UK Competition and Markets Authority's response to the European Commission's public consultation on 'Empowering the national competition authorities to be more effective enforcers'

Executive statement

1. The Competition and Markets Authority (CMA) welcomes the opportunity to respond to the European Commission's public consultation on how to empower national competition authorities (NCAs) to be more effective enforcers. The CMA does so from its perspective as an NCA responsible for the enforcement of UK and EU competition law in the UK and as a member of the European Competition Network (ECN).

2. The CMA recognises the importance for consumers, for businesses, for the EU-wide economy and market and for competition enforcers themselves of NCAs being empowered to be effective enforcers free from undue outside influence. As a non-ministerial UK government department, the CMA's own independence is enshrined in its statute and practices, and we consider the powers and resources that we have to be generally adequate to enable us to meet our enforcement objectives.

3. However, as detailed further below, we consider that, in certain areas, it could be of wider benefit for further steps to be taken to ensure that authorities in all EU member states equally are able to effectively provide support for effective cross-border EU competition and thus for businesses operating across borders:

    - To date, it has been possible in a number of areas to achieve considerable and effective consistency among NCAs through 'soft convergence', in particular through the operation of the ECN. The CMA (and before it, its predecessor, the OFT) has contributed actively as a member of the ECN to past efforts to enhance consistency and cooperation in enforcement between EU competition authorities through soft convergence, including published ECN recommendations, and will continue to strongly support its operation.

- The Commission's consultation asks whether further action, including at EU level, needs to be taken to provide a solid, consistent basis for competition law enforcement across all Member States. We consider that the need for, and/or form of, any such action will depend on the evidence the Commission receives and the issue at hand. However, we note that in this event any such action must also be sensitive to the different underlying legal frameworks and wider enforcement regimes existing in each Member State.

4. The CMA recognises that this public consultation is part of ongoing work and has engaged with the Commission and other NCAs to discuss related issues identified in this consultation. We look forward to continuing that engagement.

5. Any proposals for further activity in this area (in particular, any proposals for EU level action) would need to be the subject of separate consideration by the CMA and the UK government on their own merits. Equally, any specific proposals would also need to involve a more holistic assessment of how they would fit within any wider package of reforms that the Commission may put forward.

The UK institutional framework

6. Under the UK's concurrency regime, a number of the CMA's competition powers are held and applied in some regulated sectors not only by the CMA but also by the relevant sectoral regulators. Those concurrent sector regulators along with the CMA form the UK Competition Network (UKCN). Like the CMA, the concurrent sector regulators are NCAs and members of the ECN. The UK concurrency arrangements are an important element of the UK's competition regime, the functioning of which must be safeguarded.

7. In preparing this response, the CMA has engaged with relevant UK stakeholders, including those concurrent sector regulators, the UK government and others. This included a stakeholder event, held jointly with the UK Department for Business, Innovation and Skills (BIS) on 6 January 2016 which included private legal and economic practitioners, academics and other government departments.[1]

[1] While this engagement has informed our response, this submission represents the views of the CMA alone from its perspective as a competition law enforcement authority, and does not purport to represent those of the UK government, other UKCN member authorities or any other UK stakeholder.

Ensuring effective enforcement

8. The CMA acknowledges the importance of NCAs across the EU being effective enforcers. Specifically we see particular benefit:

   - **for consumers** – if all NCAs have a sufficient enforcement toolkit which is actively used and helps enable a level playing field across Europe, that should boost both consumer confidence and the effective competition that delivers significant benefits to consumers in terms of increased choice, lower prices and more innovation;

   - **for businesses** – a level playing field also serves to boost business confidence and creates an environment in which markets can develop efficiently across EU borders and in which businesses can compete effectively throughout the EU. Furthermore, consistent and effective enforcement, free from political influence, is important for business as it delivers increased legal certainty and reduced costs for those involved in cross-border activity;

   - **for the EU-wide economy and markets** – effective enforcement of the antitrust rules across the EU supports competition in the Single Market, which itself helps to create jobs and deliver productivity and economic growth; and

   - **for enforcers** – ensuring NCAs are appropriately set up and have the necessary tools and resources to do their jobs increases effective enforcement of the rules, and enhances the scope for beneficial cooperation between enforcers where there are cross-border issues.

