Submission by the Balanced Economy Project to the Consultation on Reforming Competition and Consumer Policy, Department for Business, Energy & Industrial Strategy.

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Authored [redacted] *for the* ***Balanced Economy Project***[1].

1. Introduction

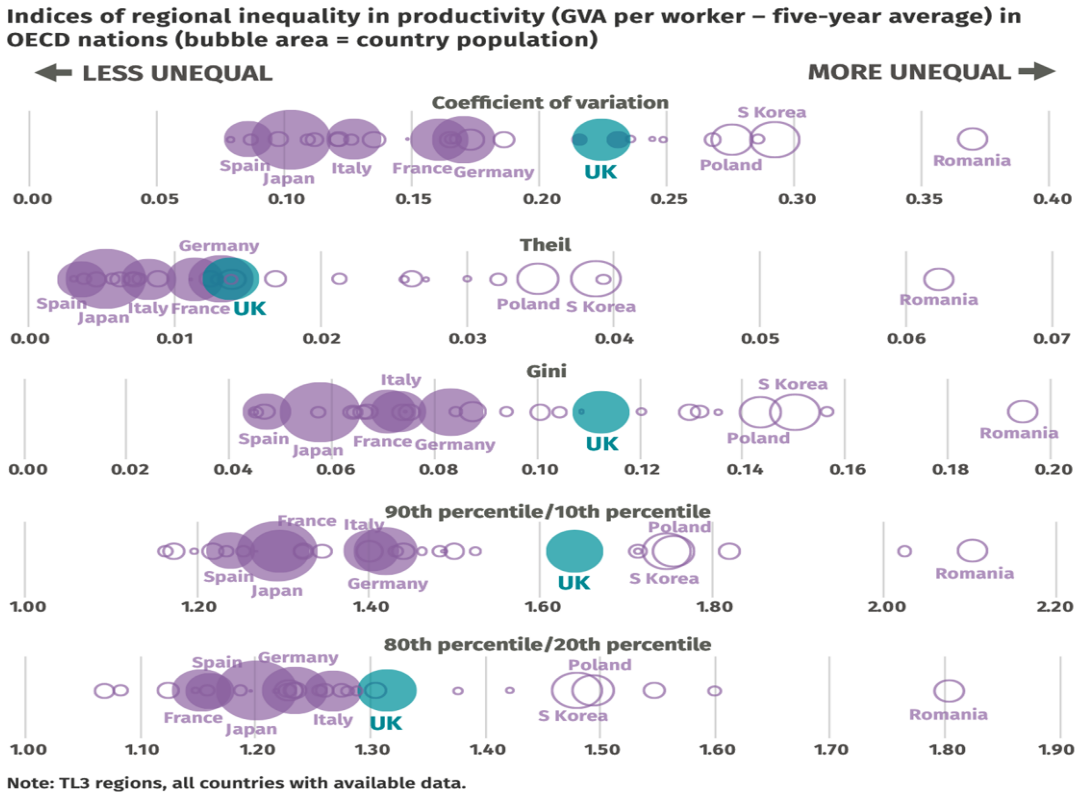
The Balanced Economy Project promotes a balanced, resilient, diverse, and thriving economy, where the state governs confidently in the broad public interest, and a diverse, resilient and empowered civil society sees, understands and challenges excessive concentrations of corporate and private power, and holds the government to account in delivering this vision.

We believe the UK economy is deeply unbalanced, along geographical, racial, gender and income/wealth lines. We believe that monopoly - which we use as a shorthand to denote significant and durable corporate power enjoyed by dominant firms - is a centralising force that worsens all these imbalances. We also believe that monopoly makes the UK economy less resilient, less innovative, less dynamic, and slower-growing than it could otherwise be.

The UK economy has struggled for years, on many international comparisons. The problem is not just that the 'pie' is shared unequally - but that the pie is smaller than it could be. Regional economic inequalities can be seen across many dimensions, as Figure 1 shows.

[1] *This submission presents supporting evidence in hyperlinks, rather than footnotes.*

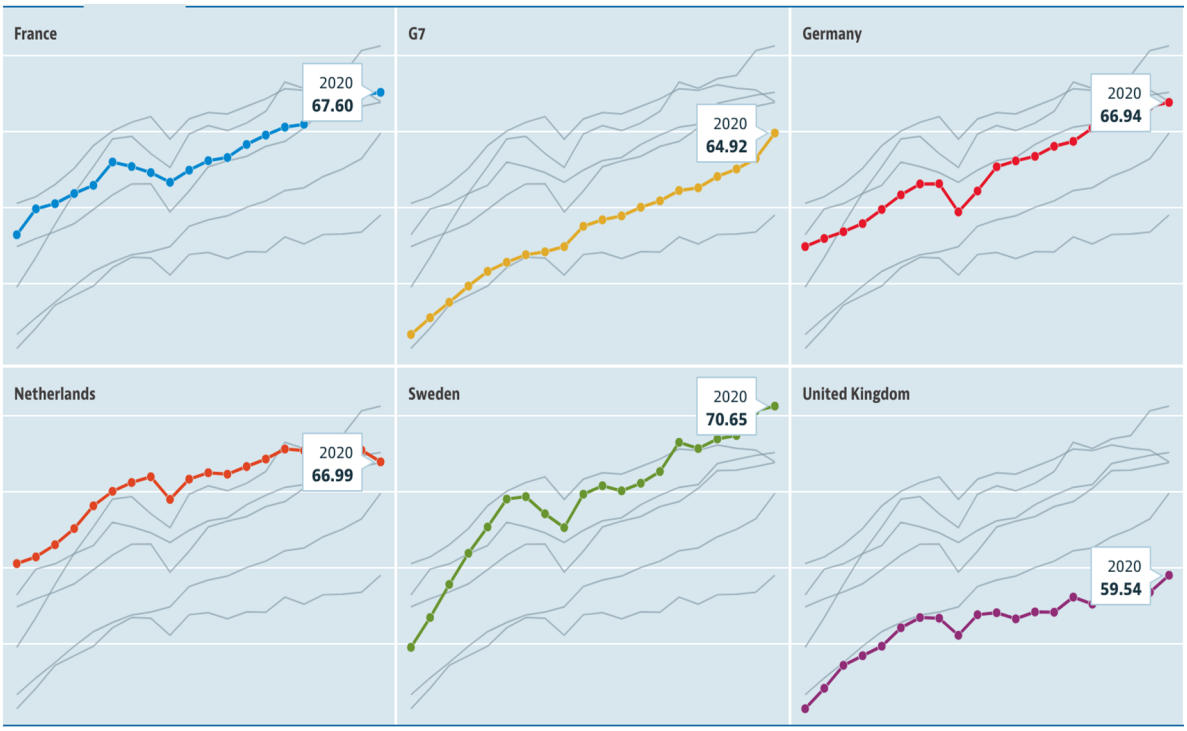
Figure 1



Source: IPPR, 2019

2. Productivity, as GDP per hour worked, is nearly 10 percent below the G7 average.

Figure 2: GDP per hour worked, US$, 2001-2020



Source: OECD, 2021

The causes of Britain's underperformances are many, including the role of oversized finance, but we argue that whatever the diagnosis, competition and associated anti-monopoly policies are potentially the strongest - and among the least recognised - set of tools for tackling them.

