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BEIS CONSULTATION ON REFORMING COMPETITION AND CONSUMER POLICY

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation by the Department for Business, Energy & Industrial Strategy ("**BEIS**") on Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers (July 2021) (the "**Consultation**"). We confirm that nothing in this response is confidential.

This response contains our own views, based on our experience of advising and representing clients in relation to competition law matters, and is not made on behalf of any of our clients.

COMPETITION

1. **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?*
>
> *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?*
>
> *3. Should government provide more detailed and regular strategic steers to the CMA?*

1.1 We note that the Competition and Markets Authority ("**CMA**") already has broad information gathering powers in the context of market inquiries, mergers and Competition Act investigations. In our experience, responding to information requests from the CMA is a time intensive exercise which usually involves external advisers. Businesses are likely to adopt a similar approach to requests for information under the proposed new power and this will therefore impose an additional administrative and cost burden on businesses.

1.2 We have a number of concerns about this proposal. First, it is unclear from the Consultation why the CMA's existing information gathering powers are not sufficient to enable it to advise the government on the state of competition law in the UK. Second, the Consultation does not set out whether information gathered using the proposed powers could then be used by the CMA for any other purpose: if so, then it is even more likely that businesses will want to seek legal advice to ensure they are conveying information accurately. Third, it is not clear from the Consultation how extensive any information requests from the CMA would be.

1.3 We consider that the CMA already has significant information gathering powers under its markets, mergers and Competition Act powers which will enable it to provide the government with advice on the state of competition in the UK. It would not be proportionate to subject businesses to additional cost and time burden involved in preparing response to the CMA's questions.

2. MARKET INQUIRIES

> *4. Should the CMA be empowered to impose certain remedies at the end of a market study process?*
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> *5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?*
>
> *6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?*
>
> *7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?*
>
> *8. Will the government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?*
>
> *9. What other reforms would help deliver more efficient, flexible and proportionate market inquiries?*

2.1 We are supportive of measures which will streamline the process and reduce the burden on businesses. We therefore welcome the proposal to allow the CMA to focus on specific market features in market inquiries to allow market inquiries to be more targeted, efficient and proportionate.

A single market inquiry tool

2.2 We have concerns about the proposal to combine market studies and market investigations into a single market inquiry process. Most importantly, if the two processes are combined into a single tool we would emphasise the need for new decision-makers for any final decision, as is required in Competition Act investigations. This would be particularly important in cases where the CMA proposes imposing remedies which may have a significant impact on how businesses operate.

Interim measures

2.3 As recognised in paragraph 1.68 of the Consultation, the CMA can impose interim measures at any point during a Competition Act investigation where it is "*necessary as a matter of urgency for the purpose of preventing significant damage to a particular person or category of person, or to protect the public interes*t". However, as also recognised at paragraph 1.67 of the Consultation, the CMA has only used its interim measures powers once in a Competition Act investigation.

2.4 It is important to note the fundamental difference between Competition Act investigations, which involve an allegation of anti-competitive conduct, on the one hand and market inquiries, which do not, on the other. Given there is no allegation of anti-competitive conduct in market inquiries, it is not appropriate or proportionate to allow the CMA to impose interim measures before it has concluded that there are adverse effects on competition.

Reviewing previous remedies

2.5 We welcome the proposal to allow the CMA flexibility to review and revise previous remedies without undertaking a new market study. Market inquiries involve significant costs and administrative burdens for businesses involved in the process and it is therefore appropriate to enable the CMA to withdraw remedies without subjecting businesses to the additional costs of a second market investigation. It would allow remedies to be adapted to take account of future market dynamics which may render the intervention unnecessary or

counterproductive and enable the CMA to be more responsive and ensure remedies do not have adverse consequences on markets.

2.6 However, we are concerned by the suggestion in paragraph 1.85 of the Consultation that this flexibility could be used to expand or supplement remedies. This could have unintended consequences both for the market and for individual businesses. This would be of particular concern where engagement by the CMA with potentially affected market participants is insufficient to enable the CMA (and businesses) to understand the potential implications of proposed remedies and/or for affected business to have an opportunity to seek to protect their legitimate interest. In our view the power should be limited to allowing the CMA to revoke obsolete remedies and to vary remedies to reduce the burden imposed on business, where the CMA deems this to be appropriate.

3. MERGER CONTROL

Introductory comments

3.1 The Consultation proposes to substantially expand the CMA's jurisdiction to review transactions. In our view, and as acknowledged at paragraph 1.90 in the Consultation, the "*merger control regime is working well*". The rationale for proposing such significant reforms is therefore not clear. In particular, before providing the CMA with significantly expanded jurisdictional powers, a necessary pre-condition would be to demonstrate clear evidence of a material enforcement gap. The Consultation does not, however, refer to any evidence substantiating an enforcement gap.

3.2 We welcome the recognition in the Consultation at paragraph 1.90 that the process should be "*as efficient as possible*", however, we are concerned that some of the proposals will further increase the regulatory burden on medium and large businesses. Transacting parties in the UK are already facing increased regulatory scrutiny with the introduction of mandatory filing requirements in certain sectors under the National Security & Investment Act and the additional regulatory oversight for mergers proposed in the government's consultation on a new pro-competitive regime for digital markets (July 2021). Following Brexit and the abolition of the "one-stop shop" principle, parties will now also need to notify many transactions to both the CMA and the European Commission ("**Commission**"). It is therefore clear that, even absent the current proposals, the regulatory burden on companies is increasing and there is a real risk that completing transactions with a UK nexus will become less, rather than more, efficient. Broadening the CMA's jurisdiction to review mergers will only add to this administrative burden.

Jurisdictional thresholds

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

Turnover thresholds

3.3 We support the Consultation's proposal to increase the target turnover threshold to £100 million. This is consistent with the Consultation's stated aim of ensuring that the regime focuses on mergers which may give rise to competition concerns. It will also reduce the administrative burden on smaller businesses in transactions where this is no overlap between the parties.

3.4 While the revised turnover threshold will provide legal certainty to transacting parties where the target's turnover is above the threshold, we note that target turnover is often not the determining jurisdictional factor. In many cases, the parties will also need to have regard to the share of supply threshold.

Proposed safe harbour

3.5 In principle, we are in favour of a regime which includes a safe harbour for mergers. However, the safe harbour proposed in paragraph 1.98 of the Consultation would not offer a genuine safe harbour in practice. As it is very unlikely that transactions where the worldwide turnover of each of the parties is less than £10 million will result in a substantial lessening of competition, the proposed safe harbour will not be relevant to the parties' self-assessment process in the overwhelming majority of transactions. The Impact Assessment published alongside the Consultation ("**Impact Assessment**") estimates that the proposed safe harbour would only exclude between one and six mergers from review merger per year.[1] However, this is based on the assumption that in at least four of the ten cases in 2020/2021 where the target turnover was less than £10 million in the UK the acquirer's worldwide turnover was likely to be over £10 million worldwide and does not account for cases where the target's turnover worldwide exceeds £10 million.