9. It is important to recognise the work that has already been successfully undertaken in this area within the ECN. The CMA considers that the ECN is working well. Since 2004 the ECN has played a vital role in enabling the Commission and NCAs to work together closely in applying the EU's competition rules. In addition to enabling case allocation and delivery – nearly 1,000 decisions adopted by the Commission and NCAs in this time – the ECN (including through its Working Groups) provides its members with the fora to discuss practical matters of mutual interest, share best practices and to achieve 'soft convergence'. Successes include the set of ECN Recommendations on investigative and decision-making powers adopted in December 2013. These provide an advocacy tool vis-à-vis policymakers for promoting consistency and set out the ECN's position on a number of powers

ECN members should have in their competition 'toolbox'.[2] Likewise the ECN Model Leniency Programme (MLP) has been a major catalyst in encouraging ECN members to introduce leniency programmes and in promoting convergence between them. The ECN plays a key role in making the single market work well for the benefit of businesses and consumers, in particular given the increasing scope for more 'borderless' markets (such as in the increasingly prominent digital and online sectors). The CMA considers it crucial that the ECN continues its valuable work going forward, especially on achieving soft convergence, and is committed to working with our ECN partners to help it continue to develop and to achieve its full potential.

10. The CMA agrees that it is important for all NCAs to have a broadly equivalent minimum set of core powers to ensure and enable more effective enforcement in all Member States. Where the evidence obtained following the Commission's consultation supports a conclusion that further action on convergence is needed to achieve that end, the CMA is willing to explore the scope for such action at national or EU level, taking into account the different underlying legal frameworks and need for them to be integrated with wider enforcement regimes existing in each Member State.

11. However, if and where EU level action, and in particular any legislation, is contemplated, it will be important to ensure that:

- the benefits to EU competition enforcement of such action are clearly identified, are sufficiently concrete and sustained, and are commensurate with the resource that would have to be invested to achieve them;

- national specificities and legal regimes, including the UK's concurrency regime and its criminal cartel offence and other related areas outside the 'competition space' are appropriately safeguarded and that lighter touch methods of convergence have been exhausted;

- it is important that any proposal is proportionate to the concerns it is addressing. Were a legislative solution ultimately to be pursued in specific areas, the CMA advises against a 'one size fits all' or prescriptive approach, for example by adoption of an EU regulation;

[2] The set of Recommendations set out the powers ECN members should have in their 'toolbox' on: *(a)* investigative powers, enforcement measures and sanctions in the context of inspections and requests for information; *(b)* the power to collect digital evidence, including by forensic means; *(c)* assistance in inspections conducted under Article 22(1) of Regulation 1/2003; *(d)* power to set priorities; *(e)* interim measures; *(f)* commitments procedures; and *(g)* the power to impose structural remedies.

- there is a clear agreement on the breadth and level of detail of the basic principles that should be codified in order to achieve effective enforcement; and

- any potential legislative solution pursued should be drafted so as to minimise the need for further amendments to the law at national level where a Member State already meets the necessary requirements. This will facilitate implementation and, importantly, limit both unnecessary disruption of established systems and additional regulation or business burden.

12. The Commission's consultation identifies four areas for possible further convergence, ie (i) resource and independence; (ii) the enforcement toolbox; (iii) the power to impose fines; and (iv) leniency programmes. The remainder of this response sets out the CMA's key observations in respect of each of these four areas, but in summary, the CMA:

    - considers there is scope for further collective action to secure the provision of resources, NCA independence, and adequate enforcement toolboxes and sanction arrangements for fines across the EU, but that any such action should not extend to detailed procedural harmonisation; and

    - in one important area in particular, leniency, the CMA remains to be persuaded of the need for or appropriateness of EU action, given the variety of legal systems across the EU and the level of 'soft' convergence already achieved to date. In particular, given the variety of national legal systems, the CMA notes the risk of inadvertently undermining overall enforcement and thereby reducing incentives to apply for leniency.

