduly simplistic: consider the massively consequential market investigations undertaken in energy and retail banking, for example.

3.11 Two very significant options for change are proposed in response to this case for change. One option is to give the CMA powers to impose certain remedies at the end of a market study; the other is to merge the two stages into a single stage market inquiry tool.

3.12 As regards the proposal to amalgamate the market study and investigations system to form a new single 2-year market inquiry regime,[28] the Consultation acknowledges that the last public response on this suggestion expressed strong support for retaining two distinct phases. The Government's sole rationale for moving ahead with such a change

[22] Paragraph 1.46.
[23] Paragraph 1.47.
[24] Paragraph 1.48.
[25] Paragraph 1.50.
[26] Paragraph 1.51.
[27] Paragraph 1.54.
[28] Paragraphs 1.63-1.67

at this stage appears to be declining use of market investigations.[29] Furthermore, as the Consultation indicates, a market investigation reference can already be made without having first conducted a market study, albeit this is uncommon.[30]

3.13 We agree with the results of the previous consultation that showed strong support for maintaining two distinct phases. This is also the CMA's position.[31] The case for change is not made out: there is a lack of proportionality between the evidence of the need for change (which is very small or at least, not well developed) and the nature of the change proposed (which is profound and far-reaching).

3.14 The Government's proposals would affect the basic building blocks of the current regime, which rests on the differences between the market study and market investigation phases - they are different tools for different situations:

(a) A market study for a quick initial look at a market, and scope for a quick and *agreed* outcome that furthers the interests of consumers (normally because there is an obvious answer that emerges from the initial work); and

(b) A market investigation for the more detailed analysis that can lead to remedies being *imposed* by the CMA.

3.15 This distinction is the bedrock of the current, high-performing regime. It works well in large part because (as the CMA points out) '*companies generally engage with market studies in a positive and cooperative way*'.[32] Changing it *might* help, or it *might* make it worse. It will certainly trigger unintended consequences – for example, it could change the incentives on companies participating in a market study so that they are less likely to make a meaningful offer of a voluntary undertaking. The CMA may regard itself as less able to accept a simple voluntary offer in a single-stage process, because there is always further analysis to be done to work out whether or not to accept that offer, and with no 'break point'. As the CMA points out, '*this [change] may well mean that all cases default to a more onerous market investigation framework, meaning that the flexibility of the current market study process risks being lost*'.[33] The overall effect could well be to make the process work less effectively.

3.16 To weigh these risks and concerns, it is insufficient (in terms of supporting Government's policy decision-making) simply to describe a proposed change and set out some effects that the change *might* have. What matters most is the quality and depth of the evidence. This is important both to establish the case for a chance and to work out which changes are most likely to achieve their objectives. We urge the Government to restore a link between the evidence for change, and the scope of changes.

3.17 Stakeholders urging Government to make major changes should be asked to show evidence and analysis that is proportionate to their request. Ideally, the evidence should

[29] Paragraph 1.64
[30] Figure 2 – CMA's Markets Work
[31] CMA submission, paragraph 2.16 and 2.19.
[32] CMA submission, paragraph 2.17.
[33] CMA submission, paragraph 2.16.

show a link between the nature of the problem to be solved to the nature of the change being proposed. To do otherwise risks the value of the existing regime, without due care being taken to make sure that the harm caused might more than outweigh the benefits, if any.

3.18 **The hidden costs of removing reasonable checks and balances on discretion.** We are also concerned that the drift towards more discretionary and less certain approaches is under consideration without any recognition of the problems that are likely to arise. Lack of oversight on interim measures, over-use of commitments and the variation of pre-imposed remedies will chill competitive behaviour and lead to 'informal enforcement'.

3.19 We are concerned that in relation to the strong discretionary powers held by the CMA, the approach of Government appears to be focused on providing the CMA with far greater scope for unbounded and unaccountable decision-making, undermining confidence in the current regime.

Interim measures

3.20 Interim measures are amongst the most intrusive and draconian powers of the CMA. Currently the CMA should only impose interim measures if it considers as a matter of urgency that, absent those measures, significant damage will occur.[34] As per the Competition Appeal Tribunal Rules[35] and the principles that apply to the application of interim injunctions in the general commercial legal context[36], such measures should not be imposed lightly.

3.21 This is the context in which to consider proposals to expand the CMA's ability to apply interim measures in market investigations and the proposals to restrict business's ability to review proposed interim decisions or, and to, limit the scope to appeal. Currently, the exercise of those powers is the subject of an established legal equilibrium, with the constraints applied by the courts clearly defined. Any change to the rules will require this balance to be redrawn and could have other knock-on impacts. The Government might contend that the efficacy of interim measures is currently undermined because they are too burdensome to apply, but the proposed reforms could very well end up having the same effect on the basis that they open the floodgates to abuse of due process.

