# RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION OF THE DEPARTMENT OF BUSINESS, ENERGY AND INDUSTRIAL STRATEGY ON REFORMING COMPETITION AND CONSUMER POLICY

## 1. INTRODUCTION AND SUMMARY

1.1 Clifford Chance welcomes the opportunity to respond to the consultation of the Department of Business, Energy and Industrial Strategy (**BEIS**) on "Reforming Competition and Consumer Policy". Our observations below are based on the substantial experience of our lawyers in our antitrust practice of advising on competition laws of the UK, in particular the Competition Act 1998 (**CA98**) and the Enterprise Act 2002 (**EA02**), and elsewhere. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

1.2 This response pertains only to the questions regarding competition law. The key points of our submission are as follows.

1.3 We are concerned that more regular **strategic steers** would excessively undermine the independence of the Competition and Markets Authority (**CMA**), and risk diverting CMA resources away from those areas in which they would have the most beneficial impact for consumers, and towards markets that align with the political objectives of the Government of the day.

1.4 As regards the **markets regime**, subject to our comments below we support the proposals to allow the CMA greater flexibility to define the scope of market investigations, and to determine the appropriate period of consultation for Phase 1 market studies. As regards the other proposals for the markets regime:

1.4.1 Any power to impose remedies at the end of a market study should be subject to a higher evidential threshold, to reflect the fact that market studies go into less depth than market investigations.

1.4.2 We favour retaining Phase 1 market studies, as these may be a more proportionate policy tool for certain cases than a more in-depth single stage market inquiry tool.

1.4.3 We consider that the CMA should not be able to impose interim measures from the beginning of a market inquiry as, for the reasons set out below, such measures would carry a substantial risk of being ill-conceived and, therefore, having adverse effects on competition during the period of the market investigation, as well as disproportionate costs and burdens for businesses that are subject to them. If interim measures are permitted at an earlier stage, it should be no earlier than provisional findings.

1.4.4 Any power for the CMA to vary market investigation remedies must be subject to strict safeguards, to ensure that the CMA does not end up assuming the role of a semi-permanent sector regulator, tinkering repeatedly with failed remedies.

These should include requirements for a reasoned decision and cost-benefit analysis, a substantiated link to the originally-identified AEC and a limit to the number of times such variations can be made.

1.5 As regards the **mergers** regime, subject to our comments below we support the proposals to allow the CMA to agree binding commitments earlier during phase 2, to restrict the CMA to refer only the issues that are identified at Phase 1, and to create a new fast-track referral route. As regards the other proposals for the mergers regime:

1.5.1 We agree that there should be a safe harbour for transactions where all parties have minimal turnover, but consider that it should be based on turnover in the UK, not worldwide turnover.

1.5.2 We have concerns that the proposed additional jurisdictional threshold is too imprecisely targeted at the types of competition issue that it is seeking to capture, and would impose assessment costs on large numbers of transactions (including many with minimal nexus to the UK) that are disproportionate to the likelihood of such harms. We suggest below some alternative thresholds that would be better targeted.

1.6 As regards **CMA Panels**, we support the proposal to make use of full time panellists, but favour retaining the possibility for the CMA to retain some part-time panellists, in order to maintain resource flexibility.

1.7 As regards **enforcement of the antitrust prohibitions,** we support the proposals for short-form settlement decisions and a new settlement tool for abuse of dominance investigations. As regards the other proposals:

1.7.1 We do not agree that extending the territorial scope of the abuse of dominance prohibition to dominant positions outside the UK is necessary to bring UK laws in line with those of international partners, as most of those partners do not do that. We also have concerns that this could deter new entry into UK markets.

1.7.2 We consider that immunity applicants should not be granted immunity from damages, as well as fines, as our internal research indicates that immunity applicants tend to be among the largest players in a cartel. We favour the current approach of limiting immunity applicants' liability to their own direct or indirect customers.

1.7.3 For the reasons set out below, we consider that interim measures should not be granted prior to access to file. If they are, then such access should be granted immediately after an interim measures decision is taken. We also consider that a full merits review is the appropriate standard, given the serious damage to a business' commercial interests that can be caused by interim measures.

1.7.4 Any move to make admissions in settlement proceedings binding on the parties should be carved out from s.58 CA98 so that courts are free to place appropriate weight on such admissions.

1.7.5 We are not persuaded that a statutory legal framework from confidentiality rings would give rise to significant efficiencies. If such a framework is created, it

should allow for flexibility e.g. to allow the extension of the ring to external providers of documents, and all advisors.

1.7.6 We do not support the proposal to remove the requirement for Case Decision Groups to make final decisions in CA98 cases, in particular if this allows the CMA to appoint decision-makers that have also been involved in the pre-statement of objections investigation, as this would risk unsound or biased decision-making.

1.7.7 For the reasons set out below, we would strongly oppose any move away from a full merits standard of review for appeals against CA98 decisions. We consider that this is also the appropriate standard for appeals against procedural fines, particularly if the maximum level of such fines is increased as proposed.

1.8 As regards the proposals for **stronger investigative and enforcement powers across competition tools:**

1.8.1 For the reasons set out below, we think that increases in the maximum fines for procedural infringements and the proposals to allow the CMA to impose fines for breaches of orders in market investigation and merger cases are not justified by a demonstrable need for greater deterrence.

1.8.2 Requiring directors to certify RFI responses is, in our view, a disproportionate measure, as it is unlikely to result in improved compliance with requests for information (**RFIs**) and (combined with other liabilities that are being imposed on directors) could adversely impact UK businesses' ability to attract the best managerial talent.

1.8.3 For the reasons set out below, we submit that the Government should take this opportunity to re-examine and refine the approach to aspects of the application of parental liability in the specific case of financial investor liability for the activities of portfolio investee companies.

## 2. GENERAL QUESTIONS

**Q1. What are the metrics and indicators the CMA and Government could use to better understand and monitor the state of competition in the UK?**

2.1 We have reservations regarding the use of sector-based statistics, such as those using the Standard Industrial Classification (**SIC**) system, to prepare "State of Competition Reports" that are then used as a basis for decisions on policy and enforcement. As noted by the CMA in its report on "The State of Competition 2020", even the most granular SIC codes are likely to be far broader than any correctly defined product market, and fail to take into account competition in markets that are local or regional in scope.[1]

[1] See CMA, " The State of UK Competition" (CMA133), November 2020, paragraph 2.9.

2.2 Metrics used in previous "State of UK Competition" report are flawed and give misleading results, as they are based on industries, sectors or sub-sectors derived from SIC codes, not correctly defined product and geographic markets. For instance:

2.2.1 if over a period of time 1,000 towns in the UK had gone from having a single locally-owned coffee shop to three coffee shops owned by national chains, a concentration measure based on national statistics would show a massive increase in concentration (from 1,000 competitors to three), whereas competition had actually *increased* threefold.

2.2.2 The SIC code of a coffee shop may be either (i) 56103 Take-away food shops and mobile food stands; or (ii) 56102 - Unlicensed Restaurants And Cafes. In either case, a measure of concentration based on the SIC code would provide no useful information on which relevant economic product market (e.g. which type of shop or café) has actually been subject to concentration at the national level.