Resources and independence

13. The CMA is an independent and non-ministerial government department and highly values that independence, which is enshrined in its statute, structures and organisational culture. We consider that NCAs being (and being seen to be) independent and free from undue political influence is important for consumers and business, and ensures transparency of decision making and sound accountability. As with other NCAs and the Commission itself however, the CMA necessarily operates within a political context. It is important that NCAs are sensitive to both political currents and commercial realities and that there is continued dialogue between an NCA and its government (as well as with other stakeholders), provided that that does not inhibit or limit the NCA's independent, impartial decision making or assessment. The CMA further believes that a certain level of resources is also critical to underpin that independence and enable effective enforcement.

14. In the UK context, this is exemplified by the 'Strategic Steer', whereby the UK government issues for the duration of each parliament a non-binding statement of strategic priorities outlining its aims for the CMA.[3] The CMA must have regard to the government's Steer but, importantly, is not bound by it. The Steer also informs the CMA's own published statements of its priorities, set out in its Annual Plan.[4] Rather than limiting or weakening the CMA's independence however, we consider that given the way it is framed and operates, the Steer in fact serves simply to make the high-level communication between an NCA and its government, which might otherwise be covert, open and transparent.

15. The CMA considers that the UK framework gives it the necessary degrees of independence and resource necessary for effective enforcement, and which it understands the Commission is seeking to achieve. We consider, based on our engagement with them, that the same is true of the UK concurrent sector regulators, notwithstanding certain differences in the respective roles and functions of each.

16. Given the importance that the CMA places on its independence and the adequacy of its resources, and the safeguards in place to preserve that, we consider it is important that all other EU NCAs are also similarly independent and have adequate resources to carry out their work.[5]

17. As such, should the evidence collected from the Commission's consultation support the conclusion that further harmonisation appears necessary and appropriate to achieve that end, it will nonetheless still be crucial to:

    - identify what the minimum requirements for independence and resources should be;

    - consider in detail and agree the proportionate range and level of detail of the harmonised minimum set of requirements; and

    - ensure any agreed requirements leave appropriate flexibility to accommodate specific institutional arrangements/specificities in Member States.[6] This is particularly the case in the UK context, in light of the specificities of the UK concurrency regime and where the concurrent

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[3] The most recent Strategic steer was issued in December 2015.
[4] The CMA is currently consulting on its 2016/17 Annual Plan.
[5] The CMA also notes that some of the UK sector regulators with concurrent powers operate in the context of sector specific EU legislation that provides for certain base level safeguards of independence.
[6] In this connection, and as noted above, where a Member State already meets such minimum standards, the further amendment of national laws that is necessary to comply with any harmonising legislation or other EU level action should be minimised as far as possible, to facilitate implementation and limit unnecessary disruption of established systems or additional regulation or business burden.

sector regulators each have their own structures and processes, and are bound by certain EU obligations deriving from sector-specific regulation.

Enforcement toolbox

18. The CMA recognises the importance of all NCAs having an effective toolbox of investigation and decision-making powers and of some equivalence between those powers (subject to agreement on what those equivalent powers are). The CMA therefore supports consideration of further convergence to that end. We acknowledge that, if it proves there is clear and compelling evidence that other 'softer' convergence mechanisms have proved insufficient to ensure effective enforcement across the EU and that further efforts at such are unlikely to achieve such effectiveness, there may be justification for considering possible legislative or non-legislative EU level action to do so.

19. The CMA takes the view, however, that the exact way in which any such converged powers are enshrined in national law and used must be for Member States and NCAs respectively, so as to ensure their most effective operation in practice within the particular national context and legal/institutional framework.[7]

20. In particular, and as previously noted, if following this consultation the Commission were to propose to pursue a legislative route in this area, the CMA considers that it will be important that any such measure, particularly if it concerns harmonisation of national powers and procedures, is appropriately limited in scope and sufficiently takes into account the specificities of national regimes. For example, from the UK perspective, a key concern will be to ensure that the effectiveness of wider enforcement systems, including in particular the UK criminal cartel regime, is preserved.