3.22 The application of interim measures by the CMA under section 35 of the Competition Act 1998 has itself been relatively untried and untested to date. We therefore do not consider that the provision of new powers enabling the CMA to impose interim measures during market investigations is proportionate.

3.23 What is missing from the analysis in the Consultation is any consideration of *why* the CMA is not using its powers to issue interim measures. Is the evidence that these powers are 'too burdensome to use'? Or is it that the powers are being used – for example, used as leverage to secure voluntary arrangements at the early stages of

[34] Section 35(2) of the Competition Act 1998
[35] CAT Rules: Rule 24(3)
[36] See American Cyanamid Co v Ethicom Ltd [1975] AC 396,

investigations – that produce an outcome without the cost and risk to all parties of a statutory decision?

3.24 Evidence can answer these questions. For example, that means considering whether in those cases where the use of interim measures is actively considered:

(a) Interim measures are unused because the target firm, in effect, backs down and agrees to amend its behaviour; or

(b) interim measures are considered and abandoned by the CMA without securing any change in behaviour.

3.25 That kind of evidence is easily available to Government (for example, it could be assembled without undue difficulty by the CMA). Such evidence would help Government to know whether its proposals were in fact solving an existing problem or not.

Market investigations

3.26 Market investigations are not like 'regular' investigations: for example, there is not a single firm or small group, but potentially an entire industry which is operating within the scope of the investigation. Unlike the target of an antitrust investigation, a firm can be affected by the outcome of a market investigation and be entirely unaware of that fact, much less have had a chance to be consulted and have input into the outcome. That concern is addressed today in the clear procedural protections that apply before remedies are imposed, including public consultation. Removing those protections is unlikely to make the regime work better and is quite likely to lead to a situation where firms are at risk of infringing interim measures that they were unaware of at the time they were issued. Whilst that cannot ever occur in a Competition Act investigation, it is an entirely plausible scenario in a market investigation. The CMA notes the criticality of prior engagement between the recipients of interim measures and the CMA – and it is right to do so.[37] It does not explain how that process would work in a market investigation that involved, say, hundreds of SME providers who would be affected by the outcome. On that basis, applying interim measures in market investigations risks putting whole markets or even sectors in stasis and undermining the innovative dynamic market which the Government wants to nurture.

3.27 The right approach is one based on keeping in place the existing sensible constraints on the more stringent powers. For example, businesses should continue to be granted access to file rights and that appeals against interim measures continue to be held on the merits. Currently, if the CMA proposes to issue such a decision it must provide the business with a chance to review and comment upon it and with a reasonable opportunity to inspect the underlying evidence which the CMA has obtained relating to the decision. The Government is critical of this on the grounds that it "*can be a time consuming and resource intensive"* and because "*the powers are too burdensome to*

[37] '*[T]he CMA considers that parties on whom such interim measures are proposed to be imposed in markets cases should be able to make representations to the CMA before any interim measures are imposed on them.*' CMA submission, paragraph 2.23.

use,… their purpose is undermined."[38] The Consultation proposes that the CMA should only be required to provide the business with the notice of a proposed 'interim measures' decision and the reasons for it, but not be required to provide access to the underlying file of evidence as a matter of course.

3.28 These proposals ignore a basic principle of policy design, to match powers with relevant checks and balances. At the same time as *increasing* the CMA's powers in this area, their accountability for the exercise of that power is to be *reduced*: if the business decided to appeal an 'interim measures' decision to the Competition Appeal Tribunal, the standard of review would no longer be on the basis of full merits but instead fall in line with the principles of judicial review. This may address a short-term objective of the CMA, but it is likely to reduce the standard of decision-making in the longer term. It is therefore to be contrary to the interests of consumers and efforts to maintain the regime as 'world class'.

3.29 Further analysis and evidence of case histories in real-life examples offers scope to improve the Government's ability to assess the other proposals:

(a) **Commitments.** There may be good reasons to allow the CMA to accept binding commitments at any stage in the market inquiry process.[39] But there are important likely impacts that should be considered before a decision is taken. For example, it could have a detrimental effective on participation, and lead market studies to become more 'adversarial' from the outset, with the risk being that a process which is designed to gather market information is undermined by moving too quickly to the perception that there are competition compliance concerns which need to be addressed.[40] The overuse of commitments could lead to a lack of transparency of rules and judicial oversight – in effect resulting in 'regulation by informal pressure' which often results in uneven and incomplete interventions, as well as reducing certainty for industry.

