The City of London Law Society

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Competition Law Committee

RESPONSE TO BEIS CONSULTATION ON REFORMING COMPETITION AND CONSUMER POLICY

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Introduction and Executive Summary

(1) This paper is submitted by the Competition Law Committee of the City of London Law Society ("**CLLS**") in response to the Department for Business, Energy & Industrial Strategy's consultation on Reforming Consumer and Competition Policy (the "**Consultation**"), published on 20 July 2021.

(2) The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent both complainants and those companies under investigation by regulators.

(3) The CLLS aims to ensure that the UK competition law regime:

- works efficiently and effectively to promote competition and encourage inward investment;
- protects and enhances consumer benefit; and
- respects the rule of law and companies' rights of defence.

(4) The Competition Law Committee members responsible for the preparation of this response are:

Robert Bell, Partner, Rosenblatt Ltd (Chairman, CLLS Competition Law Committee)

Nicole Kar, Partner, Linklaters LLP (Chair Designate, CLLS Competition Law Committee)

Ian Giles, Partner, Norton Rose Fulbright LLP (Secretary to the Committee)

Charles Bankes, Partner, Simmons & Simmons LLP

Jenine Hulsmann, Partner, Weil, Gotshal & Manges LLP

Isabel Taylor, Partner, Slaughter and May

(5) The Committee welcomes this opportunity to comment on BEIS' proposals, and following the submission of this response, the Committee would be pleased to assist BEIS as it develops the proposals and any draft legislation.

(6) This response primarily focuses on the competition policy reform proposals set out in the Consultation in light of the collective expertise of the Committee members. It also offers a number of general observations in relation to the proposed consumer rights and consumer law enforcement reforms.

Proposed reforms to the competition regime

(7) As Government notes, effective competition within the UK – and effective enforcement of anti-competitive behaviour – is crucial for driving innovation, productivity, and consumer welfare in a market economy. The Committee is committed to ensuring the UK's competition regime is fit for purpose in the twenty-first century and that the reforms of both competition and consumer regimes will further Government's goal of 'building back better' from the Covid-19 pandemic.

(8) The Committee firmly believes that it is in the best interests of everyone – whether consumers, businesses, investors, or Government that the UK has a strong and effective competition regime; a regime that is clear, well-balanced, and characterised by regulatory impartiality and independence. The Competition and Markets Authority (the "**CMA**"),[1] as the primary competition agency in the UK plays a critical role in creating and maintaining the regime. The CMA has, to date, been widely viewed as a leading antitrust regulator internationally, but this reputation cannot be taken for granted.

(9) Indeed, the Committee has real concerns that a number of the proposed reforms risk materially damaging key aspects of what makes the UK economy attractive for investment (both domestic and from abroad). This is particularly the case given the increasingly interventionist, and burdensome regulatory approach adopted by the CMA, and the erosion of the safeguard that has historically been provided by the 'fresh pair of eyes' in Phase 2, which has been substantially eroded since the merger of the OFT and CC.[2] The Committee does not support increasing the CMA's enforcement capabilities without appropriate checks and balances in place. Moreover, the proposed reforms do not address many of the existing problems within the regime and, consequently, are unlikely to achieve the desired outcomes. The Committee's concerns are set out in detail below but, in particular, we would highlight:

- **Regulatory independence**: the foundation of the CMA's reputation and its integrity as a regulator is its evidence-based approach to regulation and enforcement, and its independence from Government and political pressures. Increasing Government involvement and political direction risks compromising that independence (or at least the perception of that independence). This is especially concerning when considered in conjunction with other possible reforms, such as more limited judicial oversight of the CMA's decision-making process. It is crucial that any Government 'steer' only shapes resourcing *priorities* and does not determine or prejudge *outcomes*.

- **Interim measures ("IMs")**: the Committee recognises the importance of ensuring that consumer harm, poorly functioning markets and anticompetitive conduct is remedied as soon as possible. However, speed must not come at the expense of good quality, evidence-based decisions. In particular, the imposition of IMs is a drastic step with potentially very serious commercial and reputational consequences for businesses (and this can be the case even if the IMs are designed to maintain the status quo ante). It is, therefore, appropriate that the CMA must be able to demonstrate that it has sufficient evidence to merit such measures. This is crucial when investigating allegations of anticompetitive conduct, but even more so during market inquiries, not least as there is no allegation that market participants have acted unlawfully. It is also noted that there is no compensation available if ultimately unjustified measures cause real harm to businesses affected by the IMs.

- **Judicial scrutiny**: as with IMs, the Committee is concerned that a desire to speed up regulatory processes is being used to justify a reduction in the level of judicial scrutiny of the CMA's decisions. The Committee has previously provided detailed evidence demonstrating that the appeals process is not the cause of lengthy cases (see Annexes

[1] Where applicable, references to the CMA also include sector regulators where they exercise competition powers (including the FCA, Ofgem, Ofwat, Ofcom, etc.).

[2] The Committee's concern reflects the experience of many Committee members that inward investment decisions by firms are being increasingly affected by an increasingly negative perception of a cumbersome and unpredictable regulatory environment in the UK.

1 - 3).[3] Judicial scrutiny is a critical check on the (very extensive) powers of the CMA (which is not otherwise accountable, e.g., to an electorate) and in ensuring that a robust, evidence-based outcome is reached. This is critical within a regime in which the investigator itself can impose quasi-criminal sanctions of fines of up to 10% of global turnover.[4] More generally, a core appeal of the UK is its robust legal and judicial system – a merger control regime (one of the legal spheres that is most on the radar of international investors) that is perceived as unfair with little legal recourse risks undermining international perceptions of the UK's post-Brexit legal system and the strength of its rule of law.

- **The current merger control regime**: the Committee does not consider that the current UK merger control regime is fit for purpose – particularly in a post-Brexit world. Unfortunately, much needed reforms to the merger regime appear to be out of scope of the Consultation in favour of further expansion of the already expansive jurisdiction of the CMA. In particular, the Committee is concerned that:
    - the merger control process has become highly complex and poorly understood by international investors and advisers – the share of supply test for jurisdictional purposes in particular has been stretched beyond all global norms for certainty and predictability, and the CMA has also flexed the interpretation of what constitutes a 'merger'.[5] Introducing an additional threshold will exacerbate an already extreme situation;
    - in part due to the CMA's application of the share of supply test, the UK's voluntary regime has effectively become quasi-mandatory – even where there is no credible possibility of a substantial lessening of competition. A mandatory regime would simplify the process and remove the unnecessary burden on business of interim enforcement orders which have become so bespoke, and derogations from them so onerous and time consuming that separate teams within legal advisers are often established to deal with these alongside the substantive case;[6]
    - merger reviews, even for cases without substantive concerns, have become disproportionately burdensome for all parties – with huge document requests and significantly compressed deadlines; and
    - CMA Panels in Phase 2 merger reviews are not considered to provide a sufficiently *independent* and *impartial* second-level review or substantive challenge to the CMA case teams.[7]

[3] Annexes 1, 2 and 3 were originally prepared for, and provided to, BEIS by the Committee on 4 October 2019.

[4] A number of other regimes (including Australia, Canada, Ireland, New Zealand, Sweden and the US) have not pursued a solely administrative model involving a regulator who is judge, jury and executioner, and require their investigating agency to prove their case before a court.

[5] Competition law research 2018 (a report by ICM on behalf of the Competition and Markets Authority).

[6] The CMA has so far granted 52 derogations in *Breedon Group plc / Cemex Investments Limited* and 30 derogations in *FNZ / GBST*. The average number of derogations in Phase I cases that have been completed or referred since 2018 is six.

[7] For completeness, the Committee notes that Government is separately considering the merits of providing indicative timescales as targets for the completion of CA98 investigations in the revised strategic steer to the CMA which Government intends to consult on later this year. The Committee welcomes the opportunity to provide comments on this consultation in due course. In the meantime, however, the Committee submits that any indicative timescales from Government to the CMA regarding the duration of investigations ought to be accompanied by Government guidance on

- **Proposed reforms to merger control**: in line with the views expressed in (iv) above, the Committee is concerned that the proposed reforms will not be sufficient to address the underlying problems in the regime. Although the Committee welcomes the raising of the turnover threshold and the introduction of a safe harbour, these changes will not make a material difference (the turnover threshold of the safe harbour is also too low, given that thresholds are worldwide). The additional threshold for vertical mergers is unnecessary and, in any event, the proposed level of the threshold (25%) is also too low. It also does not require a transaction to have a UK nexus, which is very concerning (and inconsistent with Government's expressed desire to avoid a deluge of notifications without a substantive UK nexus). In addition, the reforms also appear to be inconsistent with the measures and scope of the proposed digital mergers regime, risking yet more ambiguity and disputed jurisdictional issues.