21. The CMA broadly agrees that a common minimum competition enforcement toolbox should include the core powers specifically identified in the Commission's consultation document (most of which the CMA already possesses) but consider it important to reflect on the necessity and merits of each such power and how these would sit within any overall harmonised toolkit. To draw out an example, of those identified powers the CMA:

    - sees particular benefits, for the effective enforcement of competition law across the EU, in further convergence on the current ability of NCAs to

[7] This is provided of course that any rules that Member States establish or apply do not render the implementation of EU law impossible or excessively difficult and do not jeopardise the effective application of European competition law.

assist each other (where necessary) in the notification and enforcement of their administrative acts and decisions (not least given the increasing extent to which markets and businesses operate across national boundaries);[8] and

- is, by contrast unpersuaded by the inclusion of, for example, 'prescription' (or 'limitation') periods in any prescribed, harmonised, enforcement toolkit.[9] The UK statutory framework does not contain temporal restrictions on the taking of decisions imposing fines or penalties for failure to comply with competition investigation powers and/or to enforce such penalties. The CMA has concerns that such prescription periods could prejudice an NCA's enforcement, introducing inconsistency with other national prescription laws, undermining deterrence and/or leniency incentives. As such, should the introduction across the EU of any such periods be considered, their precise scope would first need to be the subject of careful, cautious consideration to ensure that such risks to effective enforcement were properly protected against.

Fines

The power to impose fines – general comments

22. The CMA considers that it is important that all NCAs have effective powers to impose deterrent fines on undertakings and associations of undertakings. In the CMA's view achieving this objective plays a crucial role in creating incentives to comply with competition law, contributing to a level playing field for EU businesses and consequently to greater innovation and economic growth.

23. Based on its experience of applying the UK legal framework for imposing competition fines – which it considers is in large part effective and fit for purpose – the CMA would make the following observations regarding convergence and harmonisation in relation to NCAs' powers to impose fines:

    - Considerable progress has already been made to date in appropriately harmonising penalty setting powers across the EU.

    - In certain core areas further convergence to achieve additional consistency may be desirable.

[8] See section C.2, questions 6–7 and 9.16–9.17 of the Consultation.
[9] See section C.2, questions 6 & 9.15 of the Consultation.

- Any revisions to the current framework would need to avoid incentivising forum-shopping while also giving NCAs necessary discretion in appropriate areas of penalty setting.

Nature of fines/fining framework

24. The UK operates a civil administrative system under which – after parties have been given an opportunity to inspect the authority's case file and make representations on the case against them – UK NCAs are able to find infringements and impose penalties. Those decisions can then be appealed to the UK Competition Appeal Tribunal and higher courts. The CMA considers that such a system[10] is a proportionate and efficient approach to setting competition fines. It respects rights of defence fully whilst also reflecting the difference between cases enforced under UK and/or EU competition law, on the one hand, and criminal enforcement, on the other, where for example, other sanctions (including imprisonment) are available.

Legal maximum and who/what should be taken into account when setting it

25. In the CMA's experience, the provision of a legal maximum for fines for anti-competitive agreements and abuses of dominance – which takes into account an undertaking's turnover – is an important part of the fining framework.

26. As regards the entities taken into account in setting such a maximum in particular, where an infringement is committed by one part of a wider undertaking (for example a small subsidiary of a parent company) it is important to be able to use fines to incentivise the parent company to put in place appropriate systems and controls or otherwise seek to ensure that its subsidiaries comply with competition law, and not just to consider one part of the overall infringing undertaking.[11] This has been recognised in a number of judgments of the European courts. In the CMA's view, the deterrence objective outlined in previous EU court cases can be achieved only if a fine can be set taking account of the global turnover of the wider undertaking where this would be appropriate. Linked to this, the CMA also considers that it should be possible in the limited circumstances set out in the case law of the European Courts for liability for an infringement (and therefore a fine) to be

[10] Or potentially, equally for example a court-based civil system (such a system was considered by the UK government in 2011, as part of wider reforms being made to the UK competition and consumer regimes, but was ultimately not adopted).