(b) **Variation of pre-imposed remedies.** The Consultation notes that generally the only way the CMA can currently revisit the scope and design of a remedy which has previously been imposed is by conducting a new market investigation.[41] The Government considers this to be inefficient and instead proposes that the CMA should have increased powers to allow it to periodically review, and if necessary, vary, remedies to ensure they are effective.

The Government acknowledges the status quo provides a degree of certainty and regulatory stability to business.[42] It seems prepared to jeopardize this. We consider that in instances of all but the most minor alterations, changes to remedies will be as significant as their initial imposition. A new investigation is a proportionate step to take – there is nothing to stop the CMA from setting a shorter timetable for a focused consideration of a specific issue (in other words,

[38] Paragraph 1.166
[39] Paragraphs 1.73-1.75
[40] The CMA specifically raises its concern about this point – see CMA submission, paragraph 2.17.
[41] Paragraph 1.78
[42] Paragraph 1.85

there is no *minimum* period for completion of that process, subject to the need to consider the issues properly).

4. A robust and predictable appeals process is vital

4.1 Key points:

(a) The purpose of the appeals regime is to enable mistakes (which are rare but inevitable)- to be corrected quickly and effectively.

(b) At the heart of the current regime is the concept of merits review. This is different from judicial review in ways that are precisely designed to ensure it is the right approach for a competition law regime: it is flexible, expert and not tied up with legalities. It works well and is a known and stable regime. As the CMA itself acknowledges, it is a source of widespread confidence amongst stakeholders today.[43] An expert, independent and arms-length review of the detailed rules governing appeals was commissioned by BEIS and completed less than a decade ago, that considered and dealt with many of the points now being raised.[44]

(c) Why are we discussing changing it? The main driver for reform here is the CMA itself. The simple truth is that in their efforts to roll back merits review, they are arguing to scale back their own accountability at the same time as they argue for more powers. Inevitably, their institutional interests are engaged.

(d) Government should approach this issue as the custodian of the overall system. The right appeals regime is one that optimises outcomes for consumers, not any specific institution. That means a fair system of checks and balances, and not stripping away flexibility in order to make the appeals process more forbidding.

(e) Appeals matter because the reliability and predictability of the regime depends upon them. The harmful effect of removing merits review will be felt directly by those who face an unfair and erroneous decision that cannot be reversed, but also in the chilling impact on investment. Companies will come to understand that, at the margins, UK regulators have a greater degree of discretion and fewer constraints on bad decision-making than previously was the case. That is a step away from, not closer to, a 'world-class' regime.

4.2 We are concerned that any move to dilute the existing appeals regime would undermine regulatory certainty and reduce the predictability and fairness of the regime.

4.3 We agree with the government's assessment in the Consultation that the objectives should be:

[43] CMA submission, paragraph 2.84.
[44] The Mummery Review – see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970089/pir-review-competition-appeal-tribunal-rules-2015-cfe.pdf

- *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.*
- *Appropriate deference is given to an expert regulator's decisions on matters of technical judgment and expertise.*
- *The appeals framework respects the procedural rights of businesses and provides an effective oversight of the administrative decision making process.*
- *The courts provide robust quality assurance of the CMA's interpretation of competition law.*[45]

4.4 Each of these criteria is already delivered by the current regime:

(a) The existing appeals framework has co-existed with and contributed to the current state of the CMA, which is widely recognised as a high-performing competition authority, including it being a very successful defendant when its decisions have faced appeal.[46] Merits review is particularly well-suited to resolving issues quickly, because it is not an 'all or nothing' outcome like judicial review (where a decision is either defended in full or else struck down in full and remitted back for reconsideration).

(b) Appropriate deference is given by the CAT to an expert regulators' decisions in Competition Act[47] and regulatory[48] appeals on the merits today, as a matter of settled UK law.

(c) The existing appeals framework respects the procedural rights of businesses and provides for effective oversight. That process has included detailed consideration of proposals for reform, which led to further improvements that

[45] Consultation, paragraph 1.205.
[46] Consultation, paragraph 1.210.
[47] In competition law decisions, this is the 'margin of appreciation' afforded to a decision-maker taking decisions that are '*determinative of civil rights and obligations, the CAT held that the requirements of article 6 of the ECHR may be satisfied where the area is a specialised one and there is a combination of fair treatment by the administrative body and the availability of judicial review, and it may be appropriate to allow the administrative body a substantial margin of appreciation*.' See [2015] EWCA Civ 492 at [49].
[48] '*Whether or not it is helpful to encapsulate the appropriate approach in the proposition that Ofcom enjoys a margin of appreciation on issues which entail the exercise of its judgment, the fact is that the Tribunal should apply appropriate restraint and should not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong*'. This statement by the CAT at British Sky Broadcasting Ltd v Ofcom [2012] CAT 20 at [84] was endorsed on appeal ([2014] EWCA Civ 133 at [88]) and is widely cited in subsequently CAT judgments – for example, see BT v Ofcom [2017] CAT 25 at [77].

are only now taking effect. As one would anticipate, the CMA itself is one of the active participants in that process.[49] The evidence for this can be seen in the widespread support amongst the business community for the existing regime.