Our submission makes three core claims, in this respect.

First, the UK government, like many others, has been operating under a **harmful world view** or paradigm that tends to prioritise consumer welfare over other crucial priorities - and this paradigm has led to monopolisation, a loss of economic dynamism, weakened resilience, geographical centralisation of economic power, steeper inequality, and other harms.

Globally, this paradigm is now in the early stages of being challenged and replaced with a new agenda, led by events in the United States, as Section 2 explains. The **UK now risks getting left far behind** - and its economy, and its people and its democracy will miss enormous opportunities. So the UK must rapidly assimilate the new ideas, in order to deconcentrate its markets and to promote a balance of power across the economy.

A range of changes need to be made, from the mandate and resources given to the Competition and Markets Authority, to the way that core economic policies are made and rolled out – to put the UK at the forefront of the new agenda to deliver shared economic prosperity.

Second, this paradigm fits into a wider 'System of Monopoly' – a set of institutions, practices, interests, relationships and ideas that reinforces the current trend towards increased monopolisation. This system includes a number of bottlenecks and obstacles that make it harder for the CMA and other public authorities to constrain excessive concentrations of corporate power, as Section 4 explains.

The government must conduct and publish a mapping exercise to lay out the UK's interlocking System of Monopoly, in order to identify the obstacles and choke points so that they may be overcome, in the public interest. Section 4 outlines some initial suggestions for how to remove or ease some of the many choke points.

Third, the formulation and enforcement of competition policy in the UK (and in many other countries) happens overwhelmingly inside narrow technocratic circles, with major input from dominant firms, but with relatively little from the various stakeholders in wider society. For example, Lord Tyrie, the former chair of the CMA, stated in July:

> *"Two thirds of businesses do not know that the Competition and Markets Authority (CMA) enforces competition law in the UK and two fifths have never heard of it."*

Even though the CMA does solicit commentary from a range of different stakeholders, and indeed is increasing its efforts in this regard (Section 2.26,) the dominant consumer lens

restricts the scope of these exercises, and their impact is limited. It is urgently important to build up a broad "missing infrastructure" of competition policy that connects policymaking and enforcement directly with all the various affected stakeholders, so that they understand and are able to interact with competition policy and enforcement, and that their interests are reflected in all the processes, including in the efforts to dismantle the 'system of monopoly' that has grown up largely without their input.

This report contains numerous suggestions for reforms; an Appendix at the end summarises The Balanced Economy Project's main recommendations.

2. An old paradigm needs modernising

We begin this section with a quote from the home page of the Competition and Markets Authority (CMA).

> **What the Competition and Markets Authority does**
>
> We work to promote competition for the benefit of consumers, both within and outside the UK. We have staff in London, Edinburgh, Belfast and Cardiff.

Our emphasis is added. The CMA's mandate is more nuanced than this bare statement would suggest (for instance, "to promote competition" potentially goes beyond consumer welfare.) Nevertheless, the stress on consumers reflects a way of thinking that is deeply embedded, in the UK and in competition (or 'antitrust') authorities around the world.

This frame is problematic because people are not only consumers.

The consumer-first way of thinking is now being challenged, in the UK and elsewhere. Of course, UK citizens are all consumers - but we are also workers, citizens, voters, taxpayers, small business owners, and many other things. The CMA has made "vulnerable consumers" a focus in past annual reports and as Andrew Tyrie, former CMA chair, said: "we are all vulnerable now."

For example, if large music labels and platforms are able to deliver cheap and varied music to consumers, this is a benefit, as far as it goes. However, under the 'consumer welfare' paradigm the growing dominance of large music labels and platforms is driving down the share of revenues flowing to musicians and thus damaging the real engine room of the UK music industry - musicians. A new paradigm that more easily gave musicians stronger rights vis a vis consumers could re-vitalise this vital industrial sector[2].

[2] We have first hand testimony from people, especially small business owners, who understand the problems with the consumer-focused approach. We are happy to make introductions.

Why have our competition authorities focused so heavily on this one consumer-focused aspect of British citizens' lives? Where did this narrow view come from?

The short answer is: it came from a small group of people wielding a *new story* about markets, whose influence started to be felt in the 1970s. This was a particular subset of ideas in a grander theory about efficient markets, which some have termed 'neoliberalism.' As we have remarked elsewhere:

> *The most famous architects of neoliberalism were the American economist, Milton Friedman, and the Austrian-British economist, Friedrich Hayek.*
>
> *But on corporate power, their leader was a different person: a lawyer called Robert Bork. He argued that antitrust regulators, courts and the public should stop worrying about power, inequality, democracy, citizenship, sustainability, worker welfare, small businesses, economic diversity, innovation, resilience or the structure of markets. Instead, he felt, we should narrow our focus down to just two things that economists could easily measure: prices and consumer welfare on the one hand, and a narrow concept of economic 'efficiency' on the other.*
>
> *Bork's subtext was simple: if corporations grow bigger they can reap economies of scale and scope, thus becoming more 'efficient', and then hand those efficiencies out to consumers via lower prices and better services. Markets were efficient, he argued, so if firms wanted to merge, that was efficient. So Big was good, and corporate giants were the best friend of the little guy. In Bork's world, today's Amazon would be ideal: cheap goods, delivered efficiently. Google or Facebook, with their apparently 'free' services, perhaps even better. Never mind their workers, or whole economic ecosystems pulled into their gravitational embraces, or politicians bent into serving their wishes, or fake news, or teenage girls self-harming, or desolate high streets and communities, or local media going bankrupt: as long as consumers were getting their 'efficiencies', all was dandy.*
>
> *Though these ideas were clearly incoherent – for example, dominant firms will (of course!) raise prices if they can, and they absolutely have, worldwide – the new creed thrived, and influenced the courts, the politics and the public conversation. The ideas spread overseas, to Britain, to Europe, and further afield*[3].

The consumer welfare paradigm has led to an extreme monopolisation of our economies, principally through mergers and acquisitions and abuse of dominance, and a tolerance of 'bigness' which tends to disregard the importance of economic diversity or the dangers of monopoly. It is an economic regime filled with what has been called "The Other Red Tape". Two examples help illustrate this.