2.3 In the absence of an analysis based on properly-defined markets, our view is that measures of concentration are meaningless and potentially counter-productive. In many sectors, it is high levels of competition that have driven consolidation, as firms seek to reduce costs through economies of scale in order to compete more effectively. Provided effective competition remains (which is the purpose of the merger control regime), this type of concentration benefits consumers, and if it attracts increased scrutiny and enforcement as a result of a State of Competition report, that would risk undoing some of those benefits.

2.4 Consequently, basing enforcement and policy decisions on national, sector-based measures of "concentration" risks resulting in incorrect policy responses and misallocated enforcement resources. However, we recognise that it is not feasible for the CMA to produce analyses of every correctly-defined products and geographic market within the UK in regular State of Competition reports. We therefore submit that the CMA should instead focus, in each report, on one or two sectors only. For those sectors, it should seek to define correct relevant product and geographic markets for the main products and services within that sector (based on its previous merger, antitrust and markets decisions), and then produce concentration metrics for those relevant markets. For the reasons set out in response to Q3 below, we do not consider that BEIS should direct the CMA as to which sectors it should cover in its reports.

**Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising Government on the state of competition in the UK?**

2.5 We note that the Office of National Statistics has powers to gather information for the purpose of preparing general surveys of the state of trade and business, and to impose penalties for failure to comply, under s. 4 of the Statistics of Trade Act 1947.

2.6 In our view, it would be more efficient for the CMA to ask the ONS to gather relevant information through its existing powers and procedures, rather than creating an additional, parallel process of statistical data gathering.

**Q3. Should Government provide more detailed and regular strategic steers to the CMA?**

2.7 It is important that the CMA remains independent from the Government in order to retain its effectiveness and preserve its credibility as an institution. If the CMA were to be subject to political intervention in the form of more regular "strategic steers" (or otherwise), there would be a serious danger that such action would undermine enforcement and the standing of the CMA. In particular, we are concerned that such steers create incentives for the CMA to seek to confirm the existence of competition problems in relation to the sectors or issues that have been identified by the Government as potential causes of concern, in order to avoid undermining or embarrassing the body that is responsible for allocating its budget. Another risk is that CMA resources are diverted away from enforcement in markets that the CMA, as the expert independent authority, considers to be likely to give rise to the highest benefits for consumers, and towards markets that align with the political objectives of the Government of the day. These risks are already present in the existing system of issuing a strategic steer once every Parliamentary term, but would be greatly exacerbated if they were to be issued regularly.

2.8 The need for political accountability is, in our view, sufficiently well-served by the possibility for Parliamentary committees to call on the CMA's senior executive team to give evidence as to the CMA's enforcement activities. In addition, we note that, even before the Government started issuing strategic steers to the CMA, its requests that a particular market be referred for investigation were heeded.[2]

## 3. MORE EFFECTIVE MARKET INQUIRIES

**Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?**

3.1 It is important that a sufficiently detailed analysis takes place to identify harms before remedies are proposed. Even non-structural remedies can have a transformative effect on markets and therefore it is important they are warranted and carefully considered. It has been proposed that a power be given for remedies to be imposed at the end of market studies, rather than only in more in-depth market investigations. If remedies can be imposed at the end of market studies then there should be a higher evidential threshold for remedies to be imposed at the end of a market study than for remedies to be imposed at the market investigation, to take into account the fact that market studies go into less depth than market investigations, and that any such remedies therefore carry a greater risk of being based on faulty analyses or incomplete understandings of market dynamics.

3.2 If the CMA is given powers to impose remedies at the end of a market study then the extensions to the statutory timetable that have been proposed by the Government will be beneficial to ensure remedies are adequately thought through.

<u>Providing the CMA with greater flexibility to define the scope of market investigations</u>

[2] For example, the market investigation referral by the Office of Rail and Road of the passenger rolling stock market originated in a complaint by the Department for Transport.

3.3 We agree that it would be positive to enable the CMA to conduct more focussed market investigations. This will make them less-resource intensive for the CMA and affected parties and more targeted at areas of perceived harm. As set out in our response to the 2016 BEIS consultation on refining the UK competition regime, we consider that this could be achieved by extending the ability for the CMA to specify the "features concerned" that are to be the subject of the market investigation – which is currently possible for cross-market investigations under s.133 EA02 – to ordinary references. This discretionary mechanism would be particularly appropriate in cases where it has been possible to identify discrete market features of concern during the phase 1 study, and would create scope for significant efficiencies, particularly in the early "scoping" stage of the phase 2 investigation.

Removing the requirement to consult on a market investigation reference within the first six months of a market study

3.4 We support the Government's proposal to remove the requirement to consult on a market investigation reference within the first six months of a market study. While it is important that there is a consultation if the CMA is minded to make a market investigation reference, and that parties are given sufficient time to respond to that consultation, we agree that the CMA should have more flexibility to issue its consultation later in the 12 month market study period.

**Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?**

3.5 Market studies are a useful tool for the CMA and concurrent regulators as they can lead to positive change in markets during shorter periods of time than a market investigation. Whether it is recommendations to Government or enforcement action, market studies can lead to improvements in markets. The potential positive impacts of the CMA's existing market study powers should not be ignored. A market study may be a more proportionate policy tool than a more in-depth single stage market inquiry tool. Removing the ability of the CMA to conduct market studies might therefore force the CMA to conduct a more resource intensive and time consuming inquiry than was warranted in the circumstances.

3.6 The Government should consider and clarify the way that the removal of market studies and introduction of a single stage market inquiry tool would affect sectoral regulators. For example, the FCA often conducts market studies using its powers under the Financial Services and Markets Act 2000 (**FSMA**) rather than its powers under the Enterprise Act 2002. The Government should clarify whether it proposes for the FCA to be prohibited from conducting market studies under FSMA. It should also clarify whether sectoral regulators would be given the same powers as the CMA under the single stage market inquiry tool and whether they would have equivalent powers to making a market investigation reference.

3.7 If the Government does decide to implement a single stage market inquiry tool, we would support the Government proposals to enable equivalent remedies to be imposed following a single stage market inquiry as under a market investigation, on the basis that they would appear to involve a similar depth of analysis and investigation.

**Q6. Should Government enable the CMA to impose interim measures from the beginning of a market inquiry?**

3.8 We consider that the CMA should not be able to impose interim measures from the beginning of a market inquiry.

3.9 Unlike CA98 cases, market studies and market investigations can occur where no laws have been broken. In those circumstances, imposing interim measures on businesses would undermine the predictability of the legal and regulatory framework which is taken into account when firms invest.

3.10 The remedies resulting from CMA market inquiries are a form of regulation which should only be imposed following a consultation with interested parties. When deciding whether to introduce a new regulatory obligation, the CMA needs to take into account all relevant factors, not take into account irrelevant factors, and act proportionately. Sectoral regulators gather information about the firms and markets they regulate on an ongoing basis in order to understand how a market is functioning. It is harder for the CMA to do this comprehensively outside of the procedures already contained in market studies and market investigations, and at an early state in the investigation. Consequently, there is a significant risk that such interim remedies would be based on incorrect analyses and incomplete understandings of market dynamics, and would therefore themselves have adverse effects on competition during the period of the market investigation, as well as disproportionate costs and burdens for businesses that are subject to them.