(d) The courts provide robust quality assurance of the CMA's interpretation of competition law. This is provided not only by the CAT but also by the appellate courts. There is no suggestion that changing the standard of review would affect this role.

4.5 We also strongly endorse the Government's wisdom in observing that:

> *to justify departing from the current system, any change would need to deliver a more efficient enforcement process without unduly prejudicing the overall robustness of the UK's competition enforcement and the quality of the decisions it produces.*

4.6 We agree that this is the right yardstick against which to judge calls for reform.

4.7 The Consultation notes that "*long drawn-out appeals are just as undesirable as long drawn-out investigations*", which is true.[50] But there is no evidence that appeals of CMA and other Competition Act decisions are 'long' or 'drawn-out'. Most appeals before the CAT are resolved swiftly and with due expedition, and there is scope for cases to be fast-tracked where necessary.

4.8 It is welcome that the Consultation recognises that merits review is "*not a re-hearing of the decision*", correctly stating a point that is mis-stated regrettably often.[51]

4.9 It is also welcome that the Consultation recognises that "*the CMA has significantly improved the overall efficiency of civil enforcement against unlawful anticompetitive conduct*".[52] The Consultation then continues:

> *However, in recent years there have been calls in the Furman Review, the Penrose Report, and Lord Tyrie's reform proposals for the standard of review in appeals against Competition Act investigations to be reviewed again. Additionally, in 2016 the National Audit Office noted that "many stakeholders and legal practitioners we spoke to think there are strong incentives for businesses to litigate if they lose a case, which can lead to risk aversion in the competition authorities". In his 2019 recommendations Lord Tyrie argued that the appeal system for Competition Act investigations is more protracted and cumbersome than is necessary. In Lord Tyrie's view the current standard of*

[49] See, for example, the discussion by the CMA about its response to the *Post Implementation Review of the Competition Appeal Tribunal Rules 2015* (the review taking place in mid-2021) – in the CMA submission at paragraph 2.86.
[50] Consultation, paragraph 1.197
[51] Consultation, paragraph 1.198
[52] Consultation, paragraph 1.203

> *appeal encourages resource intensive appeals, with greater use of expert and factual witnesses, and leads the CMA to conduct disproportionately exhaustive investigations and produce lengthy 'gold-plated' decisions.*

4.10 What each of these cited sources have in common is that none of them provides any primary or direct evidence of a problem with the appeals regime that justifies reform of the standard of review:

(a) The Furman Review dealt with appeals reform in high-level terms, without any primary analysis to support its findings.[53]

(b) The Penrose Report does not call for any particular outcome in relation to appeals – rather it calls for a detailed and evidence-based review by a 'taskforce', involving all stakeholders, to develop detailed proposals for review. This idea deserves further consideration.

(c) The NAO Report's view on the appeals regime is not accurately reflected in the quote in the Consultation. Although the appeals regime was not directly within the scope of its study, in fact, the NAO emphasised that the existing appeals regime had caused the CMA to improve its game, "*strengthening processes*" and increasing the "*robustness*" of its decisions, leading directly to more thorough decisions.[54]

4.11 As with other parts of the evidence, there is a pattern of 'circular evidence' here, too. For example, a key source cited in the Furman Review was the NAO Report;[55] the NAO Report's main source of evidence as to the overall level of concern about appeals was its discussions with the regulators themselves, and a tiny handful of stakeholders who were validating the point that after an infringement is found, an appeal is a strong possibility – something that will not change under any scenario.[56] Again there is a

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[53] From the Furman Report, page 105, noting that it had not conducted any review of past cases: '*Instead the Panel has taken a forward-looking view of what is needed to optimise the competition framework for the new challenges of digital markets. If it is to achieve this, the competition authority should have an appropriate margin of appreciation to reach decisions on digital cases that are likely to be particularly complex and may require elements of expert judgement. A robust appeals process will be vital but its role should be focused on ensuring decisions are founded on procedural regularity, avoid material errors of fact or law, and are reasonable in their exercise of judgement. A framework that allows wider grounds for appeal risks undue incentives to challenge decisions, in markets where a prolonged case may irreparably damage a smaller company.*' The main problem with this reasoning is that what is described as desirable is exactly the way that the existing system works today (for example, there is no doubt that in practice and in law CAT *does* grant regulators a due margin of appreciation). This is something that has been pointed out many times, including by the CAT itself in response to the 2013 reforms.