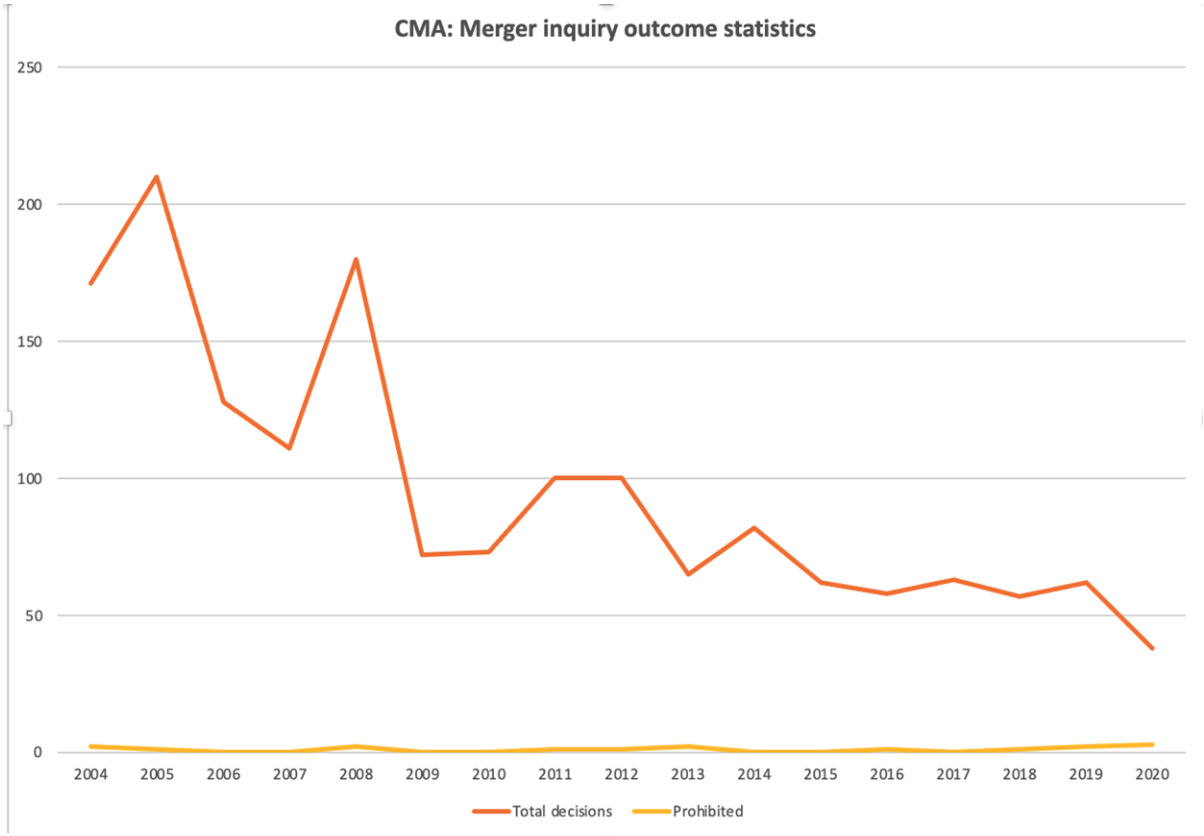
First, one can trace a historical narrowing down of UK authorities' approaches, as the word 'monopoly' has disappeared from the regulators' lexicon. For example, the

[3] This text was slightly shortened and modified from the original

“Monopolies” and “Restrictive Practices” (Inquiry and Control) Act of 1948 was followed by the “Restrictive Trade Practices” Act of 1956, the “Monopolies and Mergers” Act of 1965, the “Monopolies and Restrictive Trade Practices” Act of 1969, and then a marked shift to the “Fair Trading” Act of 1973 before the “Competition” Act 1998. Institutionally, the “Monopolies” Commission and “Monopolies and Mergers” Commission gave way more recently to the the Office of Fair Trading and Competition Commission, and now the “Competition and Markets” Authority (CMA, Footnote 19.) Another example is the Enterprise Act of 2002, which changed the standard by which mergers were assessed from a broad "public interest" test to the narrower "competition test."

Figure 3 gives a **second** illustration of this rising UK tolerance for dominant firms.

Figure 3



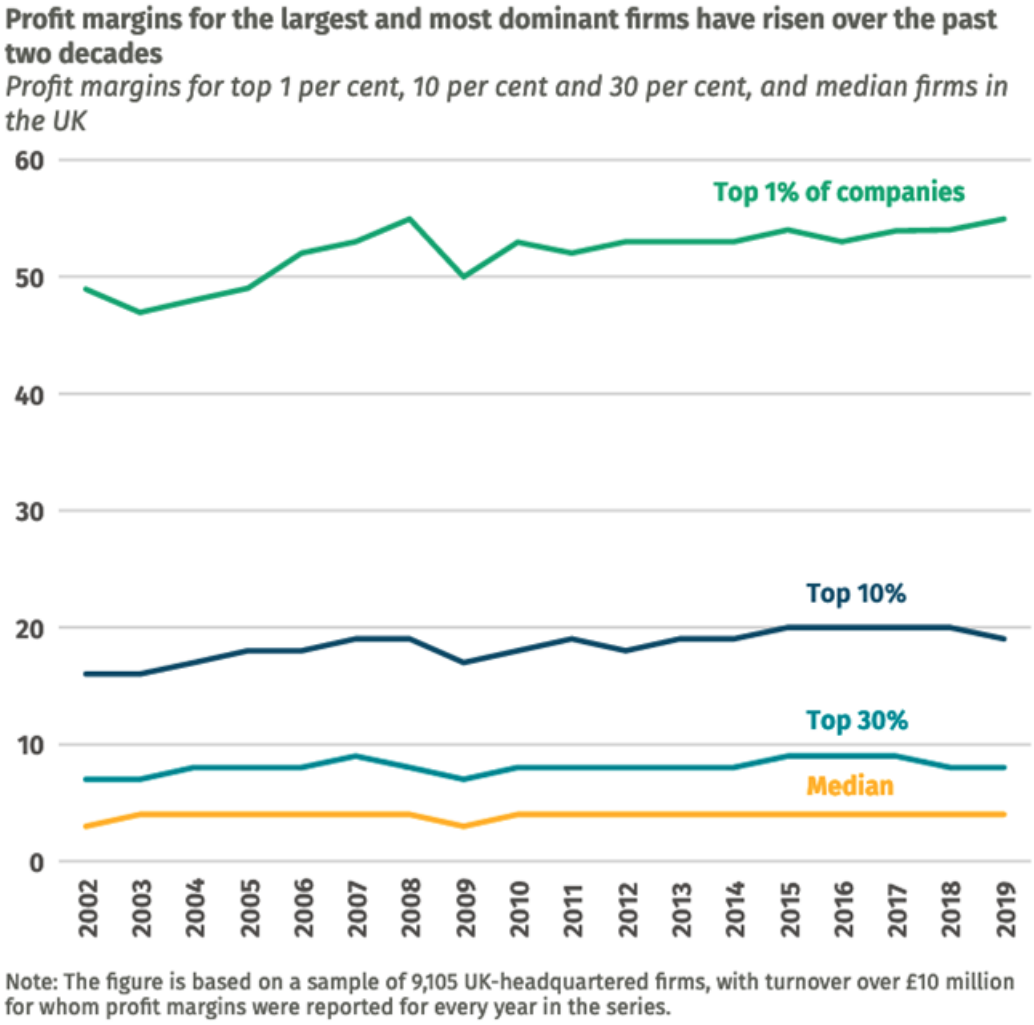
Source: our calculations from Merger inquiry outcome statistics, CMA, Aug 2021

One notable trend here is a falling number of decisions -- even as merger activity has proceeded apace. The other notable trend is the consistently low number of mergers that the CMA has prohibited - around one percent of the total notified - which itself is a subset of the total number of mergers and acquisitions[4].