3.6 We would therefore suggest that a more realistic safe harbour turnover threshold would be based on a threshold significantly in excess of £10 million <u>and</u> should be assessed by reference to <u>UK</u> turnover. This would have the benefit of providing valuable legal certainty and could be justified by the likely impact on the relevant UK market(s) of excluded transactions.

Hybrid threshold

3.7 We have a number of concerns about the proposed hybrid threshold:

(a) **Rationale:** The rationale for expanding the CMA's jurisdiction is unclear and the government has not provided any empirical evidence of an enforcement gap.

(b) **Existing broad discretion:** The CMA already has a broad discretion to identify criteria on which to determine the share of supply test.

(c) **Self-assessment by the parties:** The proposed hybrid threshold will place a significant cost and time burden on parties when self-assessing whether the CMA may have jurisdiction to review the transaction, even in the absence of an overlap.

(d) **Impact on large businesses:** As there is no requirement for an overlap, this will place a significant additional burden on large multinational businesses for which the CMA may have jurisdiction to review <u>all</u> merger activity.

(e) **Vertical mergers:** The share of supply element of the proposed hybrid threshold has not been set correctly to identify vertical mergers which are likely to give rise to competition concerns and will instead capture a large number of transactions which are very unlikely to give rise to competition concerns.

(f) **Target may have no UK nexus:** The proposed threshold does not require the target to have any UK nexus, or even that the transaction will have any (potential) effect in the UK.

(g) **No overlap required:** There is no requirement for an overlap between the parties.

<u>Rationale</u>

3.8 As set out in section 3.1 above, the rationale for expanding the CMA's jurisdiction is not clear and the Consultation does not identify, or evidence, the enforcement gap which the proposals are designed to address. Given the substantial expansion of jurisdiction proposed

[1] Paragraph 85.

in the Consultation, we believe BEIS should clearly set out the enforcement gap and empirical evidence for this.

3.9 Every merger control regime around the globe employs jurisdictional thresholds with the objective of focus on capturing transactions which are most likely to give rise to consumer harm. It is an inevitable consequence of using such thresholds that regulators will not have jurisdiction to review every transaction. It is not a failure of a regime with thresholds that the regulator cannot review any transaction that might conceivably raise competition concerns. No threshold can be perfectly calibrated. Thresholds (turnover or otherwise) should focus on capturing transactions which give rise to consumer harm, rather than ensuring that an authority has jurisdiction to review every transaction. This is an appropriate way of prioritising a regulator's resources.

3.10 We are not aware of any mergers which the CMA has been concerned, on an ex ante basis, may give rise to competition concerns and which it has not been able to review. In particular, the Consultation presents no analysis that suggests that the existing thresholds have prevented the CMA having jurisdiction to review transactions raising vertical or conglomerate concerns that may have satisfied the threshold for intervention the CMA. Absent an evidenced enforcement gap, it is submitted that the proposed hybrid threshold is unnecessary. Further, it will create further inefficiencies in the merger review process and reduce certainty for transacting parties.

3.11 At paragraph 24 of the Impact Assessment, the government states that its objective is to simplify and streamline the merger control process. As set out below, the impact of the hybrid threshold would be the opposite of the government's stated objective.

Existing broad discretion

3.12 The existing share of supply test is flexible and gives the CMA scope to review mergers which it considers to be potentially problematic. In **Sabre / Farelogix**, the CMA had used its discretion to assert jurisdiction over the merger between Sabre and Farelogix where one of the parties had limited activities in the UK. In **Sabre Corporation v CMA**, the Competition Appeal Tribunal ("**CAT**") upheld the CMA's assertion of jurisdiction, holding that section 23(8) of the Enterprise Act 2002 ("**Enterprise Act**") gives the CMA "*a broad discretion*" in identifying criteria on which to determine the share of supply test.[2]

Self-assessment by the parties

3.13 The hybrid threshold will be very difficult for transacting parties to apply in practice and it will significantly increase the cost of parties self-assessing whether the CMA would have jurisdiction to review a particular transaction. Undertaking a share of supply analysis typically requires a significant amount of legal and economic work, normally undertaken by external advisers. This often involves material costs.

3.14 While parties already have to self-assess against the existing share of supply threshold, in contrast to the current position the proposed hybrid threshold would apply even where there is no horizontal or vertical overlap between the parties. Further, even after parties have completed their self-assessment, there is no guarantee that the CMA will reach the same conclusion given the CMA's "*broad discretion*" in applying the share of supply test. The proposed threshold would therefore create significant uncertainty for businesses. To address that lack of legal certainty, businesses may choose to confirm their analysis with the CMA, either using the Mergers Intelligence Committee or by notifying the transaction to the CMA, which will in turn increase the burden on the CMA

[2] **Sabre Corporation v CMA** [2021] CAT 11, paragraph 141.

3.15 In the Impact Assessment, the government estimates that this threshold will result in an additional two to five cases being called in by the CMA.[3] There is no analysis to support this assessment but, in any event, in light of the number of mergers assessed by the CMA on an annual basis, this is a very small number of transaction in both absolute and comparative terms. By contrast, the proposal will result in a loss of legal certainly and material cost (with the associated burden on businesses)in respect of a very considerably larger number of transactions (see further below). This is particularly the case given the low threshold for a merger under the Enterprise Act which may result only from the acquisition of "material influence". This means that even acquisitions of a low at 10% need to be assessed to determine whether they give rise to a qualifying merger.

Impact on large businesses

3.16 The proposed reforms are also likely disproportionately to impact large multinational companies, hedge funds, or other conglomerates which are likely to have turnover of at least £100 million in the UK and may be expected to have a share of supply of at least 25% in at least one description of goods and services in which their portfolio companies operate. This is particularly the case given, that under the proposed hybrid threshold, there is no requirement for the 25% share of supply to be in a market which is related to the proposed transaction. Accordingly, every future acquisition undertaken by these large enterprises would fall within the scope of this new threshold.

3.17 The additional regulatory burden on these types of companies will be significant, and could have the effect of chilling investment in UK industries, in preference of countries Europe or the Americas.