[54] From the NAO Report, page 8: *The CMA has strengthened processes with the aim of increasing the robustness of its work to legal challenge. Following two high-profile failures in the Office of Fair Trading's competition enforcement work in 2010 and 2011, the CMA has set up independent decision-making panels and enhanced internal oversight. The CMA has been successful in 15 of the last 19 civil cases across its competition work that have come before the courts. Despite the acquittals in its first criminal cartel prosecution, the judge noted the procedural thoroughness of the CMA's case.*

[55] Furman Review, paragraph 3.134.

[56] From the NAO Report, page 36: '*Furthermore, many stakeholders and legal practitioners we spoke to think there are strong incentives for businesses to litigate if they lose a case, which can lead to risk*

sense of change being 'bootstrapped' from within a closed loop of public stakeholders (many of which have a natural aversion to their decisions being challenged and on occasion overturned), without anyone requiring that some evidence – rather than a stated preference, passed from one source to the next – be compiled to justify the change. Government policy is an enormously powerful influence and should not be deployed without due care or simply for the asking, regardless of the source of the request. The key missing element here is any arms-length consideration of whether these changes really pull their weight in terms of delivering better outcomes for the stakeholders who matter: consumers.

4.12 We emphasise that there is no criticism implied of these documents; the analysis of the appeals regime and the proper and forensic laying out of a case for reform of appeals was not their primary concern – each was focused on something else entirely. But they are not robust sources of *evidence* showing a compelling case for change, let alone profound change to the basic principle governing Competition Act appeals.

4.13 By contrast, the CMA's 2019 letter to Government does call directly for the scaling back of rights of appeal against CMA decisions. The CMA's call should be taken seriously, and given due consideration, but the CMA cannot be a disinterested party to that question, nor are its interests the only relevant concerns. The right way to approach that issue is to develop the evidence base on key questions about the efficacy of different approaches.

4.14 It is welcome that the Consultation sets itself in the direction of designing a process which ensures "*swift, efficient and proportionate procedure for resolving investigations*."[57]

4.15 The consequences for any business of being found to be in breach of competition law can be severe, including a very substantial penalty, intrusive remedies and the reputational harm of an adverse finding. The Government itself acknowledges that the Competition Act Chapter I and Chapter II prohibitions "*are generally applicable to all businesses in all sectors of the economy, and to all aspects of a business.*"[58] In other words, the scope is broad and the margin for error to be made by the CMA at first instance is greater. The standard of appeal therefore needs to be commensurately high.

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aversion in the competition authorities. One stakeholder told us that the UK was the best jurisdiction in the world to defend a competition case; this was consistent with the views of several other interviewees. Competition Act enforcement cases, unlike mergers or market investigations, do not have any statutory deadlines and are at risk of being squeezed by activities that do. Several interviewees told us that, in their view, the CMA's competition enforcement work has a lower profile with their competition staff than, for example, the two current large market investigations.' The inference of reliance on this evidence seems to be that it is a self-evident problem if it were really the case that '*the UK was the best jurisdiction in the world to defend a competition case*', which is hyperbole. But even if it were true, only a skewed and regulator-centric view of the world would lead to the conclusion that this is something demanding a chance to make appeals less attractive, rather than *precisely* the driver for the CMA to be 'the best competition authority in the world'

[57] Paragraph 1.197

[58] Paragraph 1.201

4.16 While CMA may have a strong success rate before the CAT, this should not be taken as *prima facie* evidence that the current standard of review is excessive.[59] Conversely, the CMA's relative success at the appeal stage is undoubtedly borne out of the very fact that it is aware that many of its decisions in this area run the risk of judicial scrutiny on the merits. Prior government consultation has concluded that the standard of review for Competition Act investigation appeals should remain as a full 'on the merits' appeal.[60] This position was shared by the CAT itself in a response to the Government in 2013 which, amongst other points, firmly set out the case against the presumption that appeals based on judicial review ordinarily equate to swifter and more efficient resolution.[61]

5. A lack of clarity around consumer rules will chill innovation- one of three keys to Build Back Better (investment, skills, innovation)

5.1 Key points:

(a) Duplication of consumer rights rules and regulations will stifle, rather than invigorate innovation.