Proposed reforms to consumer rights and consumer law enforcement

(10) The CMA already has a consumer duty, introduced in 2013, in relation to its administration of competition law to: "*promote competition both within and without the UK for the benefit of consumers*".[8] By its very nature, competition law is intended to provide benefits to consumers by protecting the structure of markets, punishing infringements, and ensuring appropriate remedies. However, the Committee agrees that consumer protection law requires further attention and welcomes the proposed extension of the consumer law regime. In recent years, competition law has increasingly been used to address concerns to which it is not necessarily best suited and which are, in our view, more appropriately dealt with within the remit of consumer law. Developing a more effective consumer law regime and the CMA's competence in this area is, therefore, a welcome development.

Competition Policy

1 What are the metrics and indicators the CMA and Government could use to better understand and monitor the state of competition in the UK?

(11) The Committee refers to the report on the state of competition commissioned by the Chancellor and the Business Secretary, as published by the CMA in November 2020.[9] As the CMA notes in its report "*[t]here is no one metric of the level of competition in the whole economy"*[10] – individual metrics can offer only one perspective. We agree. It is important to consider a range of metrics – on a collective basis – to measure and monitor the state of competition (in the UK and beyond).

(12) The metrics which informed the CMA's report are informative.[11] However, the Committee makes the following observations in this regard.

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fair and reasonable deadlines for information-gathering in relation to the same. In practice, faster investigations are likely to result in more challenging deadlines for both sides of the equation.

[8] Enterprise and Regulatory Reform Act 2013 s25(3).

[9] CMA "*The State of UK Competition*", November 2020, accessed via The State of UK Competition (publishing.service.gov.uk).

[10] Paragraph 5.

[11] The metrics include: (i) concentration; (ii) indicators of dynamic competition; (iii) profitability and mark-ups; (iv) profit and mark-up persistence; (v) consumer surveys; (vi) high frequency data on business formation and closure during the pandemic; and (vii) data on consumer and business experiences during the pandemic.

- Market concentration measures are an important metric in any assessment of the state of competition. Such measures should be considered across a range of markets and industries. The Committee agrees with the findings of the CMA's report that further work should be done to better understand the trends in concentration and the factors driving these. However, market concentration is not, in itself, a determining factor and will need to be considered in conjunction with market dynamics.
- Studies on the growth of the digital economy on a regular basis would help to ensure Government is abreast of new methods of doing business and the implications these developments have not only for traditional methods but on the ways in which we assess the state of competition more generally (i.e. developments in technology may make certain metrics more or less informative).
- More extensive analysis of consumer complaints (such as those received by, for example, Which? and the Citizen's Advice Bureau) would give a useful insight when assessed within the broader range of metrics being monitored.
- In the Committee's view, any analysis into the state of competition should also take into account trade flows over time (both on a B2C but also between SMEs).

2 Should the CMA have a power to obtain evidence specifically for the purpose of advising Government on the state of competition in the UK?

(13) The proposed expansion of the CMA's information-gathering powers across all sectors of the economy and all parts of the country is likely to materially increase regulatory burden and lead to recurring administrative challenges for businesses – particularly given the relevant metrics and indicators of interest are as yet undefined. Complying with CMA information requests during its existing inquiries is already typically an intensive, complex and onerous task for businesses. Information requests in relation to 'the state of competition' in an economic sector may be similarly challenging for businesses.

(14) In the Committee's view, should Government seek to increase the CMA's powers in this regard due consideration must be had on the burden it will likely place on businesses with regard to the scope of information that can be requested, and the deadlines provided to respond to such requests. Care would also need to be taken not to duplicate requests from other governmental bodies, such as the Office for National Statistics.

(15) In the Committee's view, and noting the very different context between such requests and those made during merger, CA98 or market investigations, it would therefore be wholly disproportionate to introduce penalties for non-compliance with such requests. Voluntary requests would, therefore, be more appropriate than mandatory requests.

3 Should Government provide more detailed and regular strategic steers to the CMA?

(16) The CMA has traditionally been a highly respected regulator, the foundation for which is its impartiality and independence. The proposal to increase Government involvement in the strategic CMA decisions and political direction risks compromising the CMA's independence (or the perception thereof). In order to continue to be treated as a credible enforcer by the business community *as a whole.* Firms must have a high degree of confidence in the CMA's impartiality. Accordingly, the Committee has concerns about the extent and impact of such steers in politicising the CMA and its processes. It is crucial that

Government guidance would only shape investigative priorities rather than outcomes and that the steer should be evidence-based. CMA decisions should not be influenced by political pressure.

(17) The independence of regulators has been a key topic in regulatory governance and also the subject of considerable work by the OECD in recent years. Indeed, the findings of the OECD's 2019 roundtable discussion on Independent Sector Regulators suggest that *greater* independence would be required given the CMA's broad economic oversight.[12] This is because "*the economic consequences of the exercise of political favouritism could be* ***much more significant*** *for actors with an economy-wide ambit, and their actions may affect many politically sensitive sectors, not just one*" (own emphasis).[13] The CMA is required to deal with companies in all or almost all commercial industries, which means it has the potential to affect *many* politically sensitive sectors.

(18) Government should consider whether, as well as providing a steer to the CMA on sectors and markets it may wish to investigate, it should advise the CMA on, for example, areas where it can give businesses clearer and more precise guidance on what is permissible within the scope of competition law or considering areas where it can reduce the administrative burden it places on businesses, in order that preventing anticompetitive activity does not also discourage investment and innovation.

(19) A notable example in this regard is sustainability, where there is considerable debate and uncertainty about how sustainability agreements should be assessed under competition law. The CMA published guidance earlier this year on the assessment of sustainability agreements, although that guidance is not itself overly helpful given it essentially simply restates general competition law principles. However, the request in July 2021 by the Secretary of State for BEIS that the CMA provide it with advice on how competition and consumer law tools might better be used to meet the UK's climate goals (including whether changes to competition law may be required) has prompted the CMA to launch a public consultation on this topic, enabling interested parties to submit their views. This is a good example of how Government's intervention can prompt the CMA to focus on important areas – and under the current regime without the need for reforms.

Market studies and market inquiries

(20) The Committee welcomes Government's commitment to reviewing the market inquiry process. Given Government's focus on ensuring a pro-competition regime, market inquiries are uniquely useful as a tool for analysing and – where adverse effects on competition from either anticompetitive conduct or market structures are identified – remedying a lack of sufficient competition in markets. This is particularly important given the risks of a loss of public faith in the market system and concerns, as referenced in the Consultation, that there has been a decrease in the amount of competition in various areas of the UK economy.

(21) Improving the market inquiry regime must be done sensitively and consistently with the broader package of reforms (including the proposed regime covering digital markets). There is certainly merit in streamlining the process given the significant burden that the current regime places on all market participants as well as the CMA. Part of this may be

[12] See OECD *"Executive Summary of the roundtable on Independent Sector Regulators",* 2 December 2019, accessed via pdf (oecd.org).

[13] Page 3.

most effectively achieved through non-legislative means, such as better scoping of market inquiries, more realism about what can be covered in the time available, and more proportionate and focused information gathering (administering which would be less burdensome for both businesses and the CMA).

(22) However, while the desire to address competition concerns as swiftly as possible is understandable (and shared by the Committee), the answer is not a significant expansion of the CMA's administrative powers without effective oversight, a reduction of private businesses' legitimate rights of defence, or the handicapping of judicial scrutiny over the CMA's decisions. Holding a public body such as the CMA effectively to account and ensuring that its decisions are correct, robust and proportionate is not a downside or inconvenience of the regime – it is a fundamental strength that allows all market participants to have confidence in both the process and the outcomes.