[11] We note in particular that the consultation states that, in certain NCAs, 'some competition authorities do not apply the concept of "undertaking" as established in EU law and cannot hold the parent companies liable for infringements of their subsidiaries. Others cannot hold liable the legal successor of an infringer (for example after a merger into another company) or its economic successor.' (Section C.3, preamble)

passed on to the legal or economic successor of an undertaking, in order to reduce the risk that fines can be avoided by corporate re-structuring.

27. Equally important in the CMA's view (and also highlighted in the consultation)[12] is the ability to fine associations of undertakings effectively, so as to ensure that deterrent and dissuasive fines can be imposed and recovered for infringements committed by or through such associations. This should ensure that fines can take account of the full range of circumstances in which an association and its members might be involved in an infringement.

28. The CMA considers there to be benefits from appropriate consistency of practice across the EU in this area, given the importance of effective sanctions in ensuring deterrence throughout Europe. Such consistency may be capable of being achieved through a number of means short of legislation. However, the Commission may conclude, based on the evidence it obtains through this consultation, that legislative rather than soft convergence on core elements in this area (such as a minimum fine cap, the ability to set fines according to the wider infringing undertaking, and the ability to impose and recover fines on associations) would be desirable. If so, the CMA considers that in formulating such EU level action it would be important to still leave Member States with a degree of flexibility around these issues. Similarly, the CMA also considers that 'non-core' elements (for example the reference year for global turnover) should be left for Member States to determine having regard to their national specificities and, as appropriate, the relevant case law of national courts.

Fining methodologies

29. The CMA considers, based on its experience of setting penalties, that there are a number of core elements relating to infringements and infringers that penalty-setting methodologies should take account of in order to ensure that deterrent penalties can in principle be set. These include potentially:

- seriousness/gravity of the infringement;
- use of turnover in the relevant market/goods or services directly or indirectly relating to the infringement as a starting point/basic amount in assessing how the seriousness/gravity assessment should be applied in the first instance;
- duration;

[12] Section C.3, preamble.

- aggravating factors, such as recidivism, senior management involvement, intentionality, coercion;

- mitigating factors, such as infringement committed under duress, cessation of infringement at the earliest opportunity;

- assessment of whether a penalty should be increased for deterrence having regard to appropriate factors (for example the size and financial position of the infringer and the nature of the infringement), and equally whether it should be decreased having regard to all the circumstances of the case, including proportionality (to ensure a penalty is not excessive);

- discounts for leniency, settlement and financial hardship/inability to pay where appropriate; and

- application of the statutory cap.

30. Equally, the CMA considers that Member States/NCAs must also be able to reflect national specificities in their penalty methodologies and have a margin of discretion in deciding how to apply the core common factors. So, for example, NCAs should be able to include additional aggravating and mitigating factors and decide case by case how those factors apply, and to determine the precise turnover and approach when considering the seriousness and starting point / basic amount of a penalty. In relation to these issues, the CMA considers that the appropriate approach is to pursue further voluntary convergence.

Leniency programmes

31. The CMA supports the Commission's objective of ensuring that well-designed leniency programmes are in place in all Member States and that these work well as a network that facilitates enforcement across the EU.

32. The paragraphs below set out the CMA's comments on the following issues identified in section C.4 of the Commission's consultation paper:

- Legal basis for leniency and divergences in leniency programmes.

- Dealing with multiple leniency applications.

- Protection of leniency, settlement and other material in the file of the competition authority.

- Interplay between leniency programmes and sanctions on individuals.

Legal basis for leniency and divergences in leniency programmes

33. As noted above, the CMA supports efforts to enhance the effectiveness of cartel enforcement across the EU, and the role of leniency within that.