3.11 If the Government is minded to give the CMA the power to impose interim measures at an earlier stage in an investigation, then this should be done no sooner than the provisional findings stage, so that the CMA engages with the parties and understands the way that the market operates prior to impose interim remedies.

**Q7. Should Government enable the CMA to accept binding commitments at any stage in the market inquiry process?**

3.12 Commitments can be a timely and effective way to achieve improvements to the functioning of markets. If commitments were agreed during the course of an investigation in a way that resolved concerns in the relevant markets and were supported by interested parties then this could avoid time-consuming and resource intensive further investigation. However, the consideration of commitments by the CMA and other stakeholders during the course of an investigation risks drawing resources away from the substantive issues that need to be examined. We therefore agree that the CMA should have the ability to pause the statutory timetable for a limited amount of time in order for commitments to be considered without undermining analysis of other areas.

**Q8. Will Government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?**

<u>More versatile and effective remedies</u>

3.13 There are several benefits and risks that should be taken into account when designing a framework on reviewing and varying remedies/commitments from a market inquiry.

3.14 Years after a market investigation has reached its conclusion, the adverse effect on competition (**AEC**) identified may no longer be relevant and the remedies may no longer be beneficial. In these circumstances, the ability to review and potentially vary the remedies more swiftly may lead to a more proportionate regulatory burden on businesses.

3.15 However, a power to revisit remedies after they have been imposed undermines legal certainty and could increase the administrative and financial burdens on business. Further, expanding or supplementing the remedies that were previously considered adequate exposes businesses to the prospects of repeated, open-ended attempts to remedy perceived market failures. It might also be challenging for the CMA to improve remedies. For example, if the first best remedy chosen to resolve an AEC is found to have been unsuccessful, the second best remedy that was not originally chosen might not be any more successful. In our view, it would not be appropriate for the CMA to assume the role of a semi-permanent sector regulator, with powers to tinker repeatedly with failed remedies.

3.16 Balancing these considerations, where the CMA seeks to amend remedies:

3.16.1 the benefits must be proportionate to the costs, with a full cost-benefit analysis undertaken;

3.16.2 the proposed changes must be focussed on the AEC that was identified in the CMA's original final report. If there has been a material change in the nature of the AEC, then it should not be possible to vary remedies to take into account those changes. In those circumstances, a new market investigation should be carried out before different remedies are imposed, in order to fully ascertain the scope and nature of that different AEC;

3.16.3 for any decision to vary remedies, there should also be the obligation for the CMA to produce a reasoned decision explaining why the revised remedies are likely to be more effective at addressing the AEC that was originally identified than those initially imposed;

3.16.4 the proposed changes should take into account changes to market dynamics in the intervening period to ensure that they are relevant; and

3.16.5 unless the variation is agreed by all the parties that are to be subject to the varied remedies, the CMA should not have the power to vary remedies more than once.

<u>A more flexible design process for market investigation remedies</u>

3.17 The Government should provide more evidence on the need to give the CMA the power to require businesses to participate in implementation trials.

3.18 If the CMA were to be empowered to require businesses to engage in remedy implementation trials it should also be required to take account of the burden that accompanies such trials before it exercises the power. This includes the costs imposed on businesses and the potential impact on customer relationships etc. Similarly, any CMA power to amend remedies could lead to substantial costs and uncertainty for businesses. Accordingly, in considering either implementation trials or the amendment

of existing remedies, the CMA should be required to undertake an assessment of whether: (i) the benefits are proportionate to the costs, with a cost-benefit analysis undertaken; (ii) the remedy or variant is focussed on the original AEC identified; and (ii) any changes should take into account changes to market dynamics.

**Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?**

3.19 We note that paragraph 1.55 of the consultation document states that the Government and the CMA should consider, as part of the process for regular State of Competition reports and strategic steers, the areas of the economy which should be prioritised for market inquiries. Our view is that the decision whether to conduct a market inquiry should ultimately rest with the CMA following the assessment of objective criteria. This will ensure that CMA resources are used most effectively.

## 4. REBALANCED MERGER CONTROL

**Q10. 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?**

Proposed changes to the turnover thresholds

4.1 We agree with increasing the turnover-based threshold from £70m to £100m. However, it is important that this change is made alongside changes to the share of supply test (as discussed below) in order to achieve the desired objective of a proportionate regime which is not overly burdensome for small businesses.

4.2 We also agree in principle with creating a safe harbour for mergers between small businesses. However, as drafted, the proposed threshold will only capture a very small number of transactions and therefore not achieve its intended aim.

4.3 In particular, the safe harbour should include a UK component rather than being based solely on the merging parties' worldwide turnover. Without this change, the CMA could potentially have jurisdiction to review transactions in which both parties have very minimal turnover in the UK. There is no prospect that such transactions would result in a substantial lessening of competition in the UK, and in any event competition authorities in other jurisdictions are likely to have jurisdiction to review. We therefore suggest that the global thresholds are replaced with UK turnover thresholds or, alternatively, that an additional limb for UK turnover is added.

4.4 If the Government disagrees with the proposal to include a UK element to the safe harbour, the proposed £10m threshold should be increased substantially, as it is very unlikely to capture transactions which would otherwise be notified to the CMA.

Proposed changes to the share of supply test

4.5 We do not object, in principle, to adding a new limb to the share of supply test to capture vertical/conglomerate mergers and mergers which remove potential competition from the market. However, as drafted, we think that the new limb will capture a significant number of transactions which are highly unlikely to have an effect on competition in the UK.

4.6 First, the proposed threshold would capture a large volume of transactions with no UK nexus at all. For example, it would capture transactions in which the buyer meets the threshold but the target has no UK turnover, presence or plans to expand into the UK.

4.7 Moreover, the proposed threshold would mean that any business with a UK turnover of more than £100 million and a UK share of supply of 25% or more would need to self-assess any acquisition it makes, anywhere in the world, to determine whether there is some potential UK nexus that could trigger a review by the CMA. Consequently, we consider that the estimate, in BEIS' "Reforms to Merger Control: Impact Assessment", that only 20-40 additional mergers per year would need to be self-assessed as a result of introducing this threshold, is much too low. In our view, it is more likely that hundreds of additional transactions per year will incur self-assessment costs.

4.8 We also consider the impact assessment's estimate of "illustrative net benefit to consumers" of £12.97-£32.4 million to be much too high. The threshold aims to capture mergers giving rise to issues of vertical foreclosure and/or potential competition. However, it is much less common that such issues give rise to consumer harm, which is why they make up a relatively small proportion of the workload of the CMA (or indeed any other competition authority). In contrast, the CMA's impact assessments are derived primarily from mergers giving rise to horizontal issues, which means that the BEIS estimates that are based on those assessments are likely to very significantly overstate the benefits of catching more mergers involving vertical and potential competition issues within the scope of the EA02 merger regime.