[4] As one expert analysis put it, regarding the GAFAM (Google, Apple, Facebook, Amazon, Microsoft) companies: *"the failure of merger policy to examine at all hundreds of consummated deals that went below the radar (of the total of nearly 500 for ‘GAFAM’ deal alone since 2010, only a very small number has been actually reviewed – and this does not include stake-building in companies, nor does it include acquisitions by other many large platforms)."* Indeed, Google's CEO Eric Schmidt has openly admitted to a strategy of purchasing companies beneath the threshholds for merger notification.

It is also worth noting that, through a principle that the economist John Kay has called "obliquity," even the consumer interest would be served better by moving away from the consumer-welfare paradigm: for example, markups and profit margins by large and dominant firms have risen skywards: 60 percent above costs, worldwide, in one study. In the UK, IPPR in 2021 provided this evidence:

Figure 4



Source: IPPR, 2021

Too much focus on consumers has led to this state of affairs, and we propose that the UK learns from the principle of having a broader set of goals, and explicitly moves away from the consumer welfare paradigm to a dynamic new approach focused on power, as discussed below.

A new paradigm is emerging

The goals of policy and enforcement should encompass a broader set of concerns that would support the needs of a balanced, diverse, dynamic, competitive and resilient economy.

We need to move away from prioritising one set of stakeholders – consumers – and promote the interests of a range of others: small businesses, workers, taxpayers, and others, as Section 3 explains in more detail.

Indeed, this new paradigm to challenge monopolies is now starting to be embraced elsewhere, especially in the United States. This challenge first emerged about ten years ago from a small but increasingly influential civil society movement, sometimes known as the "New Brandeisians' (after the former US Supreme Court Justice, Louis Brandeis.) They argue that the consumer welfare paradigm is incoherent and counter-productive and that regulators, courts and policy makers should explicitly address concentrated power as a market distortion that threatens democracy and the economy as a whole. This civil society movement has now moved firmly into the judicial and policy arena in the U.S., with appointments such as Lina Khan to head the Federal Trade Commission, a remarkable wave of new antitrust activism by nearly all U.S. state attorneys-general, and an Executive Order by Joe Biden on promoting competition in the US economy, explicitly rejecting Bork's ideas, and mandating both a decisive shift towards this paradigm and also its expansion across multiple agencies of government. Some in the UK have begun to promote such ideas, and this potentially transformative new agenda can be attractive across the political spectrum, from left to right.

The "New Brandeisians" are right to focus on corporate power. One argument that has been raised against this idea of moving away from a consumer-only approach is that it is easier to apply rigorous measurements to consumer welfare, and that a focus on power or a more diverse set of harder-to-measure goals would bring in too much discretion for policy-makers. This is an important point, but we would argue in response:

1. Power-centric competition law has been applied in many historical instances, with great success. Most notably, perhaps, during the high-growth 'golden age' of capitalism' roughly from the 1950s to the 1970s.
2. Choosing a particular yardstick for success because it is easier to measure is reminiscent of the story about the drunk searching in the night for his car keys under the street lamp. When a policeman asks where he lost them, he replies that he lost them in the park, but he is looking under the street lamp instead, because the light is better there. Just because something is hard to measure, does not mean it is not an important goal.
3. Neoclassical economics, which has little to say about power, does not have to be - and, we argue, *should not be* -- the main yardstick by which the goals of policy should be guided, and success or failure assessed. Over-reliance on one discipline – economics – risks bias in the system, as well as institutional group-think, which has contributed significantly to the rise of dominant firms at the expense of diverse and thriving economic ecosystems. When it comes to balancing competing goals and interests, many of which (such as effects on democracy) are not comparable to each other, or hard to measure in numerical data, there is a far better system for processing it - called the democratic political process. Where discretion is potentially a problem,

then accountability, transparency and other mechanisms must be built into the system to ensure that it functions in the public interest. (The previous public-interest regime in the UK failed to integrate such accountability mechanisms, unfortunately. For example, the Digital Markets Unit (DMU) could make balanced decisions taking into account benefits to innovation, impact on privacy, security risks, online harms, environmental protection, and assessing the effects on other public policies as well as on competition, in the short, medium and long terms.

4. Narrow goals such as 'consumer welfare' put authorities in a strait-jacket which prevents them from acting where necessary. This has already been acknowledged in public as a problem by senior UK government-appointed officials.[5]

We would argue that a power-centric approach that incorporates social and economic goals beyond low prices to consumers, should be re-integrated with other areas of economic life, including policies on corporate governance, trade, patents, national security, industrial policy, and more. But for the purposes of this submission we propose a first place to start in making these changes is in the **mandate** of the CMA. That is the focus of the next section.

3. Transform the CMA's name and mandate

The CMA's current mandate is:

"to promote competition for the benefit of consumers, both within and outside the UK."

However, now that the UK is no longer tied to the previous interpretations of competition law under EU law, this is an opportunity to broaden the CMA's mandate and approach.[6] These should reflect a wider set of stakeholders and goals, including a focus on:

- Power, and the structure of markets. Excessive concentrations of economic power harm the economy, democracy and society, and a diversity of open economic ecosystems is a benefit. Size, market power, ecosystem power, market shares, market

[5] For example, see the letter on July 12, 2021 from Andrea Coscelli, head of the CMA, to Darren Jones MP, Chair of the Business, Enterprise and Industrial Strategy Committee, responding to an enquiry about whether or to what extent the CMA could intervene in the current wave of leveraged buyouts of high street brands. Coscelli noted that "The CMA can only respond to these questions insofar as, in doing so, it is fulfilling its legal mandate to promote competition in the interests of consumers, and it is exercising one of its statutory functions" and that "the extent to which the CMA can intervene in an acquisition on the basis that it is highly leveraged is therefore very limited."

[6] Previously the UK's Competition Act and Enterprise Act were interpreted in line with the *Treaty on the Functioning of the European Union* and the EU Merger Regulations. These in turn are embedded in a wider context of the social democratic principles embodied in the Treaties and EU law as a whole. In this respect Brexit presents an opportunity to reframe UK competition law, its purpose and its guiding principles. In the absence of a positive restatement of the framework within which UK competition law operates there is a risk that the regime becomes untethered from the broader goals of social and economic policy – so there is a need for a balanced approach that takes these into account, and a role for an Attorney-General's Office that can decide what action needs to be taken to safeguard the public interest.

capitalisation and other metrics and indicia may be used to design policy goals, where **excessive power** is recognised as a market-distorting problem in itself, and indeed a problem because of its potential influence over democracy. We propose the development of an "**Excess Power Standard**" as a test that could be used in, for example, consideration of a merger.