(b) An overt reliance on vague market concepts to steer consumer legislation risks imposing regulation by informal pressure.

(c) There are significant question marks in relation to the evidence relied upon to build the behavioural model of unsubscribing from unwanted subscription, particularly concerning the concept of consumer encountering 'difficulty' in unsubscribing.

(d) The best way to improve outcomes for consumers is to have clear and balanced rules and, more importantly, to use the existing powers properly against bad actors.

Duplication of consumer rights

5.2 The Consultation acknowledges that consumers in the UK already have a strong set of rights enshrined in law.[62] Behaviour which is deceptive or unfair is already unlawful in the UK – e.g. by means of the Consumer Protection and Unfair Trading Regulations 2008. The core of the existing regime was refreshed less than a decade ago - the Government will be aware that the Consumer Rights Act 2015 already offers comprehensive protection from traders that use unfair contract terms. In specific sectors, such as energy and communications, this is supplemented by sector-specific rules. As the Consultation correctly points out, "*the UK has one of the world's strongest consumer protection regimes*," and "*this legal framework is still working well*."[63]

[59] Paragraph 1.204
[60] Paragraph 1.202 {ADD FURTHER FN TO PRIMARY SOURCE]
[61] Response of the Competition Appeal Tribunal to government's June 2013 consultation 'Streamlining Regulatory and Competition Appeal'
[62] Paragraph 3.1
[63] Paragraph 2.2

5.3 UKCTA is particularly concerned that little consideration appears to have been given to the existing rules that apply in the communications sector that duplicate or already achieve the outcomes that Government wants to secure. For example, there are already a number of legal requirements in place in the regulated sectors which seek to provide consumer protection. In the communications sector, these include rules in relation to the automatic renewal of contracts, the provision of short summaries of key terms to consumers pre-contract, tariff notifications and conditions around subscription services.[64] Duplicating these rules (or adding closely analogous but slightly different rules on top those that are already in place) does nothing to further the interests of consumers, but raises compliance costs to business, and will have a direct detrimental impact on innovation and growth. It is not clear whether the Consultation intended to duplicate these rules or whether this is in error.[65]

Commented [RH1]: could be more specific on comms sector

Commented [DS2R1]: Now done.

5.4 All this implies that a pause for thought may be a sensible step at this point. Any new rules will be with us for a long time and should only be imposed after careful and deliberate consideration, being contingent on the removal of existing over-lapping regulation to avoid the risk of double compliance. If refinement of some consumer rules is justified, this should be targeted to areas where there is clear and compelling evidence of a problem that can be solved by changing the rules. For example, any alterations to requirements that traders remind consumers before the end of any commitment period that their subscription contract will auto-new unless cancelled should only apply in those cases where the contract will roll-over onto a new fixed term on the basis that, if a customer rolls over onto a monthly-rolling contract, the extent of any harm is limited.

Regulation by informal pressure

5.5 The Government's main identified premise for considering it necessary to open the consumer rights regime again at this stage is, at best, light: namely, "*the increase in online transactions, particularly in those mediated by online platforms*" in recent years.[66] A number of independent but unofficial market studies are cited in support to demonstrate an increase, to some degree, in online sales (unsurprisingly enhanced by the COVID-19 pandemic) and that increasing numbers of web merchants are using insights into consumer behaviour to influence choice and "*guiding consumers' subconscious behaviour through exploiting behavioural biases.*"[67]

[64] Paragraph 2.14

[65] For example, the text of the Consultation cites the existing Ofcom rules (paragraph 2.14), which implies that the regulated sectors are all within the scope of the new proposals. But the specific IA for subscriptions, however, notes that 'Typically, the good, service or digital content is provided on an ongoing or regular basis over a period of time in return for a recurring payment. Subscription contracts are popular with consumers. Indeed, an estimated three quarters of UK adults have at least one subscription contract and the average subscriber spends £660 a year on subscription contracts in **non-regulated** markets, making the subscriptions industry worth around £25 billion per year.' (emphasis added).