4.9 Consequently, we consider that the proposed threshold, if introduced, should be much more targeted, with a view to avoiding unnecessary self-assessment costs for businesses, in particular in relation to transactions involving overseas targets with minimal nexus to the UK. We therefore suggest that the drafting should be amended, as follows:

4.9.1 Split out the two limbs of the proposed test so that it is only satisfied where one party has a 25% share in the UK and the <u>other</u> party has £100m turnover in the UK.

4.9.2 Alternatively, if the Government is not minded to do this, it should issue statutory guidance on which transactions can safely be considered to have no UK nexus and are therefore outside of the CMA's jurisdiction.

4.10 Secondly, the proposed 25% threshold in the current drafting is too low as foreclosure concerns do not arise at that level. It is recognised that in order for merging parties to have the ability to engage in input or customer foreclosure, they must have a significant degree of market power. Market power for the purposes of vertical foreclosure is generally presumed where parties have market shares above 40% and we therefore suggest increasing the threshold to 40%.

4.11 In order to address the concerns discussed above regarding the proposed wording inadvertently capturing transactions which will not present any real competition issues in the UK, the Government might also consider, in the alternative, using more focused thresholds that target the actual vertical and potential competition issues that it considers are not captured by the current thresholds, for example:

4.11.1 The merging parties are active vertically-related markets that are within, or include, the UK and either party has a UK share of supply of more than 40%; or

4.11.2 The merging parties are potential competitors in the UK (which should include an appropriate statutory definition of potential competitor focused on realistic likelihood of entry) and one party has a UK share of supply of more than 25%.

4.12 If the above reforms are implemented in a way that allows the CMA to review mergers involving vertical and potential competition issues, then we consider that it is important to tighten the existing share of supply test to limit the possibility for the CMA to take an unreasonably expansive approach to interpreting the share of supply test (which, in our view, it has done in a number of recent cases). In particular, the statutory wording should be amended to make it clear that:

4.12.1 the share of supply test cannot be met if no goods or services have ever actually been supplied in the UK, i.e. that "steps towards commercialisation" of the type that were found to constitute a relevant supply in the CMA's *Roche/Spark* decision cannot constitute a relevant supply; and

4.12.2 while the CMA has a discretion as to the factors that is uses to determine whether the share of supply test is met (in accordance with 23(5)-(8) EA02) it must nonetheless do so by reference to economic consideration relating to substitutability and competition between the goods or services in question. This is necessary to ensure that the CMA's jurisdictional assessments are more predictable, and are not based on categories of products and services within which the relevant products and services have no reasonable competitive connection.

**Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that Government should be considering?**

<u>Dispensing with provisional findings in appropriate cases</u>

4.13 One reform that the Government and/or the CMA might also consider – which could be achieved without legislation - would be to make it clear that the application of the revised s.103 EA02 means that inquiry groups should consider whether it is possible and expedient to dispense with certain procedural steps, in particular the issue of a provisional findings decision (given the absence of any statutory duty to consult). For some mergers, such as those referred on the basis that an SLC is "more than fanciful", inquiry groups may be able to satisfy themselves relatively quickly that there will be no SLC on the balance of probabilities. In such cases, provisional findings serve only to give complainant third parties the opportunity to challenge findings. In appropriate cases, it may be more efficient to either inform third parties of the substance of the inquiry group's thinking in a meeting or, if the inquiry group is sufficiently confident that it already has all the necessary information and views of third parties, to simply proceed with issuing the final report.

4.14 By way of comparison, in phase 2 proceedings under the EU Merger Regulation, for example, the historic average is that around a quarter of cases are unconditionally

cleared without the issue of an SO. We recognise that the use of inquiry groups in the UK regime means that direct comparisons with EU procedures may be misleading, and that there would inevitably be a smaller proportion of cases in which inquiry groups could satisfy themselves that there is no SLC at an early stage in the process. However, it remains the case that the European Commission frequently issues unconditional phase 2 clearance decisions without giving third parties a written copy of its provisional or draft final conclusions for comment. Consequently, the Government should, in our view, consider whether there are similar opportunities for procedural efficiencies in the UK merger control system.

Changing the test for a phase 2 referral

4.15 The government might also consider reforming the phase 1 test that the CMA must consider when deciding whether its "duty" to refer a merger for a phase 2 investigation is engaged, as set out in sections 22(1) and 33(1) EA02. In our view, the way in which that test was interpreted by the Court of Appeal in *IBA Health* – as referring to an assessment of probabilities and, in particular, whether the prospect of an SLC is more than "fanciful" – has resulted in the referral of some mergers that ought properly to have been cleared in phase 1 and for which the resulting cost of a phase 2 investigation should have been avoided. In particular, an assessment based purely on possibility does not lend itself to recognising the important distinction between:

4.15.1 Cases in which the CMA does not, at the end of phase 1, have enough information to conclude with a sufficient degree of certainty that an SLC is unlikely to arise, or has not had enough time to conduct the analyses that would be necessary to arrive at that conclusion; and

4.15.2 Cases in which the CMA has all the available evidence on a particular issue at its disposal in Phase 1, and there is no further and fuller examination that can profitably be carried out. In such cases, the CMA is in a position to conclude, in phase 1, that an SLC is unlikely, and yet may consider that its duty to refer is engaged because it also believes that the prospect of an SLC is "realistic" or more than "fanciful".

4.16 We therefore advocate a test that is not formulated purely on the basis of probability, but which instead refers to the absence of serious doubts on the part of the phase 1 decision maker as to whether an SLC is likely to arise. Such a test is applied to phase 1 decisions under the EU Merger Regulation, and we consider that it works reasonably well in that context.

**Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?**

Allowing the CMA to agree binding commitments earlier during phase 2

4.17 We agree with this proposal and, indeed, have advocated in favour of it for some time.[3] While the CMA has recently changed its procedures to allow the parties to concede a substantial lessening of competition (**SLC**) in Phase 2, and thereby proceed to remedy

[3] See, for example, our 2018 response to BEIS' Consumer Green Paper on Modernising Consumer Markets.

discussions more quickly,[4] that is an imperfect solution, as in many cases merging parties will want to understand whether their proposed commitments will be accepted by the CMA before conceding that there is an SLC. The proposed mechanism would therefore require amendments of s.35 and 36 EA02 to allow the CMA to decide on an alternative question of whether commitments proposed by the parties effectively address the potential competition concerns that it has identified as meriting further investigation, without coming to a decision as to whether an SLC was likely to arise.

4.18 We also agree that it would be appropriate for the CMA to have the power to pause the investigation while commitments are being considered, but submit that it should be a requirement that the merging parties agree to the duration of any such extension of the applicable deadlines, and that the withdrawal of a commitment offer by the merging parties has the automatic consequence of ending the suspension of those deadlines.

4.19 Restrict the CMA to refer only the issues that are identified at Phase 1

4.20 We have also advocated in favour of this proposal in previous consultations. If the CMA is able to refer only the issues that it has identified as being of potential concern at Phase 1, that would allow for shorter, more focused phase 2 investigations.

A new 'fast track' merger route

4.21 We support this proposal. However, our experience is that it is the duration, cost and administrative burden of Phase 2 proceedings that has significantly inhibited merging parties' incentives to request a fast-track referral, rather than the requirement to concede an SLC. These factors mean that referral requests tend to be made only in cases in which the prospects of a Phase 1 clearance, with or without remedies, are extremely low.