- The interests of employees, workers and unpaid carers.
- The interests of small and medium-sized businesses.
- The interests of suppliers and other counterparties.
- The integrity of democracy in the UK.
- The collective interests of all UK taxpayers
- The interests of the environment.
- Economic resilience. We have argued, for instance, that private equity firms and techniques are generating large finance-fueled market distortions which damage resilience, and the CMA has acknowledged this year that its narrow mandate makes it hard to act to protect the economy from economic shocks.
- Economic diversity and a balanced economy, including geographical balance and "levelling up;" gender; and racial balance.
- Competition can and must be a goal, but competition is often corrupted, as firms may compete on the basis of externalities such as greater willingness to pollute, greater use of extractive financial techniques, greater disregard for privacy; or greater willingness to escape tax. Competition should be pursued as an end in itself only to the extent that this possibility of corruption is recognised, as is the acute need to guard against it.

The CMA's mandate is the starting point of a paradigm shift. We argue that the CMA's mandate should be:

"to promote a balanced, resilient and thriving economy, in the public interest."

In addition, we propose changing the CMA's name and identity, to reflect its need to address issues of excessive economic power. Thus, we propose taking a leaf from UK history, and creating a new name with that explicitly reflects a need to counteract excessive concentrations of power: for example, the Monopolies and Markets Authority.

The above concerns have more specific roles to play. For instance, they should also be reflected in changes to substantive standards for intervention including, for example, through introducing further "public interest considerations" beyond the merger control regime and beyond the existing list of considerations.[7] The Attorney-General's office should also have a duty to intervene, quickly if necessary, to initiate a case in the public interest.

We also suggest that the CMA, reflecting its broader focus, broadens the role and identity of "super-complainants," which have a special status that allowing them to bring competition

[7] The existing grounds for intervention by the Secretary of State are National Security, media plurality, public health emergencies and financial stability.

and consumer complaints. A super-complaint as currently defined:

> *"is a complaint submitted by a **designated consumer body** that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming **the interests of consumers'**."*

We urge that the definition of super-complainant be expanded, to reflect the broader list of stakeholders beyond consumers, as discussed above, with additional representative bodies designated (for example, trade unions, associations of small businesses, and alliances of NGOs).

4. Tackle the "System of Monopoly" and unlock CMA resources

Figure 3 above suggests that the CMA has struggled to contain the rapid rise in concentrated corporate power across the UK economy. Indeed, the as the consultation document has said:

> *"There is growing evidence, including in 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 and the COVID-19 pandemic is likely to have compounded these challenges."*

The UK economy, as in any country, is in the grip of a "System of Monopoly" which promotes economic concentration. This system has many parts: it includes the consumer-welfare paradigm, inherent biases towards consolidation, monetary policy, the accumulation of debt, the political power of large corporations, the role of deal-makers, advisors and economic consultants, the inequality of arms between the regulator and the regulated, and also institutional structures such as the composition of the CMA inquiry panels, the conservatism of the judiciary, and the absence of civil society in competition policymaking.

Another aspect of the System of Monopoly is the CMA's limited resources, to tackle rapidly growing challenges. The market capitalisation of Google, Apple, Facebook, Amazon and Microsoft rose by 460 percent in the decade that preceded the Coronavirus pandemic - to a combined US$4.7 trillion – nearly twice as large as UK GDP just for these five tech firms -- and has nearly doubled again since the pandemic began. Yet the CMA's resources have not *remotely* kept pace with this alone, let alone broader recent merger waves and the massive rise in corporate power.

The CMA therefore urgently needs significant additional resources to do its job. The creation of a new Digital Markets Unit alone will require a major expansion and the same issues exist outside the digital space.

However, it is also urgently important for the CMA to use its resources more efficiently, and for those resources not to be held ransom by the whims of merger-keen private firms. As Andrew Tyrie, former CMA chair, wrote in July:

> *"the CMA too often finds itself bogged down in recondite cases that make a small or negligible contribution to economic welfare. To the outside world, as was explained at the start, it can appear out of touch: detached from the real economy and the lives of ordinary consumers."*

We make a few simple proposals. Some are so powerful that they would be helped by enhanced international co-operation and co-ordination with other countries, in the face of inevitable pushback from the world's most powerful corporations.

a) Study the "System of Monopoly"

The CMA should publish a clear annual diagnostic, easily accessible to the general public, which describes the state of the "system of monopoly" in the UK, explaining where the bottlenecks and obstacles are in its efforts to constrain excessive concentrations of power in the public interest.

This annual report would provide a roadmap to help both policy makers but also businesses and civil society to understand the system, and provide pointers and democratic accountability for reform in the public interest.

b) **Reverse the burden of evidence for mergers.**

If the CMA seeks to block a merger, it must currently conduct detailed studies to define markets, calculate market shares, assess complex models of claimed efficiencies presented by the parties, and confront downplayed theories of harm, as well as surmount other obstacles, some of which may be political. They risk failure before the courts at the end of the process.

As Figure 3 above shows, less than one percent of mergers have been blocked. This is a stunning failure by any measure, even if the record is broadly similar in Europe and elsewhere. The system related to mergers is also an enormous consumer of CMA resources.

There is a simple, elegant solution to this problem: reverse the burden of evidence for mergers. This would, if effectively implemented, release enormous CMA resources for other priorities.

This approach would start from the structural presumption that firms above a certain size (see section c) on this, below) should not merge, and from first principles they are not allowed to. Next, the companies need to prove that their proposed merger is in the wider public interest, and that the claimed benefits cannot be achieved another way. If Amazon, for instance, wants to buy a company, it will have to demonstrate not only that the purchase

will bring benefits, but also that Amazon is unable to create the same innovations in-house: that the only way to achieve synergies is to buy the company. This latter requirement is essential: without it, reversal of the burden of proof risks merely flipping the assessment of benefits and harms.

Reversing the burden and raising the standard of proof to require evidence of indispensability for firms above a certain size would not only block most mergers: it would mean most companies would not even try in the first place. This would be a very large and immediate source of efficiencies and cost savings for the CMA.

With this measure, innovation and competition would be preserved and enhanced, and only those mergers that genuinely are in the public interest would go through.

b) **"Structural Separation" (or breakup)** of dominant firms.

Reversing the burden of evidence will powerfully stem further monopolisation, but it is also essential to disperse power and break up dominant incumbent firms, many of which are adopting “platform” approaches that allow them to leverage power in one market to dominate another.