[66] Paragraph 2.3

[67] Paragraph 2.4

5.6 Such developments are worth noting, but by themselves they do not warrant making changes to a consumer rights system which is as effective and recent (in legislative terms) as the UK's regime. The Consultation itself notes that markets are "*continually changing and adapting to new opportunities*."[68] Consumer rights cannot be picked-apart each time new phases of economic innovation present themselves. Doing so simply does not equate to taking "*the proportionate requirements for businesses*" into account – something which the Government itself recognises as vital.[69]

5.7 The case for reform in the Consultation depends too heavily on relatively vague market concepts, such as 'choice architecture practices', in order to condemn what, in many instances, amount to legitimate, reasonable and fair techniques used by all companies to compete.[70] By way of example, the Consultation places reliance upon "*Dark Patterns at Scale: Findings from 11,000 Shopping Websites*"[71], a Princeton study which used an automated website review process to document and categorise techniques it viewed as 'dark patterns' that could lead to "*unintended and potentially harmful decisions*", but made no distinction between accurate and misleading techniques, and, therefore, provides no basis for assessing whether harm actually occurred as a direct result of the techniques. By placing too much emphasis on the need to deal with vague concepts such as these, the Government is at risk of creating unnecessary doubt amongst business and (as per the over-use of commitments referred to above) encouraging 'regulation by informal pressure'.

Clear, stable rules are the best platform to foster innovation

5.8 Our concern with these issues is not limited to the specific concerns or points being raised; it is about the overarching question of where the bar ought to be set in making changes to consumer rules which depend for their effectiveness on their clarity, reliability and stability. We stand firmly in favour of better rules that will improve outcomes for consumers (considering all of their interests, including their interest in having markets in which innovative new services are developed and can flourish). But we urge the Government to be mindful of the necessary trade-off involved between frequent small changes to the rules and their effectiveness. In common with other areas of the Consultation, the evidence for a compelling case for change is very light, and the impact of the changes is material. Restoring a link between this evidence and the nature and depth of proposed changes would go a long way to ensuring that each step taken by government is most likely to have net benefits.

5.9 Beyond that, the best way to improve outcomes for consumers is to have clear and balanced rules that can be applied by business in a way that builds trust in their suppliers. Here, the incentives of the Government, regulators and providers doing their best for customers all align. Rather than tweaking the rules again, the Government may find better outcomes for consumers are more readily secured by providing the CMA and other regulators with a clear mandate to use the existing powers properly against

[68] Paragraph 2.3
[69] Paragraph 2.3
[70] Paragraph 2.44
[71] Dark Patterns at Scale: Findings from 11,000 Shopping Websites, Princeton University, September 2019

bad actors, including a rising tide of overt scams and forms of, for example, phishing and fraud.

6. Consumer Law Enforcement

6.1 Key points:

(a) Shifting from prosecutorial enforcement to administrative enforcement of consumer law would be a profound change, with far-reaching and hard-to-predict consequences.

(b) It would almost certainly reduce incentives on companies under investigation to work with regulators to reach a consensual outcome in the early stages of a new issue. This impact alone may undermine the effectiveness of the entire consumer law regime. It is not considered at all in the Consultation.

6.2 Perhaps the single most significant consumer law change proposed in the Consultation is the Government's proposal to enforce consumer law directly via the CMA rather than having to go through the courts as per the current regime.[72] We are particularly concerned about the relative lack of detailed impact analysis or consideration of evidence as to the merits of such a material change.

6.3 Empowering the CMA to investigate and reach decisions on consumer law which would be immediately binding on businesses would be a radical shift. Justification for this would require the sort of detailed evidence that is precisely lacking in the Consultation.

6.4 There appears to be little consideration of how and why the existing system works well, and hence, no thinking set out in the Consultation about why a shift to an administrative model would solve any specific concern or problem.

6.5 Consider this: the central engine driving outcomes for consumers today is the scope to reach a settlement captured via commitments (undertakings) that the company agrees to give without any admission of wrong-doing or liability. That central engine enables consumer law issues – which often involve small as well as large traders – to be resolved without detailed legal analysis about what a court would have said in the event that the issue was litigated (which only a vanishingly small fraction of cases ever are). Today, for every case that is brought before a court, up to ten are settled, and many more are resolved informally through discussions that do not require formal undertakings.

6.6 The administrative model will change the incentives on both sides of the discussion that make it less likely that settlement will be reached:

(a) There is no scope for 'blameless' settlement of an administrative case: the CMA's guidelines are absolutely clear that settlement of a case once an investigation is underway must involve an admission of liability and wrong-doing

[72] Paragraph 3.15

(b) Unlike the forward-looking question of what the trader will do in the future (under the current system) the focus of the administrative model is backward-looking, considering whether the firm under investigation did the wrong thing in the past.

6.7 These two differences mean that it is very likely that the effect of changing to an administrative model will be to drive companies (who will need to take costly legal advice on the matter) *not* to agree to change their behaviour and reach an agreed outcome, because to do so will mean admitting past wrongdoing, opening them to penalties for their past conduct (which they may have reasonably believed to be legal at the time they adopted it) and the possibility of, for example, third party claims. As a result, many more of the hundreds of cases that are currently settled will need either to be taken forward by the CMA to a full decision (taking a far higher investment of time and resources) or dropped without taking any action.