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

(23) The Committee considers that enabling the CMA to impose behavioural (but not structural) remedies at the end of a market study may help streamline the process and reduce the burden on businesses that would otherwise be subject to a market investigation. However, it is critical that the CMA must reach the same legal standard to impose remedies after a market study as would apply to impose remedies following a market investigation (i.e., the CMA must identify an adverse effect on competition and decide on necessary and proportionate remedies). In practice, given the complexity of many remedy cases, the CMA may not be able to reach that legal standard without undertaking a market investigation. It would also require substantial changes to the market study process, with greater engagement and iterative communications with parties that may end up subject to remedies. However, this may still be a useful feature for relatively simple, straightforward cases.

(24) Given the seriousness and greater impact of structural remedies on businesses, it would not be appropriate for these to be available to the CMA at the end of a market study.

(25) A key concern of the Committee with the earlier imposition of remedies is that the process will be rushed and there will be insufficient time for the CMA and parties to review information and understand the consequences of the suggested remedies. Government's proposal to extend the timetable (for at least three to six months) in order to allow for a thorough consideration of the proposed remedies would be appropriate, although evidently this also reduces the timing efficiencies as the process becomes longer.

(26) Whether it is a CMA Panel or the CMA Board, it is also important that there is a second-level review that is sufficiently independent of the CMA case team and which will challenge its provisional conclusions. Moreover, there must be sufficient access to that decision-maker by parties throughout the process – particularly firms subject to the IMs. That would involve a significant change in the role and activities of the CMA Board, given that it would need to be involved in meeting the parties and engaging with their views directly.

(27) The Committee agrees with Government that the requirement to consult on a market investigation within the first six months of a market study should be removed. Rather than this decision accelerating the market investigation process, the Committee finds it involves condensing much of the work into the first six months – and then waiting for six months for the market investigation to commence.

(28) A possible consequence of enabling remedies to be imposed at the end of a market study may be an increase in market studies being undertaken by the sector regulators using their Enterprise Act powers. Assuming the sector regulators (like the CMA) would be able to impose remedies at the end of a market study, the sector regulators are likely to view such market studies as a more attractive tool than is currently the case. However, given, as currently applies, any remedies at the end of a market investigation would be imposed by the CMA, sector regulators may also have skewed incentives to favour imposing remedies at the end of a market study as opposed to making a market investigation reference to the CMA. This may be a potential issue to consider further if this option is pursued.

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

(29) The Committee considers that, the current two-phase regime should not be replaced with a new single-stage market inquiry tool. The two-stage format offers significant procedural and timing efficiencies and has already been the subject of relatively recent reforms, as a result of which it now benefits from increased formality and transparency. Moving to a single-phase regime risks losing that progress.

(30) Streamlining and shortening the current process where possible would be a significant benefit for both businesses and consumers. However, the current system does effectively triage cases, with only complex cases with more extensive concerns referred for a full market investigation (at least in principle). The Committee is concerned that, rather than more complex cases being resolved quicker under a single-stage regime, it would actually result in simpler cases or those with more straightforward remedies being subject to a longer and more drawn out process (as is increasingly the case in merger control where even Phase 1 reviews are ever more intensive and burdensome).

(31) The Committee also believes that the prospect of opening a 24-month market inquiry is more likely to be considered too resource- and time-consuming by the CMA than opening a 12-month market study.

6 Should Government enable the CMA to impose interim measures from the beginning of a market inquiry?

(32) The Committee does not consider that it would be desirable, efficient or appropriate for the CMA to impose IMs at an early stage of a market inquiry. Although Government draws comparisons with the use of IMs in Competition Act investigations, the two situations are clearly distinct. In a CA98 investigation, there is an allegation of unlawful, discrete conduct by specific firms which is likely to already be supported (to a greater or lesser extent) by a body of evidence when the investigation is formally opened. On the other hand, there is unlikely to be a specific allegation of wrongdoing or existing evidence against specific businesses in a market inquiry. Indeed, the point of a market inquiry is that firms may well be acting legally and legitimately but that there are potentially structural issues at play. It is, therefore, highly problematic to penalise such businesses before a proper investigation has been undertaken.

(33) The imposition of IMs is also likely to be premature, with information/evidence gathering not having yet commenced (and the CMA's understanding of the market potentially weak or out-of-date). There is, rightly, a high evidential standard for the CMA to meet in imposing IMs and it is unlikely to be able to satisfy that at an early stage of its inquiry. The CMA is also unlikely to be able to impose nuanced or tailored measures given it would not have

tested the proposed measures with market participants – it may therefore impose measures which do not achieve the stated goal or which have extensive unforeseen consequences. The Committee notes by way of comparison that, in order to obtain an interim injunction in court, private parties must normally give a cross-undertaking in damages – for the CMA, this incentive is missing and there is no material downside for the CMA in getting it wrong.

(34) It must also be stressed that, while the idea of 'freezing' a market in time to enable the CMA to investigate any competition concerns is appealing, in practice IMs can be hugely damaging to a business. Even IMs to preserve the status quo are not necessarily cost-free, e.g., if they require a business to maintain unprofitable operations or defer technology or operational upgrades / changes that would benefit customers. IMs may also be in place for a number of years and prevent a business operating – and, indeed, competing – effectively for that period.

(35) The Committee also notes that assessing the role of IMs must differentiate between those seeking to preserve a status quo and those seeking to affect structural change in a market. In the context of a market inquiry, IMs may not be seeking to preserve the status quo but instead involve 'fiddling' with how a market works before identifying whether there is a problem and the appropriate solution. The consequences of requiring a change of conduct in the market are also likely to be even less foreseeable than attempts to preserve the status quo.

(36) One option that may potentially address the incentives here would be requiring the CMA to apply to court for approval, with that court then weighing the anticipated benefits against the potential for irreparable harm and make a proportionate judgment.

(37) If Government does nevertheless consider that IMs are appropriate, their use should be subject to extensive safeguards. In particular, the Committee recommends imposing time limits on the application of IMs, which could involve, for example: (i) requiring that the CMA must issue a Statement of Objections ("**SO**") or conclude the investigation within a certain timeframe; (ii) requiring the CMA to defend the IMs in court within a short time period and periodically demonstrate their continued applicability/that a case is progressing; or (iii) the IMs terminate after a given time period and cannot be replaced. Such measures would at least provide businesses subject to IMs some certainty that their cases are being prioritised and better ability to plan around the IMs.

7 Should Government enable the CMA to accept binding commitments at any stage in the market inquiry process?

(38) The Committee supports enabling the CMA to accept binding commitments at any stage in the market inquiry process, providing that such commitments are provided by all market participants that the CMA considers would need to be part of the remedial package.

(39) In circumstances where only some market participants are willing to offer commitments, the Committee is concerned this will lead to procedural unfairness whereby either those who have, or those who have not, offered commitments are disadvantaged in the market because others are subject to less onerous terms (for example, if one firm commits to sharing certain information early in the inquiry, but another is not required to under remedies imposed at the end of the inquiry). Moreover, if the CMA decides at the end of an inquiry that no remedy is required, or that more/fewer obligations are necessary, it is unclear how this would be consistent with the fact that commitments have already been

provided by other market participants. Unless there was a guarantee that the earlier commitments would be revisited and adjusted in such circumstances, this is likely to act as a disincentive to parties' willingness to offer commitments in the first place.

(40) In addition, given that inquiries are market-wide, it would appear that parties that have offered commitments would still need to be involved in the process (responding to requests for information and data where they are relevant to market practice or providing submissions where their own commercial interests could be affected, etc.). In that case, the efficiency gains would appear to be limited – and, indeed, the complexity of managing a voluntary commitments process with many different market participants (which, crucially, may not have committed unlawful conduct or wrongdoing) seems likely to only add to the complexity of the process.

8 Will Government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

(41) Whilst the Committee agrees that implementation trials could result in more effective remedies, this must be a collaborative process. Relevant businesses must be able to participate in the design and execution of the trials, given that they have the relevant knowledge to ensure that the trials are as effective as possible. Moreover, they can ensure that the remedies are not only comprehensive but proportionate.

(42) Additionally, the Committee agrees that the CMA should have greater capability to review and alter remedies or commitments that they have imposed after a market inquiry. Reviews should consider both whether remedies should be removed or reduced in scope as well as enhanced.