Dominant firms leverage market power to amass more market power, meaning that merged entities are more powerful than the sum of their parts. Without robust and aggressive government intervention market power "will become further entrenched; and will certainly not reduce," as Australia's top regulator Rod Sims put it recently. He continued:

> *"it is beyond debate that acquisitions have taken place that have contributed significantly to the substantial market power of the digital platforms. With the benefit of hindsight, they should not have been allowed to proceed."*

Using the prism of power, rather than consumer welfare, allows authorities immediately to conduct necessary breakups. UK authorities should unwind old mergers, in carefully targeted ‘structural separations”; and break up existing businesses along business lines or conflicts of interest, for example. Such conflicts:

> *“further entrench their dominance, thwart competition, and stifle innovation.”*

They can also undermine economic resilience and prosperity. For example, large accounting firms should go beyond ‘ring-fencing’ and be forced completely to separate their auditing functions from their consulting functions so that these functions sit inside fully independent firms; or large banks should separate their investment banking functions from deposit-taking, as is widely acknowledged in both cases.

It is also essential to **end self-preferencing**, so that designated companies with Strategic Market status (presumably like Amazon) and potentially others are not allowed to sell their

own products on their own platform, in direct competition with third parties who are selling on the same platform. (This prohibition would be a form of break-up, as the dominant firm would have to sell off its in-house sales activities.)

It is important to break firms up along the correct fault lines, and for the right reasons.

While it may not be a good idea, for instance, to break up the core Facebook firm in a way that creates many mini-Facebooks, there is also no good public interest reason why Facebook should be allowed to own Whatsapp or Instagram (for example, attorneys-general in 48 U.S. states are demanding exactly this breakup.) Likewise, there is no good reason why Google should be allowed to own Fitbit,; and no good reason why Amazon's marketplace or Amazon streaming services should be owned by the same firm that owns Amazon Web Services, which furnishes these business lines with computing power. Indeed, the Ending Platform Monopolies Act submitted in the U.S. Congress June this year proposes this: platforms above a certain size would be prohibited from owning a business that creates a clear conflict of interest, which incentivises it to favour its own service over competitors' services or over users of the platform.

Structural separation to prevent conflicts of interest is vastly more effective than trying to regulate these conflicts after the fact. Those parts that are best left together can be dealt with through other mechanisms such as utility-style regulation or inter-operability, discussed below.

We commend the CMA for its recent efforts to prevent consolidation of market power with, for instance, its pushback against Facebook's purchase of Giphy. Yet this and other similar measure are still pinpricks relative to these giants: far more must now be done.

Companies have argued that breakups are impractical - like unscrambling eggs. This is not so. Research shows clearly not only that breakups are quite feasible - not necessarily harder than merging -- and that these separations happen all the time.

Given the enormous political power of dominant digital firms to resist breakups, and the fact that many of the dominant platforms are American or Chinese, it is essential to engage in international co-operation and co-ordination on this, to build the political momentum for such changes.

c). Use Bright Line Rules and other tools and principles

Where legal standards are subjective – whether particular conduct is good or bad for "consumer welfare", whether a merger is "anti-competitive" or not – the competition agencies must spend considerable resource proving [on a balance of probabilities] the harms that they have theorised against a hypothetical counterfactual. This is resource intensive and creates uncertainty. Not so when **bright line rules** or strong (rebuttable) legal presumptions are deployed. If mergers beyond a certain threshold, for example reducing the number of

players from 7 to 6 or fewer, or certain types of conduct are presumptively illegal then the burden on regulators is substantially relieved.

There have been proposals for the adoption of such Bright Line Rules in the US. The CMA should **explore international best practice on bright line rules** and consult nationally on the calibration of appropriate legal presumptions in the UK to allow the agency to best use its resource to target the most harmful conduct and mergers.

Another tool that the CMA should **expand** is **the potential range of firms that can be designated as having Strategic Market Status (SMS.)** The SMS designation in the UK should be used more broadly, beyond the digital sector. Germany, for instance, has a new regime that targets "undertakings with paramount significance for competition across markets," which is a similar designation to SMS (and indeed reportedly inspired by the UK's Furman Report). However, while the new German designation looks likely to apply mainly to digital markets, its relevance is defined as "across markets" without further elaboration, rather than being focused on digital markets only.

Another very important tool, especially important in the digital sphere, is **"inter-operability" and an open web,** where systems work together, even if they are from competing firms. For instance, interoperability requires that customer data is not siloed inside 'walled gardens' constructed by dominant firms or platforms like Apple, but instead is portable between them, in an "Open Web," to allow enhanced competition. The Furman Review, for instance, urged "measures to promote data mobility and systems with open standards," and the Penrose Report endorsed the principles too.

Email or telephone numbers operate along such principles, for instance: a gmail user can send a message to a protonmail account, or any telephone user can freely call any other telephone user and vice versa. By contrast, a book purchased on Amazon's Kindle e-reader cannot be accessed from a Barnes & Noble Nook reader.

For example. people who dislike Facebook's privacy standards could switch to a more privacy-focused competitor, without cutting themselves off from their family members, friends or colleagues who still use Facebook. As the Stigler Committee on Digital Platforms in the U.S. noted:

> *"Interoperability would facilitate ongoing competition on the merits of the user experience, rather than on the size of the installed base, and potentially stimulate robust competition."*

d) Use Interim relief.

A consistent approach is needed towards the pursuit of and granting of **Interim relief/measures** (which is when a court grants a short-term measure while a full investigation or determination is made.) A dominant company may have thousands of cases against it

outstanding at any given time, and may be content to delay responding for months or even years, thus 'bogging down' actions against it. However, if a court obtains interim relief against a firm, preventing execution of a new commercial development, technology, contract or business model, this will move cases to the top of that firm's priority list and thus allow rapid "David versus Goliath" victories. The CMA should consider requesting interim relief in any case involving a dominant firm when there is a possibility for harms to manifest during the conduct of the case.

e) Discourage anti-competitive deals

The FTC in the United States has recently brought back the "prior approval" rule, which requires parties to a failed, unlawful merger, successfully blocked by the agency, to obtain prior approval from the FTC before implementing the same or a similar deal afresh. To conserve CMA resources, a similar rule should be adopted in the UK: sellers should be blocked from bringing another merger to the CMA (or the CMA should automatically block a second merger involving the same assets) if the authority has already blocked a deal involving the same or similar assets. This would discourage sellers from trying their luck with anti-competitive deals. As a recent example, this would have saved the CMA considerable resource in reviewing the Sainsbury's /Asda deal and encouraged Walmart to pursue the deal with the Issa Brothers in the first instance. (However, this second deal would also be problematic under a broader conception of competition policy.) Prior approval could also be used more broadly, for example where there is potentially abusive bundling or foreclosure by digital and other firms.

Similarly, it has been proposed that authorities should only consider the merger package presented by the parties at the time of notification, including the proposed package of remedies. The CMA would then approve or block the merger based on the package offered: if insuffient remedies are offered at the outset to remedy the harms identified by the CMA then the deal would fail. This "Fix it or Forget it" or "No Remedies" approach to merger control would again encourage parties to put forward the least anti-competitive but commercially viable deal they can structure.

f) Protect whistleblowers and prevent retaliation.