34. The CMA's experience is that the leniency regimes across the EU would generally appear to be working well and that leniency is an effective tool in cartel enforcement. Moreover, given that all but one of Member States have leniency regimes in place and that the system of summary applications and cooperation between NCAs is (in the CMA's experience) working well, the CMA is currently not persuaded of the need in this area for, for example, legislative action at EU level.

35. Leniency is a significant benefit that is granted as a means to achieving deterrence and promoting compliance through effective enforcement. While the CMA regards leniency as an important tool in the detection and investigation of cartels and is keen to ensure that incentives to apply for leniency are maintained, it is also important that any changes to the leniency regime do not result in any unintended negative consequences for effective enforcement and deterrence across the EU.

36. Perhaps more so than the other areas being considered in the Commission's consultation, it is also important to recognise that leniency is an instrument of policy that falls within the discretion of each enforcement authority.[13] The Court of Justice recently confirmed that national competition authorities are free to adopt autonomous leniency programmes.[14] Moreover, it is essential that the leniency policies adopted by authorities reflect the particular requirements of the relevant national legal system and, in particular, its procedural requirements, which can vary significantly from Member State to Member State. National authorities must, therefore, be able to tailor their leniency programmes to the requirements of their competition laws and any other laws which may be covered by their leniency regimes, as well as the wider legal system within which they operate, including the demands imposed on them by national courts, and must have the flexibility to adapt their policies as necessary. This ability to adapt and be responsive to changes as they arise risks being considerably limited if EU legislation in this area meant that changes could only be made through a lengthy, formal process of legislative amendment.

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[13] As noted by the UK courts, for example in Crest Nicholson PLC v Office of Fair Trading [2009] EWHC 1875 (Admin), where the judge (Mr Justice Cranston) recognised that 'as well as the wide discretion which the law confers on competition authorities in conducting an investigation, the courts have specifically recognised the discretion they have to grant penalty reductions under leniency programmes.'

[14] See paragraph 57, Case C-428/14, DHL Express (Italy) Srl, DHL Global Forwarding (Italy) SpA v Autorita Garante della Concorrenza e del Mercato, judgment of 20 January 2016.

37. The CMA's view is therefore that voluntary convergence and/or deeper cooperation between ECN members remains the most appropriate way of both addressing any obstacles to the effectiveness of leniency regimes across the EU and realising any opportunities for further enhancing such effectiveness.

38. If, nevertheless, in the light of the evidence provided to it, the Commission considers that EU legislation in the area of leniency would have concrete benefits for effective cartel enforcement across the EU that could not be achieved through non-legislative means (for example, if it was necessary to preserve, or allow the introduction of, a leniency programme in one or more Member States), the CMA considers that any such legislation should be limited in scope. In particular, we note the following:

- Legislative harmonisation, if improperly scoped or designed, could lead to a situation where national leniency regimes were not optimised for the national legal and procedural framework governing enforcement in individual Member States. National leniency regimes must be able to reflect wider national choices in respect of enforcement arrangements, which means that there will necessarily be some divergence between national leniency programmes to reflect the particular context of national enforcement. This is recognised by the current ECN MLP. The CMA's view is that this discretion for NCAs to apply leniency flexibly is a key feature which should be maintained.

- This flexibility also allows Member States to adopt leniency programmes that support the enforcement of laws other than Article 101 TFEU (such as, for example, in the UK, the criminal cartel offence under s188 of the Enterprise Act 2002) and/or to ensure that the existence of such laws does not undermine incentives to apply for leniency in respect of Article 101. To the extent that this is also relevant in other Member States – for example, where some forms of cartel activity may be capable of being enforced as a species of fraud or under specific bid-rigging offences – legislative changes which remove the current flexibility may limit the scope for addressing those concerns through adjustments to the relevant NCA's leniency policy.