(43) The current system is ineffective; the CMA cannot review remedies without pursuing a new market investigation. Reviews would provide greater flexibility, which is particularly important in nascent and fast evolving markets. However, if a review system is implemented, to reduce uncertainty, the terms of the reviews must be clearly defined. The CMA must outline the frequency of future review and the criteria for amending the remedies. Additionally, to identify the effects of the reforms, a mandatory waiting period of several years should be required before reforms are reviewed again.

(44) Parties should still retain the right to request a full review of the remedies in the event of a change in market circumstance.

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

(45) Parties to market studies and market investigations are often required to provide significant amounts of internal information to the CMA. The Committee would encourage the CMA, as standard practice, to engage in discussions with parties on draft questionnaires and receive representative samples of internal documents rather than require an exhaustive search for all relevant documents. This would ensure that requests are relevant to the issues and proportionate.

Merger control

(46) The Committee welcomes the prospect of reforms to UK merger control as it does not believe the current regime is fit for purpose. Unfortunately, fundamental issues with the

regime in terms of the CMA's unclear and complex jurisdiction and the disproportionate burden it places on parties are beyond the scope of the proposed reforms. As set out below, we consider that a full review of the merger control regime would be more appropriate.

(47) The UK regime has become an outlier internationally given the complexities and legal uncertainty around jurisdiction (especially the share of supply test but also the ambiguity around what constitutes a 'merger'), the duration of a review which is also not aligned with other key jurisdictions (at 40 working days, the UK has one of the longest Phase 1 review periods in a sophisticated jurisdiction), and the administrative burden it imposes on parties (particularly through disproportionate information requests and the application of IMs). Even for experienced competition practitioners it has become difficult to advise confidently on the CMA regime – combined with the painful IEO process and the significant penalties, this leads to conservative advice and undue pressure on the briefing paper process.[14] There is also a growing perception that CMA Panels no longer provide a sufficiently independent second-level review or substantive challenge to the CMA case teams in Phase 2 merger reviews.

(48) It is also important to place the merger control regime in the wider regulatory context. Many transactions in the UK will now also be subject to the National Security and Investment ("**NSI**") regime (which, as BEIS is aware, is predicted to involve 1,000 to 1,800 transactions being notified each year). The Committee notes that there are also concerns that the NSI regime is itself unclear, overly broad and difficult to apply (e.g., the extent to which/when intra-group transactions might require mandatory notification, how to apply the sector definitions, limited nexus with the UK required etc.). Government should consider how it can find the right balance between protecting competition and national security without discouraging investment (including from abroad) due to the cumulative regulatory burden. A key part of this will be ensuring an efficient and painless interaction between the competition and national security regimes.

(49) In this context, the Committee considers that – as currently operated by the CMA – the full efficiency benefits of a voluntary regime are not being realised. As such, the Committee believes that a mandatory merger control regime based on clear turnover thresholds (including simplified notifications for transactions with no/limited UK nexus) would be a more effective approach than the current de facto quasi-mandatory regime. While the CMA may end up receiving a greater number of notifications overall, most could be handled through simplified reviews (as is the case at the European Commission), and transacting parties would benefit from greater regulatory certainty and clarity. We also note that the CMA's published data on its merger control reviews only includes formal reviews and therefore does not include transactions informally 'cleared' under the briefing paper process (i.e., the CMA's published data significantly understates the number of transactions that the CMA currently reviews).[15]

[14] The Committee considers that the briefing paper regime works well, but also that it has become overused, with almost any transaction with any UK competitive overlap now including conditionality on at least a UK briefing paper. It is also unsatisfactory for the effective operation of the UK mergers regime to depend on a non-statutory procedure that could be changed or withdrawn by the CMA at any time.

[15] See: https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes

10 Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

Updating the turnover threshold

(50) The Committee believes that adjusting the Target turnover threshold in line with inflation is a reasonable approach as it will retain the threshold at the level originally intended and help avoid smaller transactions (with little prospect of causing a loss of competition in any markets) from being subject to a CMA review.

(51) In a similar vein, in principle, the Committee supports the introduction of the small mergers safe harbour as this would help provide greater transaction certainty and would reduce red tape for small and growing businesses. However, the £10 million worldwide turnover threshold is very low and, in the Committee's view, could be substantially higher (e.g., £25-£30 million) without a material risk of transactions slipping through which would merit review. If the threshold is fixed at the proposed £10 million, it would be more appropriate if the £10 million threshold related to UK-turnover only, given a larger presence in another jurisdiction could prevent a business with just a small UK presence benefiting from the safe harbour.

A new jurisdictional threshold

(52) The Committee is strongly opposed to the introduction of the proposed new threshold. As the Committee has explained above, the UK's share of supply test is already unique internationally in its flexibility and the level of discretion which the CMA has in determining its application (in comparison to other jurisdictions which have market share tests, a 'share of supply' does not need to correlate to an economic market recognised by industry).[16] In the Committee's experience, many transactions with only a limited competitive overlap and no credible competitive concerns are now raised with the CMA via a briefing paper.

(53) As such, the new limb appears an unnecessary complication and the Committee queries which transactions, in practice, may have raised competition concerns but which the CMA was not able to review due to lack of jurisdiction.[17] The CMA, for example, has already been able to review transactions (including potential 'killer acquisitions') that other jurisdictions missed – including *Facebook/Instagram*.[18] The Committee does not therefore see an enforcement gap in UK merger control. Introducing complexity and additional

[16] A number of examples of how the share of supply test has been 'stretched' where necessary to ensure the CMA has jurisdiction include*: Roche Holdings, Inc / Spark Therapeutics, Inc* (where the 25% share of supply of "Hem A prophylactic treatments" was met on the basis of: (i) the number of UK-based employees engaged in "activities" relating to the treatment of Hem A; and/or (ii) the number of UK patents procured from an administrative patent authority in relation to the treatment of Hem A. Notably, Spark's "activities" related only to R&D relevant to the development of a potential treatment which may possibly one day come to market in the UK*), Sabre / Farelogix* (the supply of services to British Airways that facilitate the indirect distribution of airline content; and the supply of services that facilitate the indirect distribution of airline content to UK travel agents for selected flight destinations), *Intercontinental Exchange / Trayport* (supply of front-end access services to enable energy trading in the UK); and *FNZ/GBST* (supply of Retail Platform Solutions excluding in-house software in the UK on the basis of assets under administration). For the purpose of deciding whether the test is met, the CMA may apply any such criteria (including value, cost, price, quantity, capacity, number of workers) as it considers appropriate and has taken an extremely expansive approach to the test in recent cases.

[17] The Committee notes that the CMA has won all cases before the Competition Appeal Tribunal ("**CAT**") where the appellant claimed that the CMA lacked jurisdiction, e.g., in *Sabre / Farelogix* the CAT said that the "CMA had a wide ranging discretion as to its choice of criteria by which to measure the respective parties' share of supply". [2020] CAT 11 *Sabre Corporation v Competition and Markets Authority*.

[18] Office of Fair Trading 'Anticipated acquisition by Facebook Inc of Instagram Inc' August 2012.

regulation that only captures transactions with a limited UK nexus and for little incremental benefit to the CMA is not a desirable outcome from anyone's perspective.

(54) If BEIS is minded to adopt the additional jurisdictional threshold, the Committee considers that setting the share of supply at 25% is also unduly low. As the goal is for the CMA to investigate vertical or conglomerate mergers more easily: (i) an economic market share test would be more appropriate and provide greater certainty for transacting parties; and (ii) a higher threshold would be consistent with the theories of harm that would be relevant in this context. The Committee considers that 40% would be more appropriate.

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

(55) For the reasons already indicated above, the Committee considers that – if the voluntary regime is not going to operate as such in practice – Government should consider replacing the existing thresholds (including removing the share of supply test) with a fully mandatory regime. This would involve clear-cut turnover thresholds (in line with ICN Recommendations that "*notifications should be clear and understandable*").[19]

(56) A mandatory notification requirement would be accompanied by a standstill obligation. This would remove the need for initial enforcement orders and interim orders – the application of which is unclear and unpredictable, and the administration of which is onerous for both businesses and the CMA. This would constitute a significant saving of both public and private funds.