It is well known that many small businesses operating inside the 'gravitational field' of a dominant firm or monopolist -- for example, suppliers to large supermarkets, or musicians dependent on a global music platform -- experience **fear of that platform** - they know that if they rock the boat, they risk de-selection or 'punishment by algorithm' - potentially with their business or livelihood wiped out overnight.

This is something that the CMA of course already knows and considers when seeking to understand how UK markets and economic ecosystems operate. However, it would be essential to implement a consistent and accountable approach towards retaliation. One such

approach, advocated by the newly created Movement for an Open Web, would be to protect the identity of persons applying to the courts, as is the case in family law, and treat claimants' identity as protected, but allow the authorities to test the evidence under due process protections.

5. Re-focus CMA resources

The CMA's scarce resources are misdirected towards work that has a smaller impact than it could have if the CMA's mandate were broadened and it could more clearly target the "system of monopoly" described above. Both these points apply across competition agencies, as acknowledged in the recent memo issued by Chair Lina Khan to FTC staff and Commissioners.

We will provide two examples of how the CMA could focus its resources in more productive directions.

First, as with Europe's competition authorities, the CMA exercises great diligence in opposing *cartels* - while, as Figure 3 above shows, it has shown little willingness to oppose or block *mergers*. This might seem a peculiar stance, given that a merger is effectively a reinforced, formalised, permanent version of a cartel. So we might contrast this CMA action:

> *In 2016, the Competition and Markets Authority (CMA) fined an online seller over £160,000 for breaking competition law.*
>
> *The CMA found that 2 online sellers of posters, featuring popular artists such as Justin Bieber and One Direction, and frames had participated in an illegal price-fixing cartel by agreeing that they would not undercut each other's prices for products sold on Amazon's UK website.*

. . . with the fact that Amazon is allowed to sell its own products on its own platform, using algorithms and other tools of its dominance and power, to distort an entire marketplace: the Amazon marketplace.

Amazon's power to tilt the playing field in its direction is vastly more damaging to the UK economy than a seller of Justin Bieber wall posters is, yet at the time the CMA chose to prioritise the former, rather than the latter. A broader CMA mandate, and more accountability and broader consultation, would broaden the focus and tackle larger concentrations of power.

Second, as mentioned, the CMA is hampered by its consumer focus from investigating "financialisation" and especially the use of enhanced debt to increase returns to corporate owners, at the expense of other stakeholders and of broader economic resilience.

The **CMA should have a "Finance Unit"** that specialises in investigating, understanding and publishing its analysis of the capital and debt structures of corporations that have significant stakes in our economy, especially but not only private equity firms. The finance unit should also be responsible for analysing the impact of tax and monetary policy (e.g. changes to interest rates or quantitative easing), accounting standards and other financial matters impact on corporate consolidation and unfair competition. This should include enhanced sectoral analysis, to take account of the fact that private equity and other firms, which may be appropriate in some sectors such as high technology, are less appropriate in others, such as adult or children's social care.

6. Democratise the CMA and build a 'missing infrastructure' of competition policy.

It is essential to build up a 'missing infrastructure' of competition policy so that all the stakeholders affected get to participate. This is ultimately a question of *who* gets to make competition policy and hold enforcers to account: will it be a narrow circle of technocrats with little public understanding and often with conflicts of interest, or will it be a policy area with wide public participation and public and academic scrutiny? As Lord Tyrie said in July:

> *"Public debate – with Parliament more closely involved – is now needed. Leaving the current arrangements unimproved – invisible to a wider public, impenetrable to all but the expert community, would be a serious mistake.*
> . . .
> *The CMA [should consider] the development of direct contact, from current nugatory levels with consumers and businesses, particularly smaller and challenger firms."*[8]

Democratisation is needed at several levels:

- Greater engagement with the public and civil society, including in the media, on monopoly issues, not just explaining what competition policy is and what the CMA does but stimulating public debate on the proper settlement of power in the economy. Competition enforcement should pass what Peter Freeman, Chairman of the Competition Appeal Tribunal, has called the "Today Programme" test. Invest in training for civil society to build capacity to engage with competition policy issues.
- Create a standing, **citizen-representative independent organisation** tasked with reviewing the work of the CMA, akin to FinanceWatch in Europe,[9] potentially as a coalition that includes the consumer-representative bodies that the CMA already engages with (Citizens Advice Bureau and Which?) but also alongside worker, climate,

[8] See Lord Tyrie's Report, especially pp28-29.
[9] FinanceWatch is a European NGO supported by the European Union whose role is to act as a civil society counterweight to the financial sector.

independent small business representatives and other representative groups. This is linked to broadening the standing for complainants, which was discussed above in relation to supercomplainants.

- Create an **All-Party Parliamentary Group on Competition and Corporate Power** and/or a separate **Select Committee on Competition Policy** to inform the proposed governmental steer and to review the work of the CMA and case prioritisation, to hold public hearings and conduct inquiries.[10]
- Greater transparency of CMA governance, decision-making, case prioritization and so on. Consider hosting public meetings, as has recently been instituted at the Federal Trade Commission in the US, allowing members of the public to make oral submissions on the record.

Find ways to embed the CMA's work more deeply in the economic realities of UK citizens, workers, businesses and consumers, with less focus on London and the South East. Consider hosting "CMA roadshows", with CMA staff hosting events around the country to hear concerns. As an example, the Chair of the FTC, Lina Khan, has said that she would like to expand the "regional footprint" of the agency, opening regional offices. She says this would allow the agency to:

> *"fill out our ranks by taking advantage of a national pool of qualified candidates. It also helps grow our understanding of and expertise in industries that might be more specific to certain local economies. Finally, it means that we will have more staff who live in and are connected to the many different places where our work has significant impact."*

The Government should consider how these principles can apply already to the CMA's office in Edinburgh, its Welsh and North Irish competencies, and beyond.

- We support John Penrose's suggestion to "use the CMA as a micro-economic sibling for the Bank of England". This should go beyond an annual State of Competition Report. Rather, government should broaden the research remit of the CMA to systematically gather data on markets, market participants, and concentration, and make suitably anonymised open data available to academics and researchers.[11] Working at the CMA should be an exciting and prestigious prospect for economics graduates eager to gain access to unsurpassed data on markets and the economy. We agree that the CMA should have new powers to obtain information needed for this research.
- Conduct systematic retrospective studies of historic merger and other investigations to gather and disseminate information on how to improve competition policy interventions.

[10] C.f. Biden's Council on Competition.
[11] See letter from Sajid Javid and Andrea Leadsom, 2021, Annex III.

7. Oppose the Fool's Gold of the "Competitiveness Agenda"

We believe that a balanced economy characterised by diverse and robust economic ecosystems and regulated confidently in the wide public interest will inevitably be more dynamic, more innovative, more competitive and more resilient than an economy dominated by large dominant firms exerting market power and gravitational pull on subservient economic ecosystems clustered around them.