Vertical mergers

3.18 We note that paragraph 1.106 of the Consultation suggests that the proposed reforms will allow the "*CMA to more easily investigate vertical mergers involving larger, established market players, or mergers that might increase the concentration of market power across different products or services*". However, the turnover test means that the overwhelming majority of transactions which are likely to give rise to problematic vertical effects are already captured under the current regime (noting that many transactions involving vertical overlaps also give rise to horizontal overlaps)

3.19 In addition, vertical mergers generally give rise to competition concerns only where one of the parties has market power in an upstream or downstream market. In this regard, even if it were appropriate to introduce a hybrid test in order to seek to capture vertical mergers that were not otherwise caught as a consequence of the operation of the turnover test of share of supply test, it would be inappropriate for the threshold for that test to be set at 25%.

3.20 Vertical mergers where one party has a share of supply of 25% will rarely, if ever, give rise to competition concerns as a business with a 25% share of supply will almost never have unilateral market power (market power would not typically be expected at a share of supply of at less than 40%). The hybrid threshold as proposed is therefore not appropriately tailored to address concerns relating to jurisdiction over vertical mergers.

Target may have no UK nexus

3.21 As set out in paragraph 3.12 above, the CMA already has a broad discretion to identify the criteria for the share of supply test, which it has used to establish jurisdiction to review transactions where a party has limited activities in the UK. The proposed hybrid threshold

[3] Paragraph 96.

however would allow the CMA to review transactions where the target has no UK nexus. We do not believe this to be the most appropriate or efficient use of CMA resources.

No overlap required

3.22 The existing share of supply test requires there to be an overlap between the transacting parties, however, the proposed hybrid threshold does not require there to be a horizontal or vertical overlap between the parties. It does not even require the share of supply of 25% to be in a market which is related to the proposed transaction. It is therefore not proportionately tailored to capture transactions which are likely to give rise to competition concerns. Such a hybrid test will result in businesses being required to self-assess and potentially make failsafe filings in respect of a very significant number of transactions.

Concluding remarks

3.23 To conclude, we have significant concerns about the proposed hybrid threshold. In our opinion, it would result in more, and not less certainty, increase the regulatory burden for businesses and could require the CMA to devote resources to review transactions which are unlikely to give rise to a substantial lessening of competition. This will ultimately reduce the efficiency of the UK's merger control regime.

3.24 The current "broad discretion" within the share of supply test, coupled with the concept of "material influence" as a trigger for when entities cease to be distinct under the Enterprise Act already gives the CMA sufficiently wide powers to review transactions which it considers may harm competition in the UK.

3.25 As the Consultation does not set out any evidence for the alleged enforcement gap, we submit that the proposed significant extension of the CMA's jurisdiction is not appropriate or proportionate.

Additional or alternative reforms

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

3.26 As set out above, we agree with the statement in paragraph 1.90 of the Consultation that the "*merger control regime is working* well". Other than the proposed revision of the target turnover threshold, we therefore do not think any additional reforms to the current jurisdictional tests are required.

Investigation procedures

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

3.27 We do not agree with the assertion that the speed of the UK's mergers investigations is broadly consistent with other similar countries. The CMA process is comparatively longer than other competition authorities globally at both Phase 1 and Phase 2. By way of illustration, the CMA has 40 working days to clear a transaction at Phase 1 or refer it for a Phase 2 investigation which is approximately 25% longer than its international counterparts including: Austria (four weeks), Canada (30 days), the EU (25 working days), France (25 working days), Germany (one month), Italy (30 calendar days), Spain (one month) or the U.S. (30 calendar days). Similarly, at Phase 2 the CMA has 24 weeks to reach its final decision in contrast to Austria (five months), the EU (90 working days), France (65 working days), Germany (four months), Italy (45 calendar days) and Spain (two months).

3.28 A similar trend is seen in pre-notification discussions which can last months with the CMA and are typically significantly shorter in other jurisdictions. In our recent experience, pre-notification discussions with the CMA take a minimum of 3 months and can take over six months. The CMA pre-notification process is both considerably longer and a more involved and resource intensive process than pre-notification discussions with comparable competition authorities. This adds significant time to a deal timeline and coupled with the CMA's longer Phase 1 and Phase 2 review periods means the CMA is often the long outlier (by a considerable margin) when a transaction is subject to review in multiple jurisdictions.

3.29 We are therefore generally supportive of reforms which would streamline the review process and bring the length of the CMA review process more in line with merger control regimes worldwide. We note, however, that achieving this objective will require changes to the CMA's procedures and guidelines as well as changes to the underlying legislation.

Remedies earlier in Phase 2

3.30 In theory, we support the proposal to allow the CMA and the parties to negotiate remedies earlier in a Phase 2 investigation. However, we note that Phase 2 involves new decision-makers (a procedure that we support) which will in practice make it difficult to agree remedies early in Phase 2, even where parties were simply timed-out at Phase 1.

Restricting Phase 2 to the issues identified at Phase 1

3.31 We welcome the proposal to restrict Phase 2 investigations to the issues identified at Phase 1: this would assist the CMA with streamlining the competition analysis at Phase 2. We note, however, that this efficiency will only be achieved if the CMA does not respond by becoming more reluctant to define theories of harm at Phase 1 in order to avoid fettering its discretion at Phase 2.

Fast track to Phase 2

3.32 We welcome the proposal to allow parties to request an automatic reference to Phase 2 without requiring the parties to formally accept that the merger could result in a substantial lessening of competition. However, we believe that concern is only one potential factor explaining the limited use of the fast track process. A more significant factor is that the fast track process does not deliver significant time savings having regard to the overall timetable for Phase 1. The fast track process may only save the parties approximately four weeks in relation to a Phase 1 process which, including pre-notification, may run to well over six months (even absent a remedies process). In this regard, we would not support the proposal to allow for a three week extension for fast-tracked cases to allow the CMA to gather more evidence as means that nearly all the theoretical time saved by fast-tracking to Phase 2 will be lost.

Allowing the CMA more flexibility to unilaterally extend the timetable

3.33 As set out above, the CMA review process is already considerably longer than its international counterparts and we therefore do not agree that the CMA should be given more flexibility to extend the timetable unilaterally. In our view, the CMA already has sufficient flexibility and discretion to extend the timetable where necessary. Flexibility for the CMA needs to be balanced against the adverse effects on merging parties of the lack of legal and commercial certainly arising from a very protracted review process.

CMA Panel

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

3.34 We have no comments in response to this question.

4. COMPETITION ACT 1998

Jurisdiction

> *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?*

4.1 As a preliminary point, we note that Question 14 of the Consultation suggests that for abuse of dominance cases, the reform being considered is that the CMA should have jurisdiction "*regardless of the geographical location of that market*". Section 1.149(b) of the Consultation nonetheless suggests the CMA's jurisdiction for Chapter II prohibitions be limited to conduct that "*is likely to have, direct, substantial, and foreseeable effects within the UK*". For the purposes of this submission, we have assumed that the proposal is to expand the CMA's jurisdiction in Chapter II cases on the basis of Section 1.149(b). For the avoidance of doubt, we would not support a proposal which gave the CMA jurisdiction over abuse of dominance cases with no connection to the UK.