4.22 Consequently, the attractiveness of the fast track route will depend in part on the success of other proposed reforms to streamline the Phase 2 process, and on the timing advantages that can be obtained from a Phase 2 reference. As regards the latter, the proposal to extend the Phase 2 period by three weeks in the event of a fast-track referral seems to us likely to undermine the attractiveness of using this mechanism. For example, it would not result in a shorter overall timetable in comparison to that of the *Crowdcube / Seedrs* merger inquiry, which was referred under the current fast-track procedure after a 3 week Phase 1 review period.

Reducing unnecessary delays at Phase 2

4.23 In our experience, Phase 2 reviews in the UK take longer than those in other major jurisdictions. We therefore consider that the CMA should lose its power to extend the review period by eight weeks for (vaguely defined) "special reasons". As the special reasons for extension tend to relate to the need for more time to discuss complex remedies, we consider that it would make sense to limit extensions to the review timetable to those in which the parties have offered remedies after a certain point in the Phase 2 timetable.

[4] See *Mergers: Guidance on the CMA's jurisdiction and procedure*, CMA2, paras 7.18-7.21.

4.24 We also consider that there should be more flexibility for the timetable to be suspended for a certain maximum period at the request of the parties. The absence of such a mechanism means that CMA and merging parties have to contrive to suspend the timetable through the issue of an information request to which the parties fail to respond before the applicable deadline,[5] but this requires merging parties to commit a procedural infringement for which they could, in principle, be fined.

Publication requirements in the Gazette for mergers

4.25 We agree with this proposal to replace the obligation for the CMA to publish the template merger notice in the London, Edinburgh and Belfast Gazettes with a requirement for it to be published on the CMA's website.

Streamlining the pre-notification process

4.26 One area of reform that is not considered in the consultation document is the pre-notification process. Our experience is that the CMA frequently uses this process to front-load its information gathering, including through the use of binding s.109 notices with penalties for failure to meet the specified deadline. In our view, the absence of any binding timetable for pre-notification means it should be for the notifying parties to determine pre-notification timing, not the CMA. Consequently, we consider that the CMA should not (or should not have the power to), issue RFIs with binding deadlines to the merging parties during pre-notification.

Role of the Digital Markets Unit

4.27 If the Government decides to proceed with the creation of a separate mandatory filing merger control regime for businesses with strategic market status, it will be important, in our view that the Digital Markets Unit does not become a vertical silo within the CMA, and that when applying the new merger regime it should ensure that it makes appropriate use of CMA staff that are experienced in applying the "regular" merger control regime.

## 5. STREAMLINING CMA PANEL DECISION MAKING

**Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?**

5.1 As we indicated in our responses to the 2011 and 2018 consultation on options for reform of the UK competition regime, we strongly support the proposition that a higher proportion of panellists should be full time, or subject to a significantly greater time commitment.

5.2 In our experience, the potential benefits arising from the diversity of experience and expertise that are available from part-time panellists are significantly outweighed by the difficulties that this creates for coordinating availability for hearings and other

[5] For example, in the *Ryanair / Aer Lingus* case the CMA's Phase 2 review of Ryanair's minority interest was suspended for over seven months to await the outcome of the European Commission's related review of the Ryanair's proposed acquisition of full control.

procedural steps, and the risk of inconsistent approaches between differently-constituted panels.

5.3 However, there are potential drawbacks to relying solely on a small panel of full-time members. In particular a significant reduction in the number of panel members may prejudice the CMA's ability to guarantee sufficient capacity in times of high levels of M&A activity and/or when a significant number of wide-scope market investigations have been launched. Consequently, we favour instead the retention of a certain proportion of part-time panel members in order to maintain the requisite degree of resource flexibility. In determining the appropriate proportion of part-time panellists and those with higher time commitments, the Government should be guided by the CMA. In particular, we note that the Government, in its response to the 2011 consultation, opted to leave it to the CMA to determine the balance of part time and full time working among panel members. It seems to us that any experience that the CMA has had of seeking to attract suitably-qualified individuals who are prepared to commit more of their time will be highly relevant for this exercise.

5.4 We also consider that panel members' terms of appointment should continue to be eight years, as this means that the majority of panel members at any given time have significant experience of merger and market investigations and contributes to consistency of approach between different inquiry groups.

## 6. STRONGER AND FASTER ENFORCEMENT AGAINST ILLEGAL ANTICOMPETITIVE CONDUCT

**Q14. 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?**

6.1 We do not object to the proposal to align the extra-territorial scope of the Chapter I prohibition with the effects test that applies to the equivalent prohibition under EU law, as confirmed by the *Intel* judgment of the EU Court of Justice. In practice, the existing "implementation" test has been interpreted sufficiently broadly by the CMA and the courts that this reform is unlikely to make a material difference to the extra-territorial reach of UK competition law.

6.2 However, we have serious concerns with the proposal to extent the Chapter II prohibition to businesses that have a dominant position in a market that is outside the UK, and does not include the UK. Contrary to the assertion in the consultation, this would not be consistent with the approach of the UK's international partners.[6] In particular, the prohibition contained in Article 102 of the Treaty on the Functioning of the EU requires that the dominant position be in the EU, or a substantial part of it. This is also true for the equivalent prohibitions in other major jurisdictions, such as Canada,[7]

[6] Paragraphs 1.148 and 1.149 of the Consultation.

[7] Paragraph 79(1)(a) of the Canadian competition Act requires an assessment of whether "one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business."

Australia[8] and India,[9] which all expressly require the dominant position to be within their territory.

6.3 A particular concern is that extending the Chapter II prohibition in this way could hamper international expansion of companies who have had success in one country, and dissuade them from attempting to enter the UK for fear that they may be found to be somehow leveraging their overseas dominance. It could also be used as a protectionist tool by UK-based incumbents to deter such entry, through actual or threatened litigation. We believe this approach could deny UK consumers the opportunity to benefit from the offers of new businesses set up abroad, and we are also concerned that it could be harmful to the UK's image as a country that welcomes business and fosters growth and investment.

**Q15. 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?**

6.4 We recognise the desire of the CMA to ensure that anticompetitive conduct in small and emerging markets does not harm growth and innovation and therefore the rationale behind the proposal.

6.5 We do not have strong views about whether a £10 million threshold will be more effective to achieve that objective than the current threshold.

**Q16. 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?**

6.6 We consider that it is important for companies to know when the benefit of the immunity threshold may be available. We therefore favour an approach in which immunity is based on the turnover of a single party to an agreement.

6.7 We also urge the CMA to provide clarity on the methodology for calculating turnover for the purposes of assessing immunities, as suggested in paragraph 1.154 of the consultation, as this will also contribute to providing certainty in relation to the application of the immunity threshold.

**Q17. 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?**

6.8 The Government should be mindful of the fact that immunity applicants are often among the largest players in a cartel.

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8 Sections 4E and 46 of the Competition and Consumer Act 2010.