6.8 The point here is not whether this harm to outcomes makes the shift to an adversarial model a very bad idea (although we think that is true) but a wider issue: the Consultation doesn't even consider these questions or the detailed impact of the change in any meaningful way. That ought to give the Government pause to consider whether it is being given a robust, analytically sound case for the changes that its public sector stakeholders are asking for.

6.9 The rationale for the Government's proposal is made even harder to grasp given that the current system is far from broken. On the contrary, the Consultation outlines a number of notable recent successes which demonstrate the efficacy of consumer law enforcement as it stands[73] and acknowledges that the CMA is already delivering for consumers by taking robust action in multiple sectors.[74] However, this seems to count for little in the face of the case for change, as summed up by reference to a relatively sweeping assertion from the Penrose Report: "*that our regime has a good reputation, but not a great one. Consumers too often feel that they are being ripped off.*"[75] The Consultation "*considers that slow action and weak sanctions available to the CMA and the courts charged with ruling on consumer protection law breaches mean businesses can get away with rip-offs*." No substantial evidence is present to back this up – save that the same point was highlighted by Lord Tyrie and the Penrose Report, illustrating the problem with circularity of evidence referred to above.[76]

6.10 The proposal to switch consumer law enforcement away from a prosecutorial to an administrative model, empowering the CMA to enforce directly, and largely removing the role of the courts, amounts to much more than mere tinkering at the edges. Rather, it would mark a fundamental shift, steering consumer law onto an investigative track in the vague hope that the expertise and efficiencies that have built up over many years in forums such as the CMA and the CAT as regards competition law enforcement, would somehow find their way into consumer law enforcement. Conversely, it is much more

[73] Paragraph 3.3
[74] Paragraph 3.10
[75] Paragraph 3.4, cross referring to '*Power to the people: independent report on competition policy*' 16 February 2021, page8
[76] Paragraph 3.12

likely that the problems of competition law enforcement would seep into consumer law, offsetting any benefits that there might be in addressing the perceived current problem that the courts create undue delays.

6.11 Though it fails to back it up with evidence, the Consultation maintains that the current regime undermines consumer trust.[77]It is far from guaranteed that the new proposed regime would score any better on that front. Meanwhile, much stands to be jeopardised in the course of the major transition that would be required. All this at the very time when consistent enforcement of consumer law, applied with the benefit of arms-length judicial protection, is needed more than ever.

6.12 It is notable that no detailed consideration is given to taking steps to strengthen the existing prosecutorial approach, - for example in relation to civil fines. This is despite the fact that the Consultation recognises that, "*regardless of whether enforcers operate administratively or through the courts, the ability to seek and impose proportionate sanctions would make enforcement more effective*."[78]

6.13 The Government also recognises that switching consumer law enforcement to an administrative approach will open up the same complex issues as regards appeals as it is currently grappling with on competition law.[79] The challenge this presents perhaps goes even further in the context of consumer law given the sheer breadth of scope of consumer law enforcement.

6.14 At a minimum, any shift to the European model of enforcement would need to be accompanied by a shift to merits review on appeals – for the same reasons that standard of review is applied in competition law: when enforcers move from being prosecutors (as they under in common law enforcement) to being decision-makers directly imposing fines and remedies, those affected by their decisions need to have a body who can provide arms-length independent consideration of whether the CMA's decisions is wrong. The CMA's view on this issue bears close consideration:

6.15 The CMA believes that judicial review of administrative decisions '*could be a suitable standard, but understands that there may well be calls for a full merits standard where financial penalties are imposable*'.[80]

6.16 This is precise almost to the point of sophistry: the CMA does not call for judicial review, merely that it '*could*' be the correct standard. The CMA knows that there are not merely 'calls' for merits review, but a clear legal logic that makes merits review the obvious choice. The fact that the CMA does not lay out these points in the clear language that most CMA statements rightly adopt may reflect the fact that it has a range of interests engaged on this issue. It falls to Government to take an independent view on these matters, with a view to making the overall system predictable and fair.

6.17 Profound changes to the consumer enforcement model should only happen for compelling, well-evidenced reasons. The Consultation fails to provide these. The

[77] Paragraph 3.13
[78] Paragraph 3.36
[79] Paragraph 3.24
[80] CMA submission, paragraph 2.162.

current regime is effective and not in need of radical reform. With well-considered improvements, it could be made even more robust without posing serious risk of unintended consequences which would ultimately harm UK consumers most of all.

-End-