4.2 We consider that the proposed reforms to the CMA's jurisdiction will give rise to a lack of legal certainty for businesses. The current regime benefits from clarity, certainty and lower compliance costs in comparison to an effects-based approach to jurisdiction which is inevitably more difficult for businesses to self-assess. This has become particularly acute following the European Court of Justice's ("**ECJ**") decision in **Intel**,[4] where the ECJ considered the qualified effects doctrine, which is not dissimilar to the proposal set out in the Consultation, as being a very low threshold for establishing the Commission's jurisdiction. This could lead to jurisdictional conflict with other competition authorities and create a risk of double jeopardy.

4.3 Adopting an effects-based approach to jurisdiction will result in less legal certainty for potential defendants in Competition Act investigations and for parties looking to bring follow-on damages claims. This could result in more immunity applications being made to the CMA in respect of conduct which has no foreseeable effects within the UK.

4.4 In contrast to the proposed amendment, there has been a trend in recent years in both the European Union and the UK towards treating infringements of Article 101 of the Treaty on the Functioning of the European Union and Chapter I as by object infringements and the majority of recent case law focuses on by object infringements.

4.5 While we recognise the importance of the CMA having strong enforcement powers and the ability to take action against infringements of Chapter I and Chapter II, an effects-based jurisdiction will also result in an enforcement overlap. This already occurs with concurrent investigations often run by the Commission, DOJ and other agencies. Where Chapter I infringements are not implemented in the UK, it is difficult to see what benefits an additional investigation by the CMA would bring in circumstances where multiple other agencies are investigating the same conduct.

4.6 The proposed reforms will also result in an increased focus by both businesses which are alleged to have infringed Chapter I or Chapter II and the CMA on jurisdiction and this will involve additional resources, time and cost for all involved.

4.7 Should the reforms be progressed, it is submitted that the scope should be narrowed only to direct and substantial effects. Namely, the CMA's jurisdiction should be limited to

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[4] Case C-413/14 P **Intel Corporation v European Commission**.

infringements which have an actual effect in the UK, rather than infringements which may have a foreseeable effect.

Safe harbour

> *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?*
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> *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 business that are a party have an annual turnover of less than £10 million?*

4.8 It is not clear from the Consultation what enforcement issues, if any, the CMA has had which warrant the need to revise the immunity thresholds from £50 million to £10 million. This is particularly so given that price-fixing cartels, arguably the most significant Chapter I infringements, are already excluded from the safe harbour regime.

4.9 Costs associated with CMA investigations are significant, both for the CMA and the businesses under investigation. In circumstances where the CMA has limited resources and needs to prioritise its resources to focus investigations on the most harmful and most significant infringements, it is submitted that minor amendments to thresholds will only create more work across a larger number of matters with a significant increase in enforcement costs, for diminishing benefits to the UK economy. This is particularly true now that the CMA will have jurisdiction over an increasing number of investigations following the UK's exit from the European Union.

4.10 Absent an identified enforcement gap/issue which the Consultation is seeking to address, it is not clear why there is a need to amend the current thresholds, which are sufficient and which the CMA can, in any event, withdraw by notifying a business it has concerns about its conduct.

CMA tools for identifying and prioritising investigations

> *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?*

Additional immunity from liability for damages caused by the cartel

4.11 We recognise that there are important and competing public policy issues at play in respect of this proposal. On the one hand, there has been a decline in immunity applications over time in light of the risk of follow-on damages and collective proceedings. On the other hand, the follow-on and collective proceedings regimes are premised on allowing consumers and those who have suffered loss as a result of Chapter I and Chapter II infringements the ability to recover that loss from addressees. Reforms such as the Damages Directive and amendment to the collective proceedings regime have sought, as a matter of public policy, to make it easier to victims of competition infringements to recover their losses.

4.12 Against that background, we set out below a number of policy considerations for the government to take into account.

4.13 The additional immunity from liability for damages would be a significant incentive for businesses to seek immunity. Given the significant additional benefits attached to being

the first business to obtain immunity, it is likely that the reform will result in an uptick in immunity applications, and a greater incentive for a "race" between addressees to claim immunity.

4.14 Following the implementation of the Damages Directive, immunity applicants have only been liable for losses caused by their own direct sales and not jointly and severally liable for all losses caused by the cartel. This offers immunity applicants comfort that they will not be an "easy target" for follow-on damages claims from all those affected by the infringement. If immunity applicants were no longer liable for their own direct sales, other addressees would be liable to the immunity applicant's customers on a joint and several basis. This could result in a disproportionate and significant increase in liability for addressees who had relatively minor involvement in the infringement, in addition to any fine issued by the CMA.

4.15 Granting immunity holders immunity from follow-on damages claims would make it considerably more difficult for victims to recoup their losses. Consumers, and businesses seeking to recover their losses as a result of a cartel may face significant challenges in proving losses suffered arising from supplies by the immunity applicant. Typically in follow-on damages cases, extensive data and documentary disclosure is undertaken to ensure claimants are able to prove the amount of overcharge, and give defendants the ability to potentially prove that losses were passed on. As the immunity applicant would not be a party to any follow-on claim, a claimant would need to seek third-party disclosure, which can be a cumbersome and expensive exercise. Generally, the claimant would be required to pay the immunity applicant's costs of disclosure.[5] These issues would be exacerbated where a claimant bought the vast majority of affected products from the immunity applicant, and could have the effect of discouraging them for pursuing a claim against the remaining addressees.

4.16 Defendants would also face additional uncertainty as to how the immunity applicant's liability would be "divided" between them. While each addressee is jointly and severally liable in theory, they each have a right of contribution as against the other addressees other than the immunity applicant. We are not aware of any decisions in which the CAT has addressed the issue of joint and several liability in a follow-on damages proceeding.

4.17 In conclusion, while the additional immunity proposal may seek to address perceived inadequacies in the CMA's current immunity regime, a full analysis of the consequences of the proposal should be undertaken to avoid any unintended consequences or conflict with other key policy goals, such as the ability for consumers to seek redress for losses suffered as a result of the cartel.

Protection for whistle blowers

4.18 We have no view on this proposal. As noted in Section 1.164 of the Consultation, any reform should ensure that the rights of defence of those subject to an investigation are not prejudiced. The Consultation paper does not provide further details in this regard, and stakeholders should be afforded an opportunity to review an exposure draft to ensure defendants' rights of defence are not undermined as a result of the proposal.

Strengthening the CMA's interim measure powers

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?

[5] CPR 46.1(2); and(3); **Jofa v Benherst** [2019] EWCA Civ 899.