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

(57) Post-Brexit, the CMA will now be reviewing large transactions that were previously reviewed solely by the European Commission. Co-ordination with key jurisdictions such as the EU and US will be crucial in ensuring that any of the CMA's concerns and remedial proposals are dealt with alongside options being considered by other regulators. The single most important change that is required to the UK regime is that the CMA's timetable, both at Phase 1 and Phase 2, would need to be shortened, with the introduction of timetables mirroring those of the European Commission and the United States being desirable. However, it is also important that "pre-notification discussions" do not become ever longer as has been the trend, thereby negating the benefit of a shorter Phase 1 period in particular.

(58) It is also important that, as BEIS considers a new pro-competition regime for digital markets, it ensures that both regimes are consistent and can be applied holistically – with divergence minimised to where it is necessary. The Committee's view is that, currently, the two sets of proposals are not coherent and risk adding yet further uncertainty when the goal of reform should be to simplify the regime where possible. In particular, the interaction between the digital mergers proposals and the general merger regime is unclear and there is a real risk of overlap between them resulting in contested jurisdiction (especially given that a 'digital' merger only requires one of the parties to be an SMS firm – the actual transaction does not need to involve a digital market). Currently, both sets of reforms are

[19] International Competition Network Merger Working Group Notification & Procedures Subgroup 'Setting notification thresholds for merger review' April 2008.

seeking to address the same issue in relation to killer acquisitions and the different approaches are not consistent – for example, the digital regime requires a UK nexus but the proposed new threshold under the general regime does not.

(59) Furthermore, the Committee is concerned that the ambiguity about which cases are within the remit of the digital regime means that some of the most invasive elements of that regime may increasingly spread into the general regime. These would be especially problematic in respect of: (i) the suggestion that the burden of proof should be lowered for digital merger cases– particularly as the CMA would be able to intervene in cases where, more likely than not, the transaction will not result in harm to competition and the CMA cannot take account of the benefits of a transaction; and (ii) the proposal that the CMA should have powers to require evidence to be generated (rather than just production of evidence in the possession of the parties), which is likely to be challenging for businesses.

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

(60) There are clear benefits to maintaining a Panel system in CMA procedure. However, system users believe the CMA Panel system is not currently working effectively or achieving its desired aims. Significant reform to restore the fresh pair of eyes that Competition Commission ("**CC**") Panels previously offered or a structural replacement, is needed in the Committee's view.

(61) The CMA Panel's role in an inquiry or regulatory appeal is fundamental to ensuring fair process. In the Committee's experience, an effective Panel will:

- (i) act as an independent and impartial 'fresh pair of eyes';[20]
- (ii) provide substantive and meaningful challenge to the processes and findings of the CMA case teams;
- (iii) bring a range of different 'real world' experiences from a variety of backgrounds (in particular, relevant sector and commercial experience and different perspectives to inquiries, beyond that of the CMA);
- (iv) ensure that the decisions reached are correct, well-evidenced and bear scrutiny (including judicial); and
- (v) provide a crucial opportunity for parties with their 'day in court' in Panel hearings – to put their case and evidence directly and in-person to decision-makers (and, of course, for the Panel to question the parties).

(62) At its core, the CMA Panel must be independent of the staff and institution of the CMA. The resounding view amongst Committee members and clients who have experienced Phase II merger reviews is, however, that the fresh pair of eyes benefits of the Panel has been lost. This is hugely problematic.

(63) This is both an 'institutional' problem (in terms of Panel members increasingly adopting the same perspectives and 'mindset' as the CMA more broadly) as well as an operational problem – with Panel members based in the same offices as the rest of the CMA and

[20] The CMA's *Code of Conduct for CMA Panel Members* notes that "*When establishing the CMA, parliament considered it important that Members should act independently of the CMA Board when taking decisions as members of CMA groups. The purpose of this requirement is to ensure that decision taking by groups is based on their own judgement reached after analysis of the evidence before them*" (paragraph 18).

completely reliant on the information provided to them by case teams (who act to filter, in a non-transparent way, what the Panel sees of the parties' submissions and other material (as well as what the Panel does not see)) as well as their case knowledge, often gained in Phase I and analysis.

(64) Furthermore, the proposed reforms risk exacerbating this problem. In particular:

- by restricting the Panel to a smaller group of full-time members, the Committee is concerned that members would:
    - become even further 'institutionalised' within the CMA given that they would be full-time employees – further eroding the independence of the Panel; and
    - have a significantly narrower range of experiences, not only because there will be a small pool to draw from but also because part-time roles also enable those with specialist experience (particularly relevant to regulatory appeals and areas such as digital) to be involved alongside other commitments. Today's cases, rightly or wrongly, are fought on increasingly technical legal and economic grounds and it is also crucial to ensure that Panels also continue to feature those from wider backgrounds, including increasingly tech and digital markets, that will enable them to understand the issues and the details of how complex markets and sectors operate; and
    - while limiting the role of Panel members may increase technical proficiency via members undertaking a larger number of investigations, it does so at a high price: i.e., at the expense of the Panel's wider engagement in proceedings and live issues during the course of the case. The net effect may be that it becomes even harder for the Panel to exercise independent judgement and oversight. If Panel members only get involved in cases at a late stage, it seems even less likely that they would be well positioned to challenge and overturn provisional findings by the case team.

(65) The key issue in the Committee's view is, therefore, how to reform the Panel so as to boost its independence, as well as its capacity to challenge both CMA case teams and the parties from a substantive perspective in an inquiry. The Committee considers that this is a key issue for the Government to consult on and options for reform may include:

- re-creating, to some extent, the institutional separation that previously existed between the first- and second-stage decision-makers in the regulatory process (i.e., the OFT and CC). While the Committee does not recommend re-establishing a separate institution, it may be that the Panel should be affiliated with, and be based physically within, another body, such as the CAT;
- ensuring that Panel members are ringfenced from wider CMA activities and do not take on other roles within the CMA (in particular leadership, policy, or strategic positions, such as sitting on the CMA Board).
- removing the CMA and its leadership team from any involvement (including consultations and advice, or a role on the selection panel) in the appointment of Panel members and Inquiry Chairs; and/or
- abolishing the panel system and moving to a prosecutorial model with decisions by the CMA and/or the Panel to, e.g., block mergers, requiring judicial approval (as in the US).

(66) The Committee would welcome the opportunity to further engage with BEIS on options for reform in this regard.

14 Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

(67) Recognising the impact of globalisation, the Committee supports the proposal to align the UK's approach with that of the EU and the US by expanding the territorial scope of the Chapter I and Chapter II prohibitions.

15 Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

(68) While the Committee acknowledges the importance of small markets and generally supports Government's commitment to a robust enforcement regime across the whole of the UK's economy, it is not clear that reducing the thresholds for immunity for penalties for either Chapter I and/or Chapter II infringements will result in greater enforcement action (if indeed this is Government's desired outcome). In principle, providing *additional* rather than more limited immunity will help to improve the effectiveness of the CMA's enforcement regime (i.e., by encouraging infringing parties to come forward). It is notable that the Consultation document does not cite any evidence to suggest the existing thresholds are insufficient.

(69) In the Committee's view, if it is Government's desire to improve the CMA's enforcement toolkit in relation to small markets specifically, the competition law framework is not necessarily the right 'fix'.

16 If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to (a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the businesses that are a party have an annual turnover of less than £10 million?

(70) As above, in the Committee's view, there does not appear to be a compelling reason to reduce the existing immunities for agreements of minor significance.

(71) However, in the Committee's view, the immunity threshold is likely to be simpler and more clearly understood by smaller businesses if it applied only to *agreements* to which all the businesses that are a party have an annual turnover of less than £10 million. This would also avoid a situation where some businesses are financially penalised for participating in an agreement for which other businesses are not (irrespective of the level of involvement and culpability).

17 Will the reforms being considered by Government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular,

will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

Incentives for leniency applicants

(72) The Committee welcomes Government's consideration of how the leniency process can be reformed in order to ensure that it remains an effective means of identifying cases for investigation.