Dealing with multiple leniency applications

39. There is already a system in place to streamline the process for those who have engaged in cartel activity and who wish to seek leniency in a number of EU jurisdictions. There may be scope for further cooperation among NCAs through the ECN in relation to summary applications and the CMA will

continue to share best practice and work closely with the Commission and other NCAs in this area.

40. Even with a summary application process, however, there will continue to be circumstances in which an authority will need to be provided with further information that is specific to its particular jurisdiction to enable it to determine whether and, if so, what enforcement activity is appropriate. For example, in the UK where the leniency policy also covers the criminal cartel offence under the Enterprise Act 2002, the CMA may need to request further information to determine whether a criminal investigation would be appropriate. It may also be helpful for NCAs to request further information from leniency applicants to make better informed resource and case allocation decisions.

41. While the CMA is aware of calls from some competition practitioners for a more streamlined system for leniency applications across the EU, it is not aware that the absence of such a system is in fact currently deterring applicants from coming forward such as to have a material adverse effect on either leniency incentives or cartel enforcement. It therefore remains unclear to the CMA whether EU action in this area would materially strengthen cartel enforcement across the EU.

Protection of leniency, settlement and other material in the file of the competition authority

42. The CMA has not encountered difficulties in practice in relation to the protection of leniency, settlement or other material on the CMA's file. The UK has strong protections in place to guard against misuse or onward disclosure of material which is disclosed by the CMA (whether through the access to file process or as required by the UK's criminal disclosure regime) and which allows the CMA, absent an order of the court requiring disclosure, a broad discretion to resist requests for disclosure of sensitive material.[15]

43. However, the CMA acknowledges that protection of such material may be an issue in other jurisdictions and, to the extent that this is the case, supports attempts to address this.

44. Given the existing position in the UK, the CMA does not have strong views as to how any such issues could best be addressed. However, to the extent that any legislative harmonisation in this area were to be proposed following the consultation, we would reiterate that such legislation would need to allow for any relevant broader legal requirements in Member States. In this context,

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[15] For example, in Part 9 of the Enterprise Act 2002. See guidance on the CMA's general approach to transparency and disclosure and the CMA's detailed leniency guidance (OFT1495).

such requirements could include, for example, any applicable criminal disclosure rules and, in particular, would need to recognise the public interest in ensuring both the effective enforcement of national laws (particularly where these involve criminal offences), and compliance with relevant protections for the rights of defence (including those arising under the Charter of Fundamental Rights of the EU). Any potential legislation should also be consistent with, for example, any confidentiality regimes applicable to cross-EU sectoral regulatory regimes. Similarly, further consideration may also be needed to matters such as the possibility of allowing for the disclosure of leniency and settlement material to other law enforcement agencies where appropriate (for example, where there is evidence of criminality).

Interplay between leniency programmes and sanctions on individuals

45. The interplay between corporate leniency and sanctions on individuals for cartel activity has been considered in some detail by the CMA and is addressed in its published leniency guidance.[16] The CMA supports further engagement within the ECN to explore ways of ensuring that in those Member States that impose sanctions on individuals the interplay between leniency programmes and sanctions on individuals is such as to ensure (so far as possible) that incentives to apply for leniency are preserved.

46. In this regard, the CMA considers, in particular, that it would materially benefit enforcement in the EU if Member States that provide for sanctions against individuals were to put in place suitable national arrangements to protect employees of undertakings that cooperate under the corporate leniency programme in that Member State, and would encourage consideration of this in those Member States where it is not already the case. This is particularly important in the case of immunity applicants where there is no prior investigation. To ensure an effective interplay between corporate immunity and sanctions on individuals it is essential to provide legal certainty for both the individuals and the undertaking. In particular, an undertaking that is considering 'blowing the whistle' on a cartel and applying for immunity will wish to have legal certainty concerning the possible legal consequences for its employees.