4.19 The Consultation proposals focus on the rules relating to access to file and the standard of review for appeals of interim decisions, however, there is no explanation of why these are considered to be burdensome or how these restrict the CMA from imposing interim measures in Competition Act investigations. In our view, these procedural elements are not why the CMA rarely uses its interim powers in Competition Act investigations.

4.20 Instead, it is the high threshold for imposing interim measures set out in section 35 of the Competition Act which explains why the CMA rarely uses its powers in Competition Act investigations. Specifically, the CMA has to be satisfied that it is required to act "*as a matter of urgency*" in order to prevent "*significant damage*" and/or to protect the public interest. We are not seeking to comment on the merits or otherwise of diluting or amending the test in section 35. However, we would emphasise that a high threshold is appropriate given that interim measures can have a significant impact on business operations before the CMA has found any infringement of competition law.

4.21 As noted in the Consultation paper, the CMA has used its interim powers once which demonstrates that it can use these powers where there is a genuine need to do so. In September 2020, the CMA imposed interim measures relating to certain airline routes between the UK and the US.[6] The CMA's investigation (opened in 2018) follows an investigation by the Commission investigation which was resolved by commitments in 2010. The interim measures imposed by the CMA extend these commitments and require the airlines to release slots to competitors and provide other pro-competitive measures, effectively maintaining the status quo. The imposition of interim measures in this case may reflect difficulties in completing its assessment during the Covid-19 pandemic due to the impact on transatlantic travel.

Access to file

4.22 As set out above, we do not believe the rules on access to file before an interim measure is imposed stymy the CMA's ability to impose interim measures. We therefore question whether changing these rules will make the interim measures tool more effective or more widely used. However, we are concerned that the proposal to deny addressees access to the CMA's file before an interim measure is imposed will significantly undermine a defendant's rights of defence.

4.23 Interim measures require an addressee to change their behaviour on the market by stopping a particular course of conduct and/or positively prescribing conduct to be undertaken. This can have a significant and costly impact on businesses before the CMA has reached a conclusion on whether the business has infringed competition law. It is therefore vital to ensure that a potential addressee is able to fully engage with the CMA on any proposed interim measures and that the addressee's rights of defence are preserved.

Judicial scrutiny

4.24 We do not support the proposal to reduce the standard of review if an interim measures decision is appealed. It is important that the CMA's decision is subject to a full merits review given the significant burden that can be imposed on businesses, akin to a final infringement decision, without the requirement to find an infringement in order to properly preserve an addressee's rights of defence.

4.25 The only case in which the Office of Fair Trading ("**OFT**") issued directions for interim measures demonstrates why it is vital to maintain a full merits review of interim measures decisions. In 2006, the OFT imposed interim measures on the London Metal Exchange

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[6] Case number 50616, **Investigation of the Atlantic Joint Business Agreement**, Decision to issue interim measures directions, 17 September 2020: https://assets.publishing.service.gov.uk/media/5f621a70e90e072bc1a7533e/AJBA_Decision_to_issue_interim_measures_170920.pdf.

("**LME**") in relation to an alleged abuse of dominance. The OFT withdrew its directions following an appeal by the LME to the CAT and the introduction of material new evidence. In making its costs order in favour of the LME, the CAT strongly criticised the OFT's decision to issue the directions, describing the OFT's procedure as "*superficial and flawed*" and the decision as "*ill-founded*".[7] The CAT was concerned that the direction was based on a limited understanding of the LME's business and that the quality of evidence provided "*fell below the standard which should normally be required by an authority such as the OFT when carrying out its functions under section 35 of the [Competition] Act*".[8] It is therefore crucial to preserve an addressee's rights of defence and ensure that the CMA's decisions stand up to scrutiny.

Additionally, we do not believe that amending the standard of review would have an impact on how frequently the CMA uses its interim measures powers in Competition Act investigations. The Consultation notes that the regime is too burdensome on the CMA but it is not clear how amending the standard of review for a process which takes place after the CMA has exercised its powers would have any bearing on how burdensome the process is.

Concluding remarks

4.26 In combination, the denial of an addressee's access to file and the removal of their ability to seek a merits review of the decision in the CAT significantly undermine the addressee's rights of defence. In effect, an addressee would be unable to correct or challenge factual errors made by the CMA in its deliberations. In our view, reducing safeguards will not lead to better enforcement and preserving the current requirements is more likely to encourage better enforcement and decision making from the CMA than hamper it.

Evidence gathering powers

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?

Wider powers to interview witnesses

4.27 The Consultation notes that the proposal to allow the CMA to interview witnesses beyond a business under investigation would align the CMA's powers in market inquiries and merger investigations. It is submitted that Competition Act investigations have significant differences which necessitate the need for different powers.

4.28 In the context of a Competition Act investigation, the conduct under investigation and the identities of the businesses being investigated are often not publicly known. The proposal to compel customers, suppliers or competitors of a business under investigation to attend an interview before the investigation and/or identity of the businesses being investigated is made public could be hugely prejudicial to the businesses under investigation and have a significant impact on that business' affairs. In such proposals were to be considered, very significant safeguards would need to be put in place, such as non-disclosure agreements or civil penalties for the unauthorised disclosure of information relevant to an investigation, in order to protect the affairs of a business subject to an investigation.

4.29 Any reforms would also need to ensure that businesses' rights of defence are properly preserved. This would need to include allowing the business under investigation access to

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[7] **The London Metal Exchange v Office of Fair Trading** [2006] CAT 19, paragraph 170.

[8] Ibid, paragraph 149.

transcripts, or allowing counsel to attend the interview in-person and ask questions of the witness.

4.30 Finally, we note that preparation for attendance to a CMA interview can be very time consuming and costly. The CMA's power to compel attendance may therefore place significant burdens on individuals or companies who may not have a significant interest in the investigation.

Preserving evidence

4.31 The proposal to expand the legal duty to preserve evidence beyond an information gathering notice is likely to cause uncertainty and increase costs of compliance. In our experience, initial information notices are often very broad and capture a significant amount of information and data which is likely to fall within future information requests. In addition, it is difficult at the early stage of an investigation for a business to know the precise nature of the CMA's scope of investigation and/or which particular lines of inquiry the CMA may pursue in the future.

4.32 The internal storage of data by businesses is expanding at an exponential rate, and is increasingly being stored across multiple servers and systems, a number of which may be managed by third parties. While most businesses have internal document retention policies in place, they can often vary based on the seniority of the individual and the nature of the data/information. Attempting to predict the lines of inquiry the CMA may consider during multi-year investigations on day one of the investigation may often be a near impossible task.

Domestic premises inspections

4.33 We note the Consultation does not explain if the CMA currently experiences difficulties in deciding whether to seize materials at domestic premises. Accordingly, we are unable to comment on the merits of the proposal and whether it sufficiently addresses a perceived procedural gap.