(73) We agree with Government that the increasing significance of follow-on damages in various jurisdictions may be a significant factor in the reported decline in leniency applications, although this is by no means proven and the wider trends in global cartel enforcement do not generally suggest that there are significant numbers of cartels operating undetected.

(74) While the Committee fully appreciates the policy priority of ensuring that cartels are effectively detected – and the key role that leniency applications play in this – we are also aware that it is important to ensure that culpable parties nevertheless are accountable for unlawful anticompetitive conduct. This is both about deterrence as wide as a wider social goal of restoring faith in markets (i.e. knowing that wrongful conduct is punished) and ensuring compensation for those impacted.

(75) The Committee considers that while it is appropriate that leniency applicants can benefit from full immunity during the public enforcement process, full immunity in the private enforcement process would be unprecedented as it is not reflected in any other jurisdiction. This factor, in itself, would significantly limit the effectiveness of this reform as cartelists will remain keenly aware of their liability for damages in other jurisdictions if they apply for leniency – consequently, this is most likely to affect only UK-focused cartels.

(76) Therefore, in order to balance these policy goals: of on the one hand incentivising leniency applicants to come forward and reveal covert activity and on the other, not suffer a disadvantage in doing so by being the obvious target of claimant law firms, the Committee recommends that a form of *partial* immunity from the private enforcement process would be preferable. The Committee considers that such a system could take a number of forms but may involve, for example:[21]

- a single one-off payment that is negotiated with the CMA and which is ultimately available to claimants that can prove damages in the UK (i.e. a "voluntary redress fund") – this would largely limit the financial exposure of the leniency holder from the outset whilst also helping to achieve finality in the proceedings from the leniency applicant's perspective; or
- an agreement to pay a certain percentage or capped amount of the overall damages awarded in the UK – reducing rather than limiting financial exposure.

Protections for whistle-blowers

(77) A whistle-blower willing to identify themselves to an authority is arguably likely to provide greater assistance than an anonymous source. On that basis, there is, in principle, a case for greater protection.

[21] By way of comparison, in the US cartel members are subject to treble damages in private actions, whereas leniency applications are incentivised as leniency holders are only liable for the actual damages sustained by the claimant.

18 Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

Changing the rules regarding access to file in relation to interim measures

(78) In the Committee's view, the proposals relating to the rules regarding a business' access to file in relation to interim measures are highly problematic. Government correctly notes that interim measures impact on the commercial and reputational interests of the business concerned, but it is important to recognise not only how deeply damaging and disruptive the imposition of interim measures is to a business' operations, but also that many of its customers or consumers are likely to assume it has already been found culpable of unlawful conduct. Interim measures could potentially last for several years given that CA98 investigations continue for lengthy periods of time and result in potentially irreparable (and ultimately uncompensated) harm to businesses.

(79) It is therefore crucial that a business subject to interim measures retains its legal rights of defence and has a fair opportunity to review the evidence against it. In the Committee's view, greater efficiency cannot come at the expense of a defendant's rights of defence. Removing a business' legal rights to examine the evidence against it would be easing the burden on the CMA not by reducing the procedural administration surrounding access to file, but by de facto enabling the CMA to impose interim measures at a lower evidential standard because the business has been deprived of the right to review and potentially contest, the evidence, in court. Although a business may not require full access to file, it should at the very least be provided with all documents on which the CMA is relying. The CMA must be able to substantiate its decision with sufficient evidence and it should not be afraid – having made that decision – to provide such evidence to affected parties and – if appropriate – the court. If the CMA does not have sufficient evidence that it can confidently defend its use of interim measures, then it should simply not be resorting to interim measures at that stage of the inquiry.

(80) As discussed above, it is notable that the CMA does not need to provide a cross-undertaking for damages – as private parties must do when applying for an injunction in court. This clear imbalance means that the CMA is not subject to the same incentives to ensure effective decision-making.

Changing the standard of review if a decision is appealed

(81) In the Committee's view, the decision to impose interim measures – particularly given the lack of checks and balances on the CMA's incentives and decisions – should be judged on the merits. A narrower judicial review standard may encourage regulators to conduct a more restricted analysis and to provide the bare minimum of reasons. Lowering the standard of review is, again, only simplifying the administrative burden on the CMA by making it harder for cases which are not fully legally defensible to be overturned in court. A Competition Appeal Tribunal ("**CAT**") appeal is neither a time-consuming process (particularly relative to the period of time for which the interim measures may remain in place) nor highly burdensome for the CMA. The Committee also notes that the CMA, unlike the business subject to interim measures, has the opportunity to prepare its case

prior to the interim measures being imposed (particularly relative to the burden of the interim measures on the business).

19 Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms Government should be considering?

(82) In principle, these measures will serve to strengthen the CMA's investigations toolkit in the Committee's view; noting that many of the proposals seek to bring the CMA's tools in line with existing powers under the EA02 or pursuant to the cartel offence.[22] However, it is important that parties subject to the CMA's information gathering are able to fully exercise their rights of defence. For example, in relation to (b), parties would need to have sufficiently detailed and specific descriptions of the focus of the investigation in order to be expected to preserve relevant documents. Regarding (c), it would be important that individuals within their own home have sufficient access to legal advice before the seize and sift process is commenced.

Options for resolution

20 Will Government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do Government's proposals provide the right balance of incentives between early resolution and deterrence?

(83) The Committee supports the introduction of Early Resolution Agreements, in principle. This will likely be an attractive mechanism for certain businesses which will, in turn, help to bring complex Chapter II cases to a close more efficiently.

(84) While there are a range of factors to be weighed when considering whether to engage in the settlement process, the requirement for an admission of liability does act as a disincentive in the Committee's review, given the increased exposure to private damages claims. This is particularly, but not only, relevant to cases where liability is disputed either on the facts or as a matter of law (for example, if the CMA is pursuing a novel theory of harm). As noted above in response to Question 17, because damages are of a compensatory rather than a punitive nature, they can dwarf financial penalties imposed by competition authorities (including the CMA) in practice. Putting aside the uncertainty relating to who will likely bring a claim, there are a number of ways in which a claim for damages could be framed in the Chapter II context and, in reality, the only certainty is that potential claimants will seek to obtain the highest award possible. Businesses that are subject to a Chapter II investigation therefore face considerable uncertainty in this regard. While an Early Resolution Agreement would not rule out the possibility of follow-on damages claims altogether, it would make such actions more difficult and potentially less likely – and therefore may facilitate settlement in appropriate cases.

(85) That said, the overall 'success' of this measure from an efficiency perspective is dependent on many factors, including, in particular, the overall complexity of the case and the number of parties involved (noting that a number of the CMA's recent abuse of dominance cases have involved successive periods of ownership by different businesses), and also the

[22] Slide 12; BEIS Consultation on Reforming Competition and Consumer Policy (CLLS initial discussion guide).

stage of the CMA's investigation this mechanism would be available to parties.[23] It is conceivable that an Early Resolution Agreement may not be reached with *all* parties to an investigation and for that reason the resource and time savings may not necessarily be material in practice (while recognising that Chapter II cases would generally be expected to focus on conduct by one dominant undertaking).

(86) In the Committee's view, the proposal does, in principle, strike the right balance between efficiency and deterrence. Ultimately, businesses which enter into Early Resolution Agreements may still need to make a settlement payment and/or be subject to commitments and a reputational risk still remains (albeit that an admission would not be required).[24] More generally, the CMA's recent appetite for Chapter II cases provides a strong deterrence in and of itself.

(87) We also note that the CMA has pursued cases where it has investigated under both Chapter I and Chapter II. In this context the ability to settle both types of case in the same or similar ways would be helpful.

21 Will Government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

(88) There are clear benefits to incentivising the use of a voluntary redress scheme, including that resolution can be achieved more quickly than pursuing compensation through the courts. For that reason, the Committee agrees, in principle, that the proposal to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme could help to encourage the use of redress schemes.

(89) Introducing protections does mean, however, that Government should ensure the voluntary redress scheme system is robust and will ensure fair compensation given the implications of such protections on parties who have suffered harm (who will rarely be in a position to assess for themselves on an informed basis whether a redress scheme is fair). As acknowledged in the Consultation document, any party that considers it has suffered a loss as a result of a competition law infringement can still choose to pursue compensation through the courts – regardless of whether it is entitled to compensation through the voluntary redress scheme. Ultimately, a lack of access to the underlying documents will inevitably make bringing a follow-on damages claim much more difficult.