9 Section 4 of the Competition Act 2002, and the legislative explanation to that provision.

6.9 In 2016, we carried out an analysis of European Commission cartel fines which indicated that the firms that obtained immunity from fines were disproportionately among those that benefitted most from the cartel, and that would have received the largest fines (see the extract at Annex 1 of this response). In 74% of cases in which immunity was granted, the value of the fine that would have been imposed on the immunity applicant was greater than the average fine that would have been imposed on other co-conspirators, but for their leniency reductions. On average, the value of immunity was well over double (2.4 times) the average value of fines that would have been imposed on individual co-conspirators. We would be happy to update this analysis with statistics from more recent cases, if that would be helpful to BEIS (note that the CMA does not publish comparable figures on fines that would have been imposed on immunity applicants).

6.10 These statistics imply that the proposal to grant immunity from damages, as well as from fines, would risk seriously prejudicing the ability of claimants to secure full compensation for the harm caused to them by a cartel. In particular, it would fall to other, smaller cartelists to compensate the immunity applicant's customers, so increasing the risk that they are unable to meet such liabilities, and exit the market.

6.11 Consequently, our view is that the current approach of limiting immunity applicants' liability to their own direct or indirect customers, unless customers of other cartelists have been unable to recover damages from those other cartelists,[10] remains the best approach to incentivising immunity applications while protecting the interests of customers and consumers.

**Q18. 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 procedures for issuing decisions

6.12 The impact that interim measures can have on a company are significant. We are concerned that imposing interim measures without allowing the business access to the underlying evidence would infringe business' rights to defence. It is right to be cautious about the use of interim measures; they are by nature imposed while there is no current finding of infringement. That means there is an inherent risk that the damage caused to commercial and reputational interests caused by interim measures that the consultation refers to is unjustly caused. To disallow businesses the opportunity to properly and fully defend themselves against that risk, particularly when there is no finding of infringement against them, would infringe their rights of defence.

6.13 This approach could also create an inappropriate incentive structure for the CMA. In cases in which it has already imposed interim measures without the affected business having a right to see the evidence, the CMA could be led to be incentivised to adopt an infringement decision where it may not otherwise have done so, so as to retroactively justify the interim measures and avoid a situation in which those measures have caused harm that is later found to be unwarranted. Allowing businesses access to file reduces this risk.

[10] As provided for by paragraphs 14 and 15 of Schedule 8A CA98.

6.14 Furthermore, while administrative errors are inevitable, allowing access to file will limit the number of mistakes made in the imposition of interim measures.

6.15 At a very minimum the company should be given access to the full file immediately after the decision is taken and be able to rely on evidence in the file in any appeal.

Changing the standard of review of appeals against the decision

6.16 In relation to the standard of review proposal, a full merits review is the appropriate standard given that interim measures decision can cause very serious damage to a business' commercial and reputational interests, potentially needlessly. This is even more important where changes to access to file are made.

6.17 It is not clear that diluting the standard of review to judicial review would save any time or cost, particularly as the effect of the interim measures is not suspended pending the review.

**Q19. 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?**

More effective requirements for businesses to preserve evidence

6.18 Regarding the document retention proposals, while it is relatively easy for an individual (or company) to understand what cartel conduct is, it may be more difficult for them to be required to assess whether an investigation is likely for Competition Act infringements. This will place a significant burden on individuals not justified by the nature of the infringement.

6.19 Furthermore, we understand that incentives are already in place for companies to preserve information, as this is taken into account in leniency and fine considerations.

6.20 We agree with the civil penalty proposal.

More flexible powers of inspection for domestic premises

6.21 Our concerns regarding the proposals to amend the powers of "seize and sift" when inspecting private premises is the risk of depriving individuals of personal belongings and inadvertently taking personal information.

**Q20. 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?**

Binding admissions

6.22 We recognise that there would be procedural efficiencies in making admissions of facts or liability in a settlement process binding on that party as evidence of the facts admitted to, with no need for further corroboration of those facts by the CMA in respect of that

party's conduct. However, we do not consider that such admissions should also, as a rule, be binding on the parties in subsequent follow-on damages litigation.

6.23 While settlements may be "freely entered into", our experience is that a main driver for the decision to settle is a desire to put an end to the commercial disruption caused by the CMA investigation, such that settling parties are often under pressure to admit to facts that they do not consider to be wholly accurate. Consequently, we submit that any such reform should be accompanied by an amendment to s.58 CA98 to exclude uncorroborated admissions of fact from the rule that relevant factual findings of the CMA are binding on the parties, unless otherwise directed by the Court. It would then be for the Court, in every case, to assess for itself the weight to be placed on such admissions.

Short form decisions

6.24 We agree with this proposal. Our experience of the European Commission's settlement procedure is that short form decisions create significant procedural and timing efficiencies for both the Commission and the parties. Moreover, avoiding a long form decision, and the associated risk that inaccurate facts will be published, acts as a further incentive for parties to settle.

A new settlement tool for abuse of dominance investigations

6.25 We also favour this proposal. We consider that the possibility for businesses accused of abuse of dominance to settle without an admission of an infringement, and with no binding findings of fact or law for the purpose of follow-on damages claims, is likely to mean that the settlement process is used much more frequently in such cases. Abuse of dominance cases tend to give rise to the most complex issues of fact (including assessment of economic evidence relating to the questions of dominance and the effects of the allegedly abusive conduct) and law, so creating these incentives to settle would considerably free up the resources available to the CMA to investigate other matters.

**Q21. 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?**

6.26 We agree that this is a sensible proposal.

**Q22. 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?**

6.27 The Government is proposing to introduce a pre-determined legal framework for confidentiality rings which it considers to be a useful alternative to the process of redacting confidential information from documents as part of the access to file process. The rationale for this is that the process of negotiating the terms of a confidentiality ring can be long and burdensome. It is unclear to what degree it is true that agreeing confidentiality undertakings with the other side is a burdensome process. In our experience the process usually only requires one person from legal at the CMA and is often agreed quite quickly, even to the extent that there are differences in opinion.

6.28 In this respect, we are concerned that the CMA will continue (as suggested by footnote 102 of the consultation) to give access to non-confidential versions of key documents only, with all other documents on the file placed within a confidentiality ring. This puts the burden on addressees of a statement of objections to justify the removal of documents from the ring if they want to share those documents outside the ring. On the CMA's current practice, it requires such justifications to be made on a document-by-document basis and often sets a (short) deadline for this to be done. In our experience, this process is very burdensome and time consuming for the parties under investigation and in effect diverts significant resources from responding to the statement of objections. It is also not obvious at the early stage which documents need to come out of the confidentiality ring.

6.29 Nevertheless if the Government considers that setting out a prescribed framework for confidentiality rings is appropriate we would recommend that the Government considers ensuring that it allows for flexibility e.g. to allow the extension of the ring to external providers of documents and to ensure that all advisors can have access to the ring.

6.30 To ensure that confidentiality rings are effective, the Government is also considering whether civil sanctions should be available in the case of a breach a confidentiality ring. In our experience advisors take enormous care to ensure that confidentiality rings are respected and that there is no sharing of confidential documents. The existing sanctions in Part 9 of the Enterprise Act are a sufficient incentive to ensure that documents are kept confidential and we do not consider that it is necessary to legislate to include additional sanctions for participants to confidentiality rings.