Settlement

4.34 We note that the Consultation has not addressed any of the difficulties posed by hybrid settlements in Chapter I cases. While we support facilitating the settlement of Chapter I cases as this results in cost and efficiency benefits for the business(es) and the CMA, hybrid settlements raise a number of potential issues in relation to a business' rights of defence.

Binding admissions

4.35 We are concerned by the proposal that the CMA should be able to rely on admissions of facts and liability made by settling parties in infringement decisions addressed to those parties without obtaining corroborating evidence. It is important to protect the rights of non-settling parties to challenge infringement decisions. We therefore ask the government to consider the potential unintended consequences of allowing the CMA to use admissions of fact and liability without corroboration as this could have an unfairly prejudicial impact on non-settling parties, particularly if it opens the door to uncorroborated admissions of guilt being used by the CMA as proof of infringing behaviour on the part of non-settling parties.

Short form decisions

4.36 From a policy perspective, we agree that issuing short form decisions as a default where parties are settling with the CMA would reduce the burden on the CMA and the parties in respect of, for example, agreeing confidentiality. Where all parties to an investigation are settling with the CMA, we support the proposal to issue short form decisions as a default.

Streamlined process

4.37 In our view, the requirements in the CMA Rules should be retained. The CMA has adequate discretion in shaping the settlement regime set out in the CMA Rules and setting out the basic requirements in secondary legislation preserves legal certainty. We note that the CMA has guidelines on its settlement process and has recently consulted on changes to these, which demonstrates that the CMA already has the necessary autonomy to implement the settlement regime as it sees fit.

A new settlement tool for Chapter II cases

> *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?*

4.38 We welcome the proposed introduction of Early Resolution Agreements ("**ERAs**") to resolve Chapter II cases, as this is likely to result in a more efficient and cost-effective process for both the CMA and the relevant business. Offering businesses the opportunity to settle cases without making a binding admission of guilt, which could be used in follow-on damages claims, will incentivise settlement of cases where parties may otherwise be reluctant to settle due to concerns about lengthy and costly follow-on litigation.

4.39 As ERAs would encourage settlement in cases where parties may currently be reluctant to consider settling with the CMA, we suggest that the government examines whether a similar tool would also have a positive impact on the settlement of Chapter I cases.

Disclosure of documents

> *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?*

4.40 In our view, the proposal to protect documents prepared in order to seek approval for a voluntary redress scheme from disclosure in civil litigation does not address the fundamental reasons why businesses do not use the voluntary redress scheme.

4.41 Crucially, businesses which are considering appealing an infringement decision will not use the voluntary redress scheme. In addition, the process for approving a voluntary redress scheme is subject to detailed rules and would result in a very lengthy process. Voluntary redress schemes may also leave the business exposed to follow-on damages claims if victims of the infringement choose not to participate in the scheme.

4.42 For these reasons, it is difficult to see how protecting documents prepared in order to seek approval for a voluntary redress scheme from disclosure in civil litigation will impact how many businesses decide to use the voluntary redress scheme.

Access to documents

> *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?*

4.43 As set out above, we are supportive of measures which streamline the process of investigations by the CMA, provided that these do not dilute safeguards which protect the rights of the defence. In order to be able to respond properly to the CMA's concerns, defendants must have access to the case file. It is important that greater use of

confidentiality rings is not used as an alternative to granting addressees effective access to the case file. Put another way, disclosure to external advisors through a confidentiality ring cannot be treated as being equivalent to providing proper access to the file, particularly where, as is common, advisers are unable to determine the relevance or import of materials on the file without consulting their clients.

4.44 We are supportive of including the first and third bullet points in paragraph 1.189 in a legal framework but we believe that discussions between the CMA and the parties regarding what information can be put into a confidentiality ring are a fundamental safeguard for the defence.

4.45 In relation to any civil sanctions, there would need to be a considered process which gives the accused the opportunity to defend themselves.

Case Decision Groups

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

4.46 To ensure accountability and legal certainty, it is important that the rules on decision-makers for infringement decisions in Competition Act investigations are set out in secondary legislation and cannot be amended by the CMA. Given the potential length of Competition Act investigations, positions can become entrenched and requiring new decision-makers for infringement decisions allows a fresh perspective and offers a crucial protection to defendants.

Judicial scrutiny

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

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?

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

4.47 We would not support any proposals to amend the CAT's jurisdiction: in our opinion, the CAT's jurisdiction and the current standard of review are appropriate. We note that the CAT is well regarded internationally and that it resolves appeals efficiently and effectively.

4.48 When the Competition Act was introduced, the Minister for Competition and Consumer Affairs explained the need for a merits review and that it served two important purposes. Firstly, a "*full appeal on the merits of the case*" was considered as being "*an essential part of ensuring the fairness and transparency of the … regime*". Secondly, the Government wished for the CAT's review process to be as efficient as possible, and to avoid the need for cases to be remitted back to the decision-maker if there was a procedural error.[9]

4.49 A full merits review of CMA decisions ensures that both the decision-making process and substantive analysis are consistent and correct. Many cases reviewed by the CAT involve complex and nuanced issues of fact, novel theories of harm or the expansion of case law in

[9] Minister for Competition and Consumer Affairs Competition Bill on 18 June 1998, text available at: https://publications.parliament.uk/pa/cm199798/cmstand/g/st980618/am/80618s07.htm.

untested areas. The current regime provides for proportionate regulatory accountability which incentivises regulators to fully engage with evidence at the administrative stage and to ensure a thorough analysis is conducted, knowing that their decision could be challenged.

4.50 The procedure for Competition Act investigations has been designed such that the CMA is both the "prosecutor" and "decision-maker", as opposed to the prosecutorial model followed in the U.S.A. Given the significant risks for companies (including substantial fines, follow-on damages claims, brand and reputational damage, the risk of an uplift for recidivism if they are found to infringe competition law in the future and potential regulatory scrutiny in other jurisdictions), it is important that there is the possibility of a full merits review by an independent judicial authority. As noted by the CAT in **Napp Pharmaceutical Holdings Limited and Subsidiaries and the Director General of Fair Trading** ("**Napp**"), an appeal to the CAT is "*the first occasion on which the Decision first receives full public judicial scrutiny* ".[10] It is the only process which is truly independent of the CMA's enforcement action.

4.51 The requirement for an independent and merits based appeals process is also prescribed by Article 6 of the European Convention on Human Rights ("**Article 6**"), enshrined in UK law pursuant to the Human Rights Act 1998. Both the CAT[11] and the European Court of Human Rights[12] have categorised competition law proceedings as criminal in nature. The European Court of Human Rights has noted that Article 6(1) rights are only upheld if appellate courts are able to determine the merits.[13] Reducing the level of scrutiny or oversight of the CMA's decisions would therefore undermine defendants' fundamental legal safeguards and may infringe Article 6(1).