22 Will Government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

(90) The Committee considers that the proposed reforms will help to speed up the CMA's access to file process and, by extension, the conclusion of the CMA's investigations.

(91) As recognised in the CMA's own guidance, it is essential that parties under investigation are provided – either directly or via external advisers pursuant to a confidentiality ring –

[23] Taking the CMA's settlement procedure as an example, the maximum discount available for settlement pre-Statement of Objections is 20%, which falls to 10% for settlements post-Statement of Objections. In practice, it is extremely difficult for businesses to understand the nature of the case against them without having access to the Statement of Objections (which sets out the evidence the CMA proposes to rely on in any Infringement Decision). This is a clear disincentive to engage in the settlement process for many businesses. While the Early Resolution Agreement mechanism, as proposed, is a different mechanism to settlement, these practical considerations remain relevant in the Committees' view.

[24] Paragraph 1.181 provides that Government envisages that Early Resolution Agreements would be published by the CMA.

with the information on the CMA's file which may be necessary to exercise its rights of defence. The proposal to disclose the relevant materials in *full* in a confidentiality ring not only places parties on a level playing field with the CMA, but also saves considerable time and resource for both the CMA and parties involved in the investigation (including third parties from whom the CMA has requested information in connection with its investigations). This is a welcome development in the Committee's view.

(92) The Committee also supports the introduction of a standardised approach to confidentiality undertakings, in principle. However, the current need to negotiate the terms suggests that the CMA's current template is not sufficiently robust. For that reason, the Committee strongly suggests that the CMA templates be revamped to ensure these remain "fit for purpose" (i.e., both before the introduction of this measure and on an ongoing basis). For example, ensuring that the provisions relating to the storage and destruction of information held in electronic form reflect current market practices.

(93) However, the introduction of civil sanctions for breaches of the confidentiality ring is disproportionate. In the Committee's experience, both individual(s) and the firm(s) already take their obligations with regard to confidentiality rings extremely seriously. Both are mindful of the potential reputational damage as a result of a breach of a confidentiality ring and the impact on their respective relationships with the CMA. At most, such penalties should be restricted to egregious breaches only (including, for example, repeat offenders). However, it is notable that the Consultation document does not put forward any evidence to suggest that the existing regime is not providing the necessary incentives.

(94) The CMA collects considerable quantities of evidence during investigations, and typically only a small proportion of this is relied on by the CMA in any Statement of Objections or infringement decision. It is neither in the interests of the CMA nor the parties under investigation to spend considerable time reviewing such material for confidentiality redactions that the CMA has ultimately not relied on and is irrelevant to its case. Measures such as streamlined access to file and confidentiality rings are therefore helpful in this regard. However, there remains a considerable burden and cost on business in both having to provide and review such material (or at least have their advisers review it via a confidentiality ring), and likewise the CMA in terms of reviewing this material to determine that it is irrelevant. More targeted information gathering by the CMA that limits the amount of irrelevant material that is collected would therefore be desirable, and reforms that make it easier for the CMA to implement confidentiality rings should not be treated as a licence for the CMA to collect increasing amounts of evidence. More targeted information gathering is also likely to help improve the speed of investigations.

23 Should Government remove the requirements in the CMA Rules on the decision-makers for infringement decisions in Competition Act investigations?

(95) In the Committee's view, there is no good reason to remove the requirements from the CMA rules on the decision-makers for infringement decisions in Competition Act investigations. Whilst acknowledging the design of internal decision-making inevitably involves trade-offs, we consider that the existing requirements include important safeguards which should be maintained.

Appeals

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

(96) The existing 'full merits' standard is the appropriate level of judicial scrutiny of the CMA's decisions in Competition Act investigations. The Committee has previously made detailed submissions on the appropriate standard of judicial scrutiny of CMA decisions in the CA98 context. For BEIS' benefit we briefly summarise the key points of these submissions below – noting that the Committee's views have not changed in this respect.

(97) In the Committee's view, changing the level of scrutiny to a 'judicial review' standard would critically undermine the Competition Appeal Tribunal's ("**CAT**") ability to "*provide robust quality assurance of the CMA's interpretation of competition law"* (one of Government's key objectives)[25] and risks violating the fundamental requirements of Article 6 of the European Convention on Human Rights ("**ECHR**").[26] There is no valid basis on which to shift to a judicial review standard given the severity of what is at stake.[27] Indeed, the Consultation document notes that businesses generally appear supportive of the merits-based review system, but Government otherwise welcomes views.[28]

(98) While it is laudable to minimise end-to-end duration and the cost of decision-making, correct decision-making should not be sacrificed in the interests of perceived speed. In any event, a full merits review is not inconsistent with this goal, because robust, predictable and correct decision-making, as promoted by a full merits review, leads to a number of real benefits for consumers, businesses and markets as a whole. For example, businesses are able to better assess whether conduct complies with competition law and more confidently make decisions. Furthermore, they do so assured that they will be penalised only for conduct which is genuinely unlawful. This is important for businesses investing into the UK. It is also consistent with standards in the USA and other major common law jurisdictions, which are a source of much inward investment.

(99) Consideration must also be given to the CMA's own administrative process, which in a CA98 case can extend for years – during which the CMA will continue to gather evidence and may ultimately restate its case multiple times.[29] Either it is recognised that this is due to the complexity of a case – which should be reflected in the time allowed for appeal – or the CMA must be more disciplined and conclude cases much more swiftly.

(100) We also understand that the Government may have a concern that the CMA is spending unnecessary time 'gold-plating' its decisions to minimise the risk of a successful appeal. This would point towards a failure in terms of the CMA's internal procedures regarding its decisions, and is not a justification for watering down parties' rights of appeal. Ultimately, whether parties might successfully appeal a CMA decision will depend upon the strength of

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[25] *Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers*, July 2021, paragraph 1.205.

[26] Restricting the grounds on which a company can appeal in circumstances where: (i) the CMA acts as investigator, prosecutor, and judge; and (ii) the penalties are so severe, it risks violating the requirements of Article 6 of the ECHR.

[27] A Competition Act infringement decision can have severe consequences for the company being investigated and its management / directors. This includes not only the financial penalties imposed on the company concerned, but also possible director disqualification and criminal enforcement. It is therefore essential that the facts in each alleged infringement are capable of ultimately being assessed and determined by an expert and impartial court.

[28] Consultation, paragraph 1.204.

[29] For example, by issuing (multiple) Supplementary Statement of Objections.

the evidence and whether the CMA's has undertaken a correct and reasonable analysis of that evidence – which are fundamental to whether there has been an infringement (and therefore is not gold-plating).

(101) Addressees of CA98 decisions do not typically bring appeals, and the appeals that are brought rarely result in the regulator's decision being overturned. For example, only eight of the 38 (21%) CA98 infringement decisions launched by the CMA or OFT since 2008 have resulted in an appeal to the CAT. Of these eight appeals, only one was upheld by the CAT. This means that only 3% of all CA98 infringement decisions since 2008 have been overturned. There is therefore questionable merit in introducing significant changes that restrict the CAT's review of CMA decisions in circumstances where addressees are already unlikely to bring appeals. The Committee does not consider that either the rate of appeals or the rate of *successful* appeals is sufficiently regular to deter the CMA from launching CA98 investigations or reaching infringement decisions.

(102) The CMA is not infallible and the system should not be designed on the basis that appeals are to be discouraged where there is a genuine grievance.

(103) Moreover, a switch to a judicial review standard of review is unlikely to result in speedier decision-making:

- Appeals before the EU's General Court and Court of Justice, although conducted on somewhat more limited grounds than a full merits review, generally take significantly longer than appeals before the CAT;
- A judicial review decision may not resolve the issue – it may be necessary to remit the matter to the administrative body, thereby lengthening the end-to-end decision-making process;
- A change to the standard of review will result in a new wave of litigation in order to determine how that new standard should apply. We expect that the outcome of this litigation will take a long time to play out, not least because of the piecemeal way in which such litigation develops; and
- A change to the standard of review will not assist the far more significant part of the end-to-end decision-making process (i.e., the administrative stage by the regulator), which in our experience is consistently longer than appeals before the CAT (see Annexes 1 – 3).[30]

(104) In any event, changing the level of judicial scrutiny of CMA infringement decisions would create inconsistencies in relation to the private enforcement of competition law. For example, in a follow-on action for damages the CMA's decision is binding and the defendant would have only limited grounds on which to challenge this decision. In contrast in stand-alone private actions there would be a full consideration of the merits of the case. The lack of a merits-based review would therefore affect rights of defence in civil litigation.