**Q23. Should Government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?**

6.31 A finding of infringement under the Competition Act can result in serious penalties for both companies and individuals. Indeed a company may be fined up to 10% of its worldwide turnover and directors may face the possibility of disqualification or even criminal sanctions for participation in a cartel. Companies may also face the prospect of costly follow on damages actions.

6.32 Because of the serious nature of the penalties that may be imposed for a breach of the Competition Act, it is vital that the assessment of the infringement is carried out to the highest possible standard.

6.33 In its consultation document, the Government recognises the value the current process of Case Decision Groups has in eliminating the risk of bias in decision making as well as reducing the risk of errors being made. We agree that the process works well. However, the Government's proposed change to give the CMA autonomy to determine the internal decision-making process for final decisions could result in the CMA deciding to appoint the same decision-makers for the entire case, for efficiency reasons. In doing so it does not quantify the efficiencies that could be gained by implementing this proposal.

6.34 We therefore do not agree with the proposal because the risk that this could lead to unsound or biased decision making and raise concerns about procedural fairness in circumstances where the benefits in terms of efficiency gains are unclear and the risk

of a "bad" decision could have such significant consequences for companies and individuals.

**Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?**

6.35 We remain of the view, as expressed in our response to the 2014 BEIS consultation on "Streamlining Regulatory and Competition Appeals" that the current merits standard of review is the most appropriate one, and is consistent with the Government's obligations under the European Convention on Human Rights and the Human Rights Act 1998. We also agree with submissions that were made by the Competition Appeal Tribunal in response to that consultation.

6.36 The reasons why we oppose any weakening of the review standard are as follows:

6.36.1 As the Court of Appeal noted in its judgment in the *Phenytoin*[11] case, the following conclusions derive from the requirements of the ECHR, the Human Rights Act, and related case law:

> *"(i) for a (non-judicial) administrative body lawfully to be able to impose quasi-criminal sanctions there must be a right of challenge; (ii) that right must offer guarantees of a type required by Article 6; (iii) the subsequent review must be by a judicial body with "full jurisdiction"; (iv) the judicial body must have the power to quash the decision "in all respects on questions of fact and law"; (v) the judicial body must have the power to substitute its own appraisal for that of the decision maker; (vi) the judicial body must conduct its evaluation of the legality of the decision "on the basis of the evidence adduced" by the appellant; and (vii), the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an "in depth review of the law and of the facts" by the supervising judicial body."*

6.36.2 Any standard of review that is lighter than full merits would not be consistent with these requirements, and would inevitably lead to additional litigation as parties sought to determine the compliance of that standard with the Human Rights Act. The end-result of this period of uncertainty is likely to be a standard of appeal that is largely identical to that which is applied today.

6.36.3 There are good reasons why human rights legislation and case law impose demanding standards in competition law infringement cases:

(a) Unlike most other regulatory decisions, competition authorities are responsible not only for deciding the relevant issues (in this case, whether an infringement has occurred and, if so, what penalty to impose) but also for selecting which cases to open and pursue. They are therefore particularly susceptible to the risk of confirmation bias, which is why

[11] CMA v. Flynn Pharma Limited, Pfizer Inc. and others, [2020] EWCA Civ 339, paragraphs 135-140.

the possibility of a full review by an independent judicial body is so important.

(b) Many decisions are based on the evidence of immunity and leniency applicants, who have incentives to cast their evidence in a certain light, in order to maximise their chances of securing such immunity or leniency. It is only at the appeal stage that those accused of infringement are able to challenge such evidence and submissions, and to cross examine relevant witnesses.

(c) A finding of infringement of CA98 creates an irrebuttable presumption of liability for follow-on damages claims (under Section 47A CA98) which in many cases are of greater magnitude than the penalty itself. It also exposes directors of the infringing company to disqualification orders). Weakening the standard of review would also limit the ability of the courts to test the facts and reasoning on which such presumed liability is based.

6.36.4 Finally, there is no evidence that a move to a weaker standard of review is justified. As BEIS notes, at paragraph 1.204 of the consultation, it is not clear that concerns that have been previously expressed about the level of scrutiny applied by the CAT are borne out in practice, given the CMA's strong success rate before the CAT and the fact that only one CA98 decision of the CMA has been overturned on appeal.

**Q25. 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?**

6.37 Fines for failure to comply with an information requests and interim orders in CA98 and EA02 investigations are penalties for breaking the law, and must therefore be subject to proper judicial scrutiny, in the same way as for civil fines that are imposed for breaches of the CA98 Chapter I and II prohibitions.

6.38 In our view, the current statutory provisions relating to appeals of penalties for failure to comply with an information requests in CA98 and EA02 investigations[12] give the appropriate degree of flexibility to the CAT to tailor the intensity of its review to the circumstances of the case. For example, in *Electro rent,* the CAT noted that the relevant provisions do not restrict it to a judicial review standard, and resolved the appeal by considering whether Electro Rent had a reasonable excuse for breaching an interim order imposed by the CMA.[13]

6.39 However, if the Government implements the proposal to substantially increase the maximum fines that can be imposed for such breaches (see Q28 below), we consider there to be a much higher likelihood that such fines would be considered to be quasi-criminal in nature for the purposes of the case law of the ECtHR, and that there should

[12] S.114(5) EA02 and s.40A(9) CA98, which gives the CAT the power to quash and substitute penalties, or the dates by which they must be paid, if it considers it "appropriate to do so".

[13] *Electro Rent Corporation v. CMA* [2019] CAT 4, paragraph 68.

therefore be an explicit statutory requirement for appeals against such fines to be heard on the merits standard.

## 7. STRONGER INVESTIGATIVE AND ENFORCEMENT POWERS ACROSS COMPETITION TOOLS

**Q27. 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?**

Tougher penalties for companies that slow down or obstruct cases

7.1 We do not support the proposal to increase the maximum fines that can be imposed for failure to comply with an information request to 1% of group worldwide turnover, plus daily penalties of up to 5% of daily turnover. In the seven cases in which the CMA has imposed fines for such infringements to date, there is no evidence that increased fines would have made any material difference to the compliance efforts made by the companies in question. In particular, the published decisions indicate that breaches have invariably been accidental. This reflects the fact that it is very difficult, for businesses that are required to respond to numerous (often hundreds) of questions during the course of an investigation, to ensure that each and every response fully reflects the knowledge and understanding of all relevant employees within their organisations, and that all such employees correctly interpret the scope of information that they must provide. Our experience is that companies already take their obligations when responding to the CMA's requests extremely seriously.

7.2 That higher fines would not lead to improved deterrence is also supported by:

7.2.1 the fact that there has been a similar number of cases (six) in which penalties were imposed for breaches of interim orders in merger control cases, despite the maximum levels of fines for such infringements being 5% of group worldwide turnover; and

7.2.2 the fact that, in all of the seven cases in which fines were imposed for failure to comply with an information request, the fine was below the statutory maximum, indicating that the CMA did not consider that a higher fine was necessary to secure specific deterrence and proportionality (in line with its guidelines).