4.52 Any proposal to remove the CAT's ability to review a decision on the merits would also have a significant, and potentially detrimental, impact on defendants outside the confines of the CMA's investigation. Third parties are able to bring follow-on actions in the High Court of the CAT, based on the CMA's decision. The CMA's decision is binding on defendants under sections 47A and 58A of the Competition Act. If judicial scrutiny were lowered and the CAT's jurisdiction diluted, a defendant's rights of defence against future third parties would also be significantly curtailed. As noted by the CAT in its response to the Government's 2013 consultation "*Streamlining Regulatory and Competition Appeals*", a defendant's liability to third parties would be disadvantaged if a merits review was disregarded, as the binding nature of the infringement could only be challenged on more limited grounds. This contrasts to circumstances where a third party sues the defendant on the same facts in which case "*there would be a full consideration of the merits of the case by an independent and impartial judicial body (and subsequent possibility of appeal to the Court of Appeal).*"[14]

4.53 It should be noted that the CAT's power to grant relief are sufficiently flexible in order to ensure efficiency and finality in decision making when an appeal is made. Under paragraph 3(2) of Schedule 8 of the Competition Act, the CAT has the power to confirm or set aside the decision, remit the matter back to the CMA, remove or vary a penalty or give directions and / or make any other decisions the CMA could have made. In effect, the CAT can substitute its own decision for that of the CMA's original decision. This can offer a quicker

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10 **Napp Pharmaceutical Holdings Limited and Subsidiaries and the Director General of Fair Trading** [2001] CAT 3, paragraph 81.

11 In **Napp**, the CAT agreed with the Director General of Fair Trading that the appeal brought by Napp challenging the decision that it had infringed Chapter II was "criminal" for the purposes of Article 6(1) ECHR (paragraph 69).

12 **A. Menarini Diagnostics S.r.l. v Italy** 43509/08.

13 Ibid, paragraph 59.

14 "Streamlining Regulatory and Competition Appeals" (Government Consultation of 19 June 2013) Response Of The Competition Appeal Tribunal Paragraph 30, https://www.catribunal.org.uk/sites/default/files/2017-12/Streamlining_Regulatory_and_Competition_Appeals_Response_220813.pdf.

resolution of a matter where the CAT finds an issue with the CMA's decision and avoids the need to always remit the case back to the CMA for reconsideration.

4.54 In the context of the CAT's powers in respect of penalties, as noted by Lord Tyrie, "*the vast majority*" of cases before the CAT result in a lowering of the fine by the CMA.[15] However, the CAT has also increased penalties, including for one of the defendants in **Allsports Limited v Office of Fair Trading**.[16] The fact that the CMA's decisions might be overturned does not warrant the removal of the defendant's rights of defence. It does not follow that a removal of any external and independent merits review of the CMA's decision would result in an increased quality of decision-making by the CMA..

4.55 In addition, the CMA will generally be able to recover its legal costs if they are successful on appeal. In **Ping Europe Limited v Competition and Markets Authority** ("**Ping**"), the CAT held that "*the starting point in appeals brought under the Competition Act 1998… is that costs follow the event*".[17] In **Ping**, the CAT also considered the recovery of the CMA's internal costs and noted that it has been established in the case law that the costs of in-house lawyers are to be assessed on the same basis as those of independent lawyers.[18]

4.56 Finally, it is noted that a proposal to change the CAT's jurisdiction also needs to be considered in conjunction with the CMA's consultation on its CA98 procedural guidelines relating to settlement[19] in which the CMA proposes to require settling parties to waive their appeal rights as part of the settlement agreement which would limit the CAT's jurisdiction.

4.57 In summary, it is important to have proper judicial oversight to balance the broad exercise of administrative discretion. While we do not believe changing the level of judicial scrutiny would necessarily improve the speed or predictability of appeals, we also note that any reforms to improve speed or predictability should not be at the expense of robust decision-making and the parties' rights of defence.

4.58 We do not have any other views on potential reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to CAT's rules.

5. INVESTIGATIVE POWERS

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?

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?

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

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15 Lord Tyrie's letter to the Secretary of State for Business, Energy and Industrial Strategy, 21 February 2019, page 39. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf

16 [2005] CAT 22

17 [2019] CAT 6, paragraph 5.

18 Paragraph 30(b).

19 CMA, *Ensuring finality in settlement cases – Proposed amendments to the Guidance on the CMA's investigations procedure in Competition Act 1998 cases – Consultation*, published 31 August 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1013773/Consultation_on_draft_CA98_procedures_guidance_publication.pdf.

Investigative powers

5.1 In our experience, businesses involved in CMA investigations typically take compliance with the CMA's investigative powers very seriously. Any proposal to increase the CMA's fining power would need to ensure that a defendant's rights of defence are protected and that, where appropriate, defendants are able to appeal any fines.

5.2 In this context, we note that occasionally CMA information requests are extensive and burdensome on defendants. Preparing a response often involves significant involvement from multiple parts of a business and the use of specialist third parties, including lawyers, forensic document review specialists, and economists. Responding to requests which require documents and emails to be produced is a time-intensive exercise which involves businesses collating documents from custodians, review documents for relevance and privilege and preparing the documents for production to the CMA. In our recent experience, the deadline imposed by the CMA for responding to these information requests are often unrealistically short and we would therefore urge the government to consider how to ensure that deadlines are reasonable and realistic if the penalties for failing to respond in time are to be increased.

Enforcement powers

5.3 We note that the Consultation at paragraph 1.228 refers to 185 breaches since 2018 of remedies put in place through its market inquiry regime. While the Consultation recognises that there is variation in the scale of these breaches and that goodwill gestures have been made by businesses to address the breaches, no reference is made to the fact that many of these breaches are inadvertent and are remedied and notified to the CMA as soon as the business becomes aware of the relevant breach. In our experience, businesses take compliance with remedies imposed after a market investigation very seriously. In addition, there is the potential reputational damage of failing to comply with remedies, particularly for larger businesses where the media may pick up on directions being issued by the CMA.

5.4 The proposal in paragraph 1.230 to give the CMA the power to impose civil penalties on businesses that fail to comply with the CMA's directions or orders or undertakings or commitments given by the business to the CMA is very broad. It would allow the CMA to fine a business which has taken reasonable endeavours to comply where the business discovers an inadvertent breach and reports it to the CMA. In our opinion, this will not enhance compliance with remedies imposed following a market inquiry process. It may also have the unintended consequence of resulting in businesses being less willing to report inadvertent or technical breaches for fear of fines, which for large businesses could be substantial.