This must be the starting point for any understanding what a 'competitiveness' means when applied to our national economy.

We believe that there are broadly two types of 'competitiveness' policies, when applied to a whole country (as opposed to a private corporation). The first, 'downgrading' type, weakens policies, taxes and regulations and enforcement, in an effort to try and attract or stimulate business activity. As economists have known since Adam Smith, an under-supervised economy will inevitably tend towards monopoly. This kind of national **competitiveness** therefore **reduces competition** in markets. Wide research shows that this kind of 'competitiveness' also reduces overall national prosperity, even as it delivers large rewards to certain narrow classes of people (such as hedge funds, owners of large multinationals, or international accountants), resulting in further unleveling of the UK economy and society.

A better and more productive kind of competitiveness involves 'upgrading', which involves improving the basics necessary for investment, such as improving schools or universities, using competition rules to shepherd diverse and resilient economic ecosystems, or upgrading roads and other infrastructure. In addition, as our analysis explains, paraphrasing the economist Paul Krugman:

> *"There's no need to think about upgrading in terms of 'competitiveness' relative to other nations. If Germany improves its education, upgrades its financial regulations to protect its taxpayers better from risky speculation, or invests in vaccine research and development, French people won't lose out. On the contrary, these improvements will make French employees and taxpayers more productive and richer, as better-off German consumers buy more French goods, and as better vaccines help everyone."*

We offer a more detailed analysis of the relationship between "national competitiveness," market competition, and competition policy, here.

END OF MAIN SUBMISSION. APPENDIX WITH RECOMMENDATIONS BELOW

APPENDIX: RECOMMENDATIONS

This appendix contains an abbreviated list of the proposals explained above.

A1. MODERNISE THE PARADIGM

- A shift in the broad paradigm is necessary, as is now rapidly happening in other countries. If the UK is to avoid falling behind, **a dominant consumer focus should be changed to focus on power and the structure of markets,** while meaningfully incorporating the concerns of other stakeholders alongside consumers, such as employees or workers, the environment, or small businesses. An **excess power** standard should be considered.

- The CMA's **mandate and name should be modernised** to reflect this paradigm shift. Its mandate should be *"to promote a balanced, resilient and thriving economy, in the public interest, while its name should be modernised to reflect the importance of tackling excess concentrations of economic power, for example changing it to the Monopolies and Markets Authority.*

A2. MAP THE SYSTEM OF MONOPOLY

- **Systematically map and publicise the interlocking "System of Monopoly"** that currently promotes excessive economic concentration, to allow the CMA and wider society to see where the blockages and obstacles lie, and to illuminate pointers for reform. Reduce reliance on **complex and contested economic evidence**. Over-reliance on one discipline – economics – risks bias in the system, and institutional group-think. This could be done through, for example, systematic **retrospective studies** of historic merger and other investigations

A3 BUILD THE MISSING INFRASTRUCTURE

- **Democratise the CMA and build a 'missing infrastructure' of competition policy,** so that it is opened widely beyond the current fairly narrow circles of technocrats that dominate its approaches, and includes participation by all affected stakeholders. This would include:
    - Create a standing, **citizen-representative independent organisation** tasked with reviewing the work of the CMA.
    - Invest in **training** for civil society organisations to build capacity in competition policy.
    - Create an **All-Party Parliamentary Group on Competition and Corporate Power** and a separate **Select Committee**.
    - Consult on changing the **governance of the CMA and its decision-making**. The head of the CMA should be empowered to lead while firmly held to account

by democratic process. Voting by those with decision-making power at board and executive level should be transparent.

- Consult on **broadening the role and identify of supercomplainants** to allow representative bodies beyond consumer groups to bring competition complaints.
- CMA to take on a broader **advocacy and engagement** role in its interactions with the general public and specific stakeholder groups.

A4 SPECIFIC POINTS FOR REFORM

- **Reverse the burden of proof** for mergers, including requiring merging parties to prove that the merger is the only way to achieve the alleged benefits.

- Use an "Excess Power" paradigm to promote "structural separation" or breakup of dominant firms.

- Ask the CMA to systematically check whether the previously claimed benefits of a merger have emerged in fact, and if not seek to **unwind** the deal.

- Use **Bright Line Rules** to simplify the CMA's tasks, release resources, and increase transparency and certainty.

- **Reinforce "inter-operability"** to allow competitors to break into the closed 'walled gardens' of dominant firms.

- **Re-focus the CMA's resources** in more productive directions, for example by shifting resources towards tackling concentrations of power directly such as through break-ups.

- **Expand the scope of the Strategic Market Status designation**, beyond digital firms.

- Use other tools such as "**interim relief**" **measures** in cases involving dominant firms, to allow early intervention in cases of abuse, and to streamline cases, or "prior approval" rules to prevent time-wasting, speculative merger efforts or to deter potential abuses.

- Recognise the fear experienced by many small businesses inside the gravitational orbit of dominant firms, and **protect whistleblowers more actively**, including with the measures such as are used in family law.

- **Create a "Finance Unit" at the CMA**, similar to the Digital Markets Unit. The aim would be to promote economic resilience, by **integrating an understanding of the threats posed by financialisation** into competition policy, for example by

analysing sources of investment such as private equity for risks stemming from leverage or other financial engineering.

- Government is requesting that the CMA prepare advice for government on "how competition and consumer law can better support the UK's transition to an environmentally sustainable and net zero economy". We suggest that Government or the CMA should commission a multi-disciplinary **Review of Competition Law and Sustainability**, with particular focus on the potential role of abuse of dominance enforcement, merger control and state aid to channel economic activity towards averting ecological crisis.

- As the consultation notes, in the context of international cooperation on enforcement, "The OECD estimates that the top 300 global companies have 40-50% of component manufacturing, final assembly, warehousing, customer service and product development based outside their home country." The CMA should conduct or **commission a review of power distribution within global supply chains** to explore expansion of concepts of dominance to account for control that so-called "lead firms" have over increasingly fragile and exploitative global supply chains, and the implications for competition policy.

- **Broaden the research remit of the CMA** to systematically gather data on markets, market participants, and concentration, and make suitably anonymised open data available to academics, as a "micro-economic sibling to the Bank of England." Also, to ensure **diversity amongst its economists** by recruiting environmental, evolutionary, institutional and other experts in cutting-edge economic thinking, and dilute the salience of consumer-focused evidence, in favour of evidence of (for example) the **state of labour markets and monopsony power** in the UK. At the same time, **reduce the salience of economic data in decision-making, relative to broader kinds of evidence**, which may be hard to reduce to data. We agree that the CMA should have new powers to obtain information needed for this research.

- Recognise explicitly that **"national competitiveness**" approaches that encourage mergers and dominance reduce market competition and are **harmful to the UK economy**.

END