47. This is achieved in the UK by the guarantee of criminal immunity for all cooperating current and former employees and directors in cases where an

[16] In the UK, the CMA's general policy regarding leniency is set out in the CMA's penalty guidance (OFT 423), published under s.38 of the Competition Act 1998. Further detailed guidance on how applications for leniency will be handled is contained in OFT 1495 (see footnote 15). This further, detailed guidance is non-statutory: the CMA applies it flexibly and may depart from it where appropriate in the specific circumstances of a particular case. Both documents were published by the OFT and adopted by the CMA Board.

undertaking applying for leniency informs the CMA of cartel activity that is not already the subject of an investigation (Type A immunity). The CMA sees this as one of the key features of the UK leniency regime and central to maximising its effectiveness.[17,18]

48. The CMA notes the specific matters relating to the interplay of corporate leniency and individual sanctions highlighted in the questionnaire. The CMA welcomes the consideration of whether divergence between Member States on these matters is indeed causing material impediment to the effectiveness of EU enforcement, and if so, what action might be taken. For its part, however, the CMA is sceptical as to whether further action would be materially beneficial when, in the CMA's experience (and provided there is sufficient cooperation amongst the Commission and NCAs), the system currently works well.

49. Indeed, there is a risk in relation to at least some of the options canvassed in the consultation paper that these could in fact have a detrimental effect on enforcement. To take a specific example, the CMA considers that providing the employees of companies that cooperate under the corporate leniency programme of the European Commission or any NCA with immunity from individual sanctions in all Member States would, rather than enhancing enforcement, in fact risk undermining the deterrent effect of the enforcement regime and the basis for the leniency regime.[19]

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[17] Provided that they satisfy the conditions for leniency (including cooperation with the CMA's investigation) cooperating current or former employees or directors of immunity applicants, wherever they are in the world and whatever their role in the cartel activity, will be guaranteed immunity from prosecution for the UK cartel offence. See further the CMA's published leniency guidance (OFT1495).

[18] Where cartel activity has taken place wholly or partly in Scotland, prosecutions for the criminal cartel offence are brought by the Crown Office and Procurator Fiscal Service (COPFS). However, decisions about whether to grant leniency to undertakings rest with the CMA. Bespoke arrangements are in place to ensure that adequate protection can also be provided to individuals where appropriate in such cases.

[19] For example, the CMA is concerned that if immunity from sanctions were to be automatically granted to individuals employed by a company that is cooperating under the European Commission's leniency programme without the need for that individual to cooperate with the NCA granting immunity, this would:

(a) result in under-enforcement by extending automatic immunity not only to employees of the first undertaking to come forward in circumstances where there was no prior investigation, but also to the employees of all other leniency applicants;

(b) therefore be contrary to the general principle that immunity should only be granted to those who cooperate with the investigation;

(c) act as a disincentive for undertakings to approach NCAs directly, even in cases that may be more appropriately dealt with by those NCAs; and

(d) potentially result in leniency applicants, knowing that employees would automatically be immune from individual sanctions, being less diligent in preparing summary applications: such an effect would also run contrary to the spirit of the MLP, which makes clear that it is the applicant's duty to ensure that summary applications are kept updated to reflect submissions made to the Commission (this allocation of responsibility is, in the CMA's view, entirely appropriate, as undertakings will generally be far better placed than either NCAs or the Commission to understand the extent of their potential exposure and therefore the scope of the conduct in respect of which they would wish to apply for leniency).

50. Similarly, the CMA would have concerns with requirements that might enable undertakings to 'game the system'.[20] Should further action be taken in relation to the interplay of corporate leniency and individual sanctions, the CMA considers that it would be important that any proposals include safeguards to avoid the risk of this.

51. Further detail on the UK's approach to interplay is set out in the CMA's published leniency guidance.

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[20] For example, where there is already a pre-existing criminal cartel investigation in the UK, the CMA considers that if there were, say, a guarantee of immunity from individual sanctions for current and former employees and directors of an undertaking that qualified for leniency under the leniency policy of the Commission or another NCA, an undertaking which was too late to qualify for immunity under the CMA's leniency policy might seek subsequently to apply for leniency to the Commission or another NCA as a device for trying to procure immunity for its employees from individual sanctions in the UK.