7.3 Similarly, we do not consider there to be any justification for increasing the maximum civil penalties that can be imposed for destroying, concealing or falsifying documents, given that this is already a criminal offence (if committed intentionally or recklessly) under s.43 CA98. Moreover, there has only been one case in which the CMA has imposed civil fines for such an infringements,[14] suggesting that there is no need for greater deterrence.

Personal accountability for the provision of evidence

[14] *Penalty notice under section 40A of the Competition Act 1998 Musical instruments and equipment: suspected anti-competitive agreements*, Case: 50565-3

7.4 We strongly oppose the proposal to require company directors to certify RFI responses as complete and correct to best of their knowledge, with false declaration attracting civil penalties, and possibly director disqualification.

7.5 Directors are already under considerable burden of liability risk, which will increase as a result of current Government proposals regarding audit and corporate governance. Every such increase in potential director liability hampers the ability of UK businesses to attract the best individuals in the international market for managerial talent. Consequently, any such increase should be imposed only where there is clear and compelling evidence that such liability is a necessary and proportionate way to address a substantial problem. There is no such evidence in respect of the proposal to require director certification of RFI responses.

7.6 In particular, certifying the accuracy of RFI responses in CA98 and EA02 proceedings is very different to civil litigation, where people attest the truth of two types of documents: witness statements and pleadings. Witness statements cover what the witness knows and pleadings are usually fairly high level. In contrast, responses to RFIs in EA02 and CA98 investigations require detailed knowledge that an individual director is unlikely to have, or be in a position to verify for themselves. As noted above, failures to comply with RFIs have, to date, invariably been accidental, so there is no reason to conclude that a requirement for director certification would have any material effect of deterring such breaches. Moreover, given that there have only been seven cases in which a fine has been imposed for failure to comply with an RFI, imposing a director certification requirement would clearly, in our view, be disproportionate to the scale of the problem that the Government is seeking to address.

7.7 In addition, it is likely that the potential for director liability would increase procedural inefficiency, as companies would push back more vigorously against vague and expansive RFIs that are sent by the CMA, and require longer to respond to them.

<u>A wider prohibition against providing false or misleading information to the CMA</u>

7.8 We consider that the proposal to extend CMA penalty powers to the supply of false or misleading responses to voluntary RFIs, such as calls for evidence outside CMA statutory functions, would be likely to have counter-productive effects. The possibility of such liability, combined with the relative ease with which accidental infringements can be committed (see our response to Q27 above) is likely to mean that businesses simply decline to respond to such RFIs. The result would be that CMA policy decisions are based solely on information provided by businesses that have sufficiently strong interests in the subject matter of the RFI to justify assuming that potential liability, and without the information that would otherwise have been provided by disinterested and impartial respondents. Such skewed information could have significant adverse effects on the CMA's ability to determine its enforcement priorities and resource allocation effectively.

**Q28. 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?**

<u>Stronger penalties for companies that fail to comply with remedies imposed or accepted by the CMA</u>

7.9 We do not support the proposed power for the CMA to impose civil penalties on companies that fail to comply with the CMA's directions/orders, or undertakings/ commitments given to the CMA.

7.10 We note that there are no published examples of the CMA ever having had to go to court to secure compliance with a market investigation order, as letters to the businesses concerned have sufficed to secure compliance. This indicates that the current system is effective. It is also proportionate, because (unlike remedies imposed for breaches of the CA98) the companies that are subject to those remedies have not broken any laws.

7.11 The letters sent by the CMA regarding alleged breaches of market investigation orders indicate that breaches have tended to be accidental misinterpretations of complex and/or vague remedy orders, and our experience is that businesses take compliance with such orders extremely seriously. Consequently, introducing the possibility of fines for such breaches is unlikely, in our view to materially increase deterrence or improve compliance.

7.12 Moreover, our experience is that the CMA's allegations of breaches of its market investigation orders are often based on contentious interpretations of those orders, such that, had any penalty been imposed, it would likely have resulted in an appeal. Consequently, the proposed powers also risk introducing new procedural inefficiencies and burdens on the CMA's resources.

7.13 However, if the Government does decide to introduce powers to impose penalties, we submit that the maximum penalty should be set at 1% of annual turnover (rather than 5%) in line with the proposed maximum fines for procedural infringements (see Q27 above).

**Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?**

<u>Update Part 9 of the Enterprise Act 2002 to provide for clearer and more flexible rules for information sharing</u>

7.14 We will comment on these proposals when further details are published.

<u>Introduce new investigative assistance powers in civil competition and consumer enforcement investigations</u>

7.15 If new powers are introduced for the CMA in civil competition enforcement investigations to use compulsory information gathering powers to obtain information on behalf of overseas authorities, strict safeguards will be necessary. We agree with the Government's suggestions in the consultation document that this should include requirements:

7.15.1 for reciprocal assistance being available in the jurisdiction in question for CA98 investigations;

7.15.2 that the conduct in question must be same or similar to conduct that could be investigated under CA98; and

7.15.3 for approval from a designated decision maker before providing such assistance. We submit that this should be a court (in the same way that court approval is needed for a warrant), not, as BEIS suggests, the CMA chair, a Government minister or other "central authority".

Other reforms to the CMA's enforcement powers which Government should consider

7.16 We submit that the Government should take this opportunity to re-examine and refine the approach to aspects of the application of parental liability in the specific case of financial investor liability for the activities of portfolio investee companies.

7.17 In particular, there should be no actual or de facto presumption of parental liability in the case of financial investors. Moreover, there is particular concern about the method of calculating financial investor turnover when determining the level of penalty that may be applied. As things currently stand, the competition agencies aggregate the turnover of all portfolio companies "controlled" by the investment funds and consider that figure to constitute the "turnover" of the financial investor managing or advising the investment funds. This is derived from the approach taken by the European Commission under the EU Merger Regulation where it may have some merit as a relatively crude tool for the limited purpose of applying jurisdictional thresholds for review. However, this calculation methodology is inappropriate in the determination of financial sanctions for the purposes of establishing antitrust deterrence since it grossly overstates the true economic position of the financial investor.

## 8. OTHER REFORMS TO THE UK'S COMPETITION LAW

Amend Serious Organised Crime and Police Act 2005 (SOCPA) so that CMA is a 'specified prosecutor' and can use the SOCPA 'assisting offender' process to enhance its criminal cartel enforcement

8.1 The assisting offenders regime is a complex and nuanced mechanism which, if not correctly applied, can lead to significant risks of distorted evidence. In our view, the CMA has not yet demonstrated itself to be a competent enforcer of the criminal cartel offence. We therefore consider that the Government should refrain from introducing this reform unless and until the CMA has attained the requisite maturity in its experience of bringing criminal cartel prosecutions.

8.2 Power for CMA to reclaim discounts to penalties if a party fails to carry out a promise (not enshrined in commitments) for which a discount was granted

8.3 We have no objections to this proposal.

8.4 Power for Secretary of State to extend Phase 1 merger deadline by 28 days, where SoS has issued a public interest intervention notice in relation to a completed media merger (to allow sufficient time for OFCOM report).

8.5 We have no objections to this proposal.

**Clifford Chance LLP**
**October 2021**

## Annex

## Extract from Clifford Chance 2016 Report on Antitrust Trends

[Document provided separately]