6. CONSUMER LAW

30. Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?

31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?

32. Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?

33. How would expressly requiring consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?

34. Should the reminder requirement apply where (a) the contract will auto-renew or roll-over, at the end of the minimum commitment period, onto a new fixed term only, or (b) the contract will auto-renew or roll-over at the end of the minimum commitment period?

35. How would the reminder requirement impact traders?

36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?

37. What would be the impact of proposals regarding long-term inactive subscriptions have on traders' business models?

38. What do you consider would be a reasonable timeframe of inactivity to give notice of suspension?

39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?

40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?

41. Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?

42. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?

43. What impact would the reforms mentioned in Q42 have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?

44. What 'reasonable and proportionate' steps should be taken by businesses to ensure consumer reviews hosted on their sites are 'genuine'? What would be the cost of such steps for businesses?

45. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?

46. Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?

47. Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?

48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?

49. Are there perverse incentives or unintended consequences from our existing consumer law?

50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?

51. Do you agree that these powers should be used to protect those using "savings" clubs that are not currently within scope of financial protection laws and regulators?

52. What other sectors might new powers regarding prepayment protections be usefully applied to?

53. How common is the practice of using terms and conditions to delay the formation of a sales contract?

54. Does the practice of using terms and conditions to delay the formation of a sales contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?

6.1 In principle, we support many of the government's proposed reforms to enhance consumer law. We have not provided comments on the proposals as we believe others will be better placed to comment on the specifics.

7. CONSUMER LAW ENFORCEMENT

55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?

60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?

65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

68. What further changes could government make to the ADR regulations to raise consumer and business confidence in ADR providers?

69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?

71. How can government best encourage businesses to comply with these changes?

72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?

74. How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?

75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?

Direct enforcement by the CMA

7.1 As a general point, we note that in other jurisdictions, such as Australia, competition authorities have had the power to issue infringement notices for breaches of certain consumer law provisions for some time. We support the proposal to allow for enforcement of consumer laws through an administrative model, provided that businesses' rights of defence are sufficiently protected during an investigation and that there is an appropriate appeals pathway. A centralised administrative model will also have the benefit of consistency of decision-making and, given its experience in enforcing competition law directly, the CMA is well-placed to take on the same role for consumer law.

7.2 We would not support a proposal to allow the CMA to undertake direct criminal enforcement of consumer law provisions. We are not aware of any other jurisdictions which allow for the direct criminal enforcement of competition or consumer laws. Given the serious nature of criminal allegations, a prosecutorial model is the most appropriate form for these types of actions. Independent judicial scrutiny is of paramount importance in criminal proceedings.

7.3 While there may be a number of advantages to the CMA directly enforcing consumer laws, an investigative procedure should ensure that the investigation is run as efficiently as possible. In designing a regime allowing for direct enforcement of consumer law, the CMA and government should have regard to what works well in the competition law regime and areas for improvement. For example, it takes the CMA several years to complete many Chapter I and Chapter II investigations. When establishing a direct enforcement regime, the government and the CMA will need to balance the desire for an efficient process with the rights of defence.

Fair and proportionate administrative decisions

7.4 In establishing an administrative regime for enforcement of consumer law, we would suggest that the government and the CMA draw on experience from the regime for directly enforcing competition law. In particular, defendants should be accorded proper rights of defence and have the opportunity to fully engage with the CMA during the administrative process.

7.5 The Consultation does not make clear whether the direct enforcement model is intended to replace, or be an alternative to the current regime. In Australia, the Australian Competition and Consumer Commission ("**ACCC**") has the power, in relation to certain types of contraventions, to either issue an infringement notice or commence civil or criminal proceedings. However, where an infringement notice is issued by the ACCC, this is a strict alternative to court proceedings (i.e. if an infringement decision is made, no criminal or civil proceedings can be commenced by the ACCC). If direct enforcement was introduced as an alternative, rather than replacing civil or criminal proceedings, it is important for a defendant's rights of defence that the issuing of an infringement notice should exclude any future civil or criminal proceedings being brought by the CMA.

7.6 The Consultation does provide any details on the proposed penalties the CMA may be able to apply. We also note that in Australia, the ACCC penalty notices are limited to $13,320 for a corporation ($133,200 for a listed corporation) and $2,664 for an individual. If direct enforcement was introduced as an alternative, rather than a replacement of enforcement through civil or criminal proceedings, it is submitted that a proportionate penalty cap should be put in place. This would create a pyramid model of enforcement, giving the CMA the ability to efficiently enforce low level infringements, while protecting a defendant's rights of defence for more serious infringements.

Judicial scrutiny

7.7 In our view, administrative decisions relating to consumer law should be subject to the same level of judicial scrutiny as decisions relating to competition law. As explained in

section 4.51 above, it is important that a defendant's rights of defence are protected by way of a full merits review. This will ensure the procedure complies with the UK Human Rights Act.

7.8 We would support a proposal for appeals to be made directly to a specialist tribunal rather than the High Court. One option may be for appeals to be heard by the CAT, as consumer protection is complementary to its role as a specialist tribunal dealing with competition matters and it would therefore be able to build on its existing expertise. It also has well established procedures which would enable it to adapt efficiently.

Settlement

7.9 We would support a settlement regime for the direct enforcement of consumer law. As with competition law, this will have the benefit of allowing businesses to reach an agreement with the CMA to bring the investigation to an end and will reduce the administrative and cost burden on both the CMA and the business(es) under investigation.

Other sectoral regulators

7.10 Any proposal to give sector regulators the power to directly enforce consumer law would need to be treated with caution. Our view is that any proposed changes need to be supported by empirical evidence which identifies an enforcement gap which the government is seeking to address.

7.11 Empowering the CMA and sector specific regulators with enforcement over the same type of conduct could lead to a number of issues. For example, the jurisdiction of the CMA and sector specific regulators may become blurred and create administrative uncertainty. In theory, businesses could also face multiple investigations for the same conduct, leading to increased costs for businesses and government and a risk of double jeopardy. It would also eliminate the potential benefits of centralising enforcement of consumer law in a single institution, such as consistency. There is also a risk that different sector regulators take inconsistent views on what constitutes a breach of certain consumer laws which would create significant uncertainty for businesses.

Fines for non-compliance with information gathering powers

7.12 If the UK were to adopt a similar regime to the Australian model (explained in paragraphs 7.5 and 7.6 above) then any fines which could be imposed for non-compliance with information gathering powers should be proportionate to the type of proceedings. In cases where the businesses involved were smaller or the infringement less serious, a lower cap may be appropriate.

7.13 Please see also section 6 above which sets out our concerns about whether increasing penalties for failing to comply with the CMA's investigative powers or enforcement powers will actually enhance compliance.

Ashurst LLP

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