[30] Annex 1 sets out, on an annual basis, the average period of time between the key stages of CA98 cases. The data shows that the average length of the administrative procedure far outstrips the time spent on the appeals process. On average, the OFT/CMA spent more than 20 months to issue an SO during an investigation and, on average, a further 15 months engaging with the parties before the final decision. The short duration of CAT hearings cannot reasonably be regarded as adding materially to the duration of the "end to end" process.

25 What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

(105) The Committee considers that the merits-based review standard is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers. It is worth noting that the Consultation comes at a time when the "rate of the" CMA's infringement decisions is accelerating, and the corresponding quantum fines are increasing.

(106) As noted above in response to Question 24, a narrower judicial review standard of appeal may encourage regulators to conduct a more restricted analysis and to provide the bare minimum of reasons. The CMA is not infallible and such a move would place it at risk of being considered an unfair regulator. Again, this move would erode respect for the UK as a fair place to do business.

26 Are there reforms which fall outside the scope of Government's recent statutory review of the 2015 amendments to the Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

(107) As noted in previous submissions to BEIS, in the Committee's view, there are some additional changes that could be considered which would help to increase the efficiency of the Tribunal's appeal process for Competition Act investigations. These include the following (both of which have been raised in previous CLLS submissions):

- Measures to ensure that the timetable as set out in the CAT's rules is complied with, in particular, ensuring that the competition authority's defence is filed within six weeks of the date on which it received a copy of the Notice of Appeal, and granting extensions only in exceptional circumstances; and
- Potentially, moving to a prosecutorial model, whereby the statement of objections sets out the competition authority's case, and the accused presents its defence before the CAT, which then reaches a final decision, that can be appealed to the Court of Appeal on a point of law only. This is not an approach that is recommended by the CLLS at this stage, as further analysis and consideration would be required in putting forward the case for such a change, but it would be likely to reduce the "end-to-end" duration of CA98 cases.[31]

Investigative powers and penalties

27 Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which Government should be considering?

(108) In the Committee's view, the proposal to increase penalties for non-compliance with CMA investigations is entirely disproportionate (even in respect of larger businesses).

[31] CLLS response to Tyrie proposals; 3.17.

(109) The Committee acknowledges the need for the CMA to conduct investigations efficiently and to obtain accurate information from respondents. However, it is not clear that the CMA's existing evidence gathering tools are currently preventing it from achieving these aims. Neither the Consultation nor the Penrose Report cite any evidence of CMA cases being disrupted or hindered by an inability to obtain information from respondents.

(110) In the Committee's experience, the vast majority of companies already take their obligations when responding to the CMA's requests extremely seriously. Companies are mindful not only of the financial consequences and possible individual liability, but also the potential reputational damage of failing to comply with the CMA's requests. The CMA's existing tools already act as a sufficient deterrent to stop companies providing late, incomplete or misleading information. Increasing these penalties would yield little incremental benefit to the CMA (in terms of being able to conclude investigations more quickly) and could potentially be counterproductive to the CMA's stated aims.

(111) If, however, Government insists on introducing penalties at the levels proposed, the CMA's information gathering processes demand scrutiny. In practice, there is a notable imbalance of power in relation to deadlines for, and the scope of, information requests. It is also often the case that information is harder to obtain than was anticipated by the CMA at the time it was requested (typically because the business does not hold the information in the exact form requested and so additional work is required to extract and represent the relevant information). Furthermore, the Committee submits that penalties should be restricted to egregious breaches only (including for example, repeat offenders).

Personal accountability for the provision of evidence

(112) The Committee considers that this proposal places an unrealistic burden on the director providing the declaration and would likely be counterproductive to the Consultation's aims. The CMA's requests for information often capture thousands of potentially responsive documents across the respondent's business and require contributions from a large number of people within the business to complete. This is especially true for larger businesses and this issue will only become more acute as businesses move their operations to digital platforms. It is, therefore, unrealistic to assume that one individual could provide a declaration that a company's response is fully complete and correct.

(113) If this proposal is adopted, then the Committee's expectation is that directors will not be prepared to provide signed declarations under current conditions. We expect that the CMA will either have to send more targeted information requests (which will yield fewer responsive documents) or provide companies with significantly longer to respond to requests. Therefore, the net effect of this proposal will be to reduce the CMA's information gathering capabilities and the speed at which it can gather information.

(114) In any event, as noted above, the Committee considers that the CMA's existing information gathering powers are already sufficient. If, however, this change was adopted, then the Committee suggests limiting its scope, such that directors provide confirmation that the responding firm has followed a specified approach / methodology when producing its response to the CMA's information request.

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

(115) The Committee agrees with the rationale behind this proposal provided that it does not (inadvertently) compel firms to respond to voluntary requests for information.

28 Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which Government should be considering?

(116) [As submitted previously, we agree that it is desirable for the CMA to have stronger powers to enforce breaches of UILs and remedies as part of the markets regime.]

(117) However, the Committee does not support the introduction of civil fines for individuals for competition law infringements: existing sanctions (director disqualification, criminal cartel offence) provide considerable deterrence already and D&O insurance may undermine any additional deterrence. The CMA already has the criminal cartel offence available to it – but is not using it – so the availability of penalties does not appear to be the issue here. The CMA is using its director disqualification powers more frequently, and has publicly stated that it will continue to do so. If civil penalties were introduced, then there is a need for robust rights of defence and means of preserving leniency incentives. Fines should be limited to a clearly defined category of hardcore infringement.

(118) For completeness, the Consultation notes that any penalties imposed by the CMA "*will be appealable by the company affected".*[32] For the reasons outlined in response to Questions 24 and 25 above, the Committee is strongly of the view that this should be a "full merits" standard rather than a judicial review standard.

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

(119) The Committee supports the ongoing cooperation between the CMA and other international regulators to enforce competition law. However, we agree that there must be procedural safeguards that the CMA has to satisfy before it can obtain information on behalf of overseas authorities. To that extent, the Committee agrees with the conditions proposed in paragraph 1.245.

Consumer rights and consumer law enforcement

(120) In the Committee's view, reform of the to the consumer regime are an important and overdue part of the overall approach to the reforms. In recent years, competition law has increasingly been used to address concerns to which it is not necessarily best suited and which are in our view more appropriately dealt with within the remit of consumer law. Developing a more effective consumer law regime and the CMA's competence in this area is, therefore, a welcome development. In many instances, where consumer detriment is not caused by a lack of competition and, even when there is a distortion arising from an existing relationship (e.g., with subscription customers trying to end a relationship), consumer powers can often be used more effectively and directly to benefit consumers and efficiently address poor practices.

(121) The Consultation deals with issues across several different pieces of consumer legislation but the Committee is particularly concerned by proposals for a civil judicial review standard of appeal across the board. In line with the views expressed above in relation to competition law, the Committee is firmly of the view that a 'full merits' standard of review is appropriate, particularly where the offence is quasi-criminal and the penalties are severe.

[32] Paragraph 1.230.

(122) The Committee also considers that there may be advantages in a general consumer investigatory regime, similar to the market regime in competition law. This could be used alongside or instead of the competition market regime, with a wider ability to provide remedies where consumer detriment was caused. The regime could cover areas where the specialist regulatory regimes do not apply, or where those regulators do not already have powers to order changes in terms or redress (such as OFGEM or the FCA). This would facilitate gaps in existing measures affecting consumer welfare to be addressed, without the distortion of the competition regime.

(123) Where there are criminal offences under the regime (whether existing or created under the reformed regime), Government should consider whether the CMA should carry out a review as to whether the offence was dishonest or so egregious that it should be prosecuted, or whether it would be better dealt with by civil penalties and therefore dealt with entirely by the CMA at first instance (subject to a full merits review in circumstances where quasi-criminal penalties are imposed).