ANTICIPATED ACQUISITION BY LONDON STOCK EXCHANGE GROUP PLC OF QUANTILE GROUP LIMITED

RESPONSE OF [✂] TO THE CMA'S PROVISIONAL FINDINGS

7 October 2022

1. INTRODUCTION AND SUMMARY

1.1 On 9 September 2022 the CMA published its Provisional Findings Report ("**Provisional Findings**") in relation to the anticipated acquisition by London Stock Exchange Group PLC ("**LSEG**") of Quantile Group Limited ("**Quantile**") (the "**acquisition**"). This response sets out [✂] response to the Provisional Findings.

1.2 The Provisional Findings conclude that the acquisition is not expected to give rise to a substantial lessening of competition ("**SLC**") as a result of the vertical links arising in connection with the supply of multilateral compression of OTC IRDs. This is despite the fact that the evidence clearly demonstrates (and the CMA accepts) that the merged entity would have the ability to foreclose TriOptima. In particular, the evidence shows that:

(a) LCH has market power, which is reflected in its very high market share of over 90% (by notional cleared trades) in clearing of OTC IRDs during the period 2018-2021;[1]

(b) LCH controls a critical input, which the CMA accepts "*plays a significant role in shaping competition between providers of multilateral compression of OTC IRDs*";[2]

(c) there are strong network effects in the provision of clearing services, and there are barriers to switching, which reinforces LCH's strong market position;[3] and

(d) there are no regulatory safeguards or internal LCH governance protections that would prevent the merged entity from having the ability to foreclose TriOptima.[4]

1.3 Not only does the CMA conclude that the merged entity would have the ability to engage in foreclosure (against TriOptima), it also accepts that there would be significant benefits to the merged entity from engaging in a foreclosure strategy, as customers of TriOptima would switch to an alternative provider of compression services. In this regard, the CMA acknowledges that "*Quantile is effectively the only alternative* [to TriOptima for compression services]*. As such, any switching away from TriOptima would almost certainly be to Quantile*".[5] This means that the merged entity would benefit from any customers that switched away from TriOptima due to the foreclosure strategy.

1.4 However, despite concluding that (i) the merged entity would have the clear ability to foreclose TriOptima, and (ii) by foreclosing TriOptima the merged entity would be able to capture "*virtually all the revenues currently achieved by TriOptima in multilateral compression of OTC IRDs*",[6] the CMA has provisionally concluded that the merged entity would not have the incentive to foreclose TriOptima because "*the likely response* [from TriOptima's customers] *would be sufficient to more than offset the benefits of foreclosing*".[7] Specifically, this conclusion is based entirely on the potential responses of TriOptima's customers to a foreclosure strategy adopted by the merged entity, rather than any action

---

[1] Provisional Findings Report, paragraph 5.10 and Table 1.

[2] Provisional Findings Report, paragraphs 5.19-5.22.

[3] Provisional Findings Report, paragraphs 5.11.

[4] Provisional Findings Report, paragraphs 5.29.

[5] Provisional Findings Report, paragraphs 5.43.

[6] Provisional Findings Report, paragraphs 5.53.

[7] Provisional Findings Report, paragraph 5.103.

that TriOptima itself could take to protect itself from being foreclosed (i.e. they are actions which are entirely outside TriOptima's control). [✂] has serious concerns with this conclusion.

1.5 This submission explains why the CMA's provisional conclusion that LCH would have no incentive to engage in foreclosure strategies is not a conclusion the CMA can reasonably reach based on the totality of the evidence presented in the Provisional Findings.[8] In particular, [✂] is concerned that the CMA has:

(a) unreasonably relied on the views and possible reactions of a small number of TriOptima's customers (to behaviour that they may not even be able to observe); and

(b) has failed to take proper account of the very clear and obvious risks facing TriOptima as a result of the merged entity's ability to engage in foreclosure strategies that would plainly result in an SLC.

1.6 [✂] agrees with the CMA's findings that LCH has the clear ability to engage in foreclosure strategies, and that the merged entity would benefit from any customers that switch away from TriOptima as a result of any foreclosure strategy.

1.7 However, the evidence shows that the merged entity would also have the clear incentive to engage in foreclosure strategies that would give rise to an SLC. In summary:

(a) ability and incentive are closely tied, and LCH has an absolute ability to foreclose TriOptima as it is the dominant provider of CCP services;

(b) there are substantial gains from engaging in a foreclosure strategy due to the existence of network effects in the provision of compression services, and the high fixed cost nature of compression businesses. A foreclosure strategy that materially weakens TriOptima as a competitor will result in Quantile having the ability and incentive to increase compression fees, reduce the quality of service and/or reduce spend on innovation;

(c) if its compression business were foreclosed by LCH, [✂]; LCH and Quantile will be aware of this and accordingly, the incentives for the merged entity to engage in a foreclosure strategy include [✂]; this is not considered in the Provisional Findings;

(d) the risks to LCH of undertaking a foreclosure strategy are very low:

(i) contrary to the statement in the Provisional Findings,[9] foreclosure may not be detectable by customers, including [✂] which prevent TriOptima from informing customers of its engagements with LCH;

(ii) LCH has many foreclosure strategies available to it, which it can deploy progressively overtime. To the extent that one of its strategies is detected by TriOptima or its customers, LCH would be able to reverse that strategy and implement another foreclosure strategy in its place;

(e) LCH has the clear ability and incentive to share information on TriOptima's strategy with Quantile. The sharing of this information would not be detectable by TriOptima or its customers and would give Quantile a significant competitive advantage;

(f) innovation is important in the provision of compression services and is a key metric of competition; TriOptima [✂] LCH to implement its innovations and service

---

8 See *BAA Ltd v Competition Commission* [2012] CAT 3, paragraph 20(4).

9 Provisional Decision, paragraph 5.101.

enhancements, and post-merger LCH will have a materially reduced incentive to work constructively with TriOptima in this regard;

(g) the CMA's conclusion that customers will be able to react to and prevent any foreclosure strategies is fundamentally flawed. Specifically:

(i) to the extent foreclosure strategies are detected by customers, they have no ability to credibly complain or respond in such a way that would result in the costs of foreclosure outweighing its benefits.

(ii) in respect of narrow retaliation (i.e. switching from LCH to rival CCPs):

(A) the provisional decision is based on the view that in order to have any prospect at all of switching from LCH to a rival CCP provider, TriOptima's customers (which include banks and financial institutions) would need to engage in a collective boycott of LCH. Such coordinated action by TriOptima's customers would be a serious breach of the Chapter 1 Prohibition of the Competition Act 1998 and, accordingly, cannot reasonably be relied upon to support a finding that the prospect of narrow retaliation would negate an incentive to foreclose;

(B) the vast majority of customers (c. 85% or 11 out of 13) said that they would either be "very unlikely" or "fairly unlikely" to switch a material volume of their current or future OTC IRDs trades from LCH to other CCPs in response to LCH disadvantaging TriOptima;[10]

(C) the merging parties and customers have recognised that [✂]; and

(D) as noted above, the CMA has found in its assessment of the ability of the merged entity to foreclose TriOptima that LCH's services are a critical input to providers of multilateral compression of OTC IRDs, and that LCH has a very high market share. Accordingly, the effective absence of alternative suppliers means that narrow retaliation cannot be an effective strategy.

(iii) in relation to wider retaliation, the finding that TriOptima's customers could move some of their other LSEG business away to credible alternatives is speculative and unsubstantiated. In particular:

(A) the provisional conclusion at paragraph 5.101 that a "*large majority*" of customers had retaliatory mechanisms available to them is incorrect as the vast majority (c. 85% or 11 out of 13) indicated they were either "*very unlikely*" or "*fairly unlikely*" to switch their spending to other LSEG services;[11]

(B) customers have confirmed that the purchase of multilateral compression and other LSEG services are made independently of each other and it would be difficult to coordinate the various divisions within their businesses to move spend away from LSEG;[12]

(C) as recognised in the Provisional Findings, were customers to switch other services away from LSEG, this would be detrimental to those customers as they would be switching spend to a less preferred

---

[10] Provisional Findings Report, paragraph 5.82-5.83.

[11] Provisional Findings Report, paragraphs 5.93.

[12] Ibid.

alternative.[13] Such costs of switching have not been considered in the CMA's analysis, and the CMA has not considered what alternatives are available to customers for those other services; and

(D) the sum of the CMA's evidence is that just **two** customers said they would either "*consider making adjustments*" to move spend from LSEG to LSEG's rivals or would "*have to consider a wider retaliation action*".[14] This does not provide a sufficient evidential basis to conclude that the merged entity would not have the incentive to foreclose TriOptima.

1.8 Moreover, the publication of the Provisional Findings sends a clear and very concerning message to LCH that its CCP customers are captive to its services and that the vast majority are unlikely to credibly retaliate to any foreclosure strategy implemented in respect of compression. Coupled with LCH's clear ability to foreclose TriOptima, the Provisional Findings leave [✂] significantly exposed to a merged entity with immense upstream market power. [✂] to continue to invest, innovate and aggressively compete in the compression market are therefore significantly undermined by the conclusions set out in the Provisional Findings.

1.9 [✂] notes that in preparing this submission, it has only had the opportunity to review and comment on a less redacted version of the Provisional Findings, and has had no access at all to the customer responses to the CMA's questionnaires, which is central to the CMA's analysis of the merged entity's incentive to foreclose. [✂] Notwithstanding the limited disclosure provided, [✂] is constrained in its ability to respond to the Provisional Findings, and to "*fully check and comment on the reliability*" of the Provisional Findings.[15] In particular, [✂] notes that it was not provided with the underlying evidence relating to customers' incentives. For the reasons set out [✂] provision of this information is required as a matter of procedural fairness.

2. LCH HAS THE CLEAR AND ABSOLUTE ABILITY TO FORECLOSE TRIOPTIMA

2.1 [✂] agrees with the Inquiry Group's provisional conclusion that LCH has the ability to foreclose TriOptima both partially and totally.

2.2 Paragraph 5.6 of the Provisional Findings sets out both a total foreclosure strategy and a number of partial foreclosure strategies that could be implemented by LCH. The partial foreclosure strategies identified by the CMA include increasing fees, limiting the days on which rivals could access LCH to carry out compression runs, altering aspects of LCH's process, limiting support provided to other compression providers who may seek to improve their offerings, and providing commercially sensitive information to Quantile.

2.3 In this section, [✂] comments on the evidence which shows that LCH has a clear and absolute ability to foreclose TriOptima.

LCH has absolute market power in the provision of CCP services for OTC IRDs

2.4 The CMA has provisionally concluded that LCH has significant market power, with a stable share of over 90% for notional cleared OTC IRDs and over 70-80% for notional outstanding volumes. Remaining CCPs in aggregate have a market share of less than 5% for cleared and 10% for uncleared.

---

13 Provisional Findings Report, paragraphs 5.98.

14 Provisional Findings Report, paragraphs 5.94.

15 See *R (Eisai Limited) v. National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, paragraph 49.

2.5 Moreover, the CMA has found "*strong network effects*" which "*may reinforce LSEG's existing strong position*".[16] The CMA correctly observes that network effects result in "*greater volumes increasing liquidity*" which is described as "*a very important factor when choosing a CCP*".[17] In this connection, 13 out of 14 SwapClear Banks identify liquidity as a key factor for choosing a CCP.[18] Similarly, the CMA found that "*all of the major CCPs competing with LCH … told us that market liquidity is a very important factor that informs the customers' choice of a CCP for clearing of OTC IRDs*".[19]

2.6 The CMA has also found that barriers to switching CCP may support LCH's strong market position.[20] This is reinforced by customer responses, the vast majority of which indicated that they were either very unlikely or fairly unlikely to switch CCP providers if LCH disadvantaged TriOptima.[21] The evidence shows that customers are captive to LCH as a CCP provider and switching would be detrimental to their commercial interests. It is clear, therefore, that LCH has a very substantial degree of market power on any measure, and LCH enjoys an entrenched dominant position within the meaning of the Chapter 2 Prohibition of the Competition Act 1998.

LCH provides a critical input for compression services

2.7 The CMA has correctly found that multilateral compression providers are unable to compress trades cleared at LCH without interacting with LCH and must be approved by LCH. [✂] therefore agrees with the conclusion that "*LCH's involvement is essential for providers wishing to offer multilateral compression of trades cleared at LCH*".[22]

2.8 The CMA has also correctly concluded that "*as a result of the extensive role of LCH in multilateral compression of OTC IRDs cleared at LCH, LCH has a wide range of potential foreclosure mechanisms*" available to it. [23]

2.9 As [✂] has explained in its previous submissions, in order to be a credible compression provider it is essential that a provider has the ability to compress OTC IRD trades cleared at LCH. Absent the ability to compete effectively in the compression of trades cleared at LCH, [✂]

2.10 Whilst this is partly reflected in the CMA's conclusion that "*LCH's input is essential for a large proportion of the supply of multilateral compression of OTC IRDs*",[24] [✂] considers that the conclusion at paragraph 5.21 should have gone further. It is simply not possible [✂]

There are no regulatory or governance mechanisms which would prevent LCH from foreclosing TriOptima

2.11 [✂] agrees with the Provisional Findings that there are no regulatory rules or requirements which would prevent LCH from engaging in foreclosure strategies. In particular, [✂] agrees that: (i) IOSCO Principles are not legally binding; (ii) the UK EMIR does not regulate the supply of inputs to multilateral compression provider; (iii) 'open access' under MiFIR and

---

16 Provisional Decision, paragraph 5.11.

17 Provisional Decision, paragraph 5.11.

18 Provisional Decision, paragraph 5.11.

19 Provisional Decision, paragraph 5.11.

20 Provisional Decision, paragraph 5.14.

21 Provisional Decision, paragraph 5.83.

22 Provisional Decision, paragraph 5.19.

23 Provisional Decision, paragraph 5.20

24 Provisional Decision, paragraph 5.21.

UK EMIR does not apply to compression providers; and (iv) the Bank of England would be unlikely to intervene in relation to any foreclosure strategy implemented by LCH.

2.12 Based on the evidence set out in the Provisional Findings, it is clear that the various governance arrangements highlighted by the merging parties are merely contractual rights in favour of customers as opposed to regulatory rights or mechanisms of internal governance and that they would not prevent LCH from implementing foreclosure mechanisms.

Conclusions on ability to foreclose

2.13 Whilst the Provisional Findings correctly conclude that the merged entity would have the ability to foreclose TriOptima both partially and totally, the ability to engage in vertical foreclosure cannot be assessed as a binary concept but rather needs to be considered on a spectrum that reflects both market power in the upstream market and the importance of the input. This is consistent with the CMA's Merger Assessment Guidelines (the "**MAGs**") which note that:[25]

> *"When assessing whether the merged entity will have the ability to foreclose its rivals, the CMA will typically focus on two issues.*
>
> *(a)* ***Market power upstream*** *…*
>
> *(b)* ***Importance of the input*** *…"*

2.14 For the reasons set out in the Provisional Findings and summarised above, it is clear that LCH has absolute market power in the upstream market (with a market share of over 90%) and LCH's involvement is an essential input to providers of compression services. The fact that LCH has a clear and absolute ability to foreclose rival compression providers needs to be taken into account when assessing the incentive to foreclose.

3. THE CMA IS WRONG TO CONCLUDE THAT LCH HAS NO INCENTIVE TO FORECLOSE

3.1 The CMA has provisionally concluded that LCH would not have the incentive to engage in foreclosure strategies. [✂] believes that this conclusion is incorrect as it is not supported by the evidence. In this section the following points are addressed:

(a) the CMA has failed to recognise that an assessment of incentives is closely tied to an assessment of ability;

(b) there is the potential for substantial gains for LCH to be achieved from a foreclosure strategy;

(c) if its compression business were foreclosed by LCH, [✂], which would benefit Quantile;

(d) the risks to LCH of undertaking a foreclosure strategy are very low;

(e) LCH has the ability and incentive to share information on TriOptima's strategy with Quantile;

(f) the CMA's contention that future innovation is unlikely is incorrect;

(g) customers of TriOptima have no ability to credibly respond to foreclosure strategies; and

---

25 MAGs, paragraph 7.14.

(h) the CMA has departed from its Guidelines without good reason.

Ability and incentives are closely related

3.2 The factors that are relevant to assessing ability to foreclose are also highly relevant to assessing incentives. This is recognised in the MAGs which note that when considering ability and incentives "*the CMA is likely to apply this framework flexibly and consider these as overlapping analyses rather than as distinct chronological stages*".[26]

3.3 In this context, the finding that LCH has a clear and absolute ability to foreclose rivals needs to be reflected in the assessment of incentives. In particular, LCH's ability to foreclose clearly has a bearing on the following factors, which the MAGs correctly recognise are relevant to the assessment of incentives:

(a) **Gain in downstream sales:**[27] The gain in downstream sales is likely to be greater if the merged entity has a particularly strong ability to foreclose, as this would likely result in substantial switching away from the affected rivals. These additional sales may in turn enable it to increase downstream prices. The Provisional Findings acknowledge that "*Quantile is effectively the only alternative* [to TriOptima]", and that "*any switching away from TriOptima would almost certainly be to Quantile*".[28] Accordingly, by foreclosing TriOptima the merged entity would be able to capture "*virtually all the revenues currently achieved by TriOptima in multilateral compression of OTC IRDs*".[29]

(b) **Loss of upstream sales:**[30] Loss of upstream sales are likely to be lower if the merged entity has strong market power upstream, and if it can engage in price discrimination or similar targeted deterioration of supply. This would allow it to hinder specific rivals in competing for customers that its downstream division is best placed to win, whilst minimising the risk to its upstream sales by otherwise continuing to offer its input on competitive terms. As set out above, LCH provides a critical input for compression services; [✂] considers that it is simply not possible profitably to provide compression services without being able to undertake compression runs in respect of LCH cleared trades. The merged entity is therefore unlikely to lose many upstream sales as a result of foreclosing TriOptima.

(c) **Other costs and benefits:**[31] The MAGs note that, particularly in complex and dynamic markets, firms may not focus on short term margins but may pursue other objectives to maximise their long-run profitability. This may include eliminating a possible long-term threat, increasing the stickiness of existing customers, positioning themselves strongly in high-growth markets, gaining customers to obtain direct or indirect network effects, obtaining access to customer data, or enabling cross-selling within a broader ecosystem. [✂] considers that all of these factors are potentially relevant in this case, and given LCH's strong market position upstream it will have an incentive to maximise profitability in whatever ways it can. For example, the CMA has recognised that the compression market is characterised by network effects and therefore there is a strong incentive for LCH to engage in a foreclosure strategy to attract additional customers. In addition, the ability to enable cross-selling within a broader ecosystem was highlighted in LSEG's announcement of its acquisition of Quantile which noted that: *"The Transaction furthers LSEG's strategy of providing*

---

26 MAGs, footnote 119.

27 MAGs, paragraph 7.19(b).

28 Provisional Findings Report, paragraphs 5.43.

29 Provisional Findings Report, paragraphs 5.53.

30 MAGs, paragraph 7.19(c).

31 MAGs, paragraph 7.19(e).

customers with a global, multi-asset class financial markets infrastructure operating across the trading ecosystem".[32]

Foreclosure will result in substantial gains for LCH

3.4 [✂] considers that there are potentially significant benefits to LCH from engaging in a foreclosure strategy:

(a) The CMA has indicated that the benefits LCH would receive are between [✂]In the year end 2021, Quantile's total revenues[33] for all its services were £11.7 million. Engaging in a foreclosure strategy would [✂]Quantile's total revenues, and very substantially increase its profits, as these additional revenues would not incur material additional costs;

(b) TriOptima is the only other compression provider in the market. Accordingly, any customers that switch away from TriOptima as a result of a foreclosure strategy would inevitably switch to Quantile. This is explicitly acknowledged in the Provisional Findings, which states that "*Quantile is effectively the only alternative*" to TriOptima for compression services.[34] In addition, the CMA has found that customers are unlikely to stop compressing trades as "*customers significantly value multilateral compression, and the largest ones need to compress to manage their capital requirements, so it is unlikely they would stop compression as a result of foreclosure*".[35] Therefore, to the extent that, over time, a foreclosure strategy is successful (and either forces TriOptima out of the market or has a detrimental impact on TriOptima's ability to compete), customers can be expected to switch to Quantile such that the merged entity will receive all of the benefits of engaging in foreclosure activities;

(c) if a foreclosure strategy is successful such that it materially weakens TriOptima as a competitor, this will result in Quantile having the ability and incentive to increase compression fees, reduce the quality of service and/or reduce spend on innovation. TriOptima's current revenues therefore represent a lower bound of the potential gains from a foreclosure strategy given that Quantile would be able to extract additional profits through changing its fee structure.[36] This is recognised in the Provisional Findings which note that:[37]

> "*This estimate of the upper bound will likely be an underestimate as the Merged Entity would also have an incentive to raise fees for multilateral compression services as competition would be weakened resulting in additional revenues and profits*"

(d) the Provisional Findings also note that if Quantile changed its pricing structures it could make "*additional profits from those customers through foreclosure*".[38] This demonstrates the powerful incentives Quantile has to engage in a foreclosure strategy for the dual benefit of: (i) gaining TriOptima's revenues; and (ii) changing its own fee structure to make additional profits;

---

32 https://www.lseg.com/resources/media-centre/lseg-acquire-quantile-group-limited.

33 Quantile Group Limited's 2021 Accounts, page 4. Quantile's compression revenues are likely to be smaller due to Quantile offering other services such as multilateral compression.

34 Provisional Findings, paragraph 5.43.

35 Provisional Findings, paragraph 5.43.

36 The ability of Quantile to changes its pricing structure is recognised by the CMA at footnote 174 of the Provisional Findings.

37 Provisional Findings, paragraph 5.53.

38 Provisional Findings, footnote 174.

(e) as [✂] has explained previously, compression is a high fixed cost business. The additional marginal cost to Quantile of serving customers that switch from TriOptima to Quantile are likely to be very low. In other words the incremental profits from a foreclosure strategy are likely to be very high. Clearly, a comparison of the costs and benefits of foreclosure needs to focus on profits rather than revenues, which the Provisional Findings do not consider; and

(f) as explained below, [✂]

Foreclosure would materially weaken [✂]business

3.5 [✂] has previously raised concerns that [✂]

3.6 [✂]

3.7 [✂].

3.8 [✂].

Low costs of a foreclosure strategy

3.9 This section explains why the costs to LCH of pursuing a foreclosure strategy are very low or zero. Not only are a number of the foreclosure strategies unlikely to be detectable by TriOptima's customers, [✂]. The CMA's contention that customers would be able detect foreclosure strategies because TriOptima would be able to inform them of LCH's activities is therefore not plausible.

Foreclosure may not be detectable by customers

3.10 As [✂] noted in its submission of [✂], there are a number of foreclosure strategies which would not be detectable by customers, including:[39]

(a) amendments to confidential agreements between LCH and TriOptima which have an asymmetric effect on TriOptima but not Quantile;

(b) the application of strict MDR cut-off deadlines to TriOptima but not Quantile;

(c) making customer data available to Quantile but not TriOptima;

(d) delaying new product developments; and

(e) sharing TriOptima's confidential information in relation to proposed innovations, developments and strategies with Quantile.

3.11 The Provisional Findings state that "*… we have provisionally found that it is likely that customers would be able to detect attempts by LCH to foreclose TriOptima in multilateral compression*".[40] But this is not supported by the evidence set out in the Provisional Findings. The CMA asked the following question to customers about whether they would be able to detect a foreclosure strategy:[41]

39 [✂] also referred to of foreclosure mechanisms that are not overtly visible to customers or ostensibly justifiable, in that whilst customers may see a change, they will not necessarily detect that it is a foreclosure strategy.

40 Paragraph 5.74

41 Footnote 186.

"*how likely do you think it is that you could accurately assess whether LCH was disadvantaging TriOptima in favour of Quantile? Please explain your answer including whether your answer would vary by how LCH disadvantaged TriOptima*".

3.12 The question is vague and does not define what "*disadvantaging TriOptima in favour of Quantile*" means. In prior submissions [✂] has explained that there are nine different partial foreclosure mechanisms that LCH could use, many of which are either undetectable to customers or could ostensibly be justified on other grounds. So far as is apparent from the Provisional Findings, the question does not specify the ways in which LCH could disadvantage TriOptima, and it would be highly unlikely that customers would have all of these mechanisms in mind when being asked to consider whether they could detect them.

3.13 Whilst the CMA explains the difference between total and partial foreclosure in paragraph 5.6 of the Provisional Findings, it is not clear how customers were interpreting the questions being asked (i.e. what does "*disadvantaging TriOptima*" mean in the context of a total or partial foreclosure strategy?). Responses are likely to vary substantially depending on how customers interpreted the severity of the harm. Given the types of strategies that LCH could use to foreclose TriOptima (as set out in paragraph 3.10 above), the CMA should have asked more specific questions about whether those particular strategies (and other ostensibly small changes which, over time, would severely impact TriOptima's ability to compete) in LCH's offering to TriOptima would be detectable by customers.

3.14 As noted in the CMA's revised edition of *Good practice in the design and presentation of customer survey evidence in merger cases*,[42] the scope for ambiguity and confusion in questionnaires reduces the evidential weight of responses. The CMA's provisional conclusion that LCH has no incentive to engage in foreclosure strategies, which is based to a very large extent on the responses of a very small number of TriOptima's customers to a vaguely formulated question, is not a conclusion the CMA can reasonably reach.

Confidentiality restrictions limit [✂] ability to inform customers of LCH's foreclosure activities

3.15 [✂] notes that four customers who indicated that they would be likely to detect LCH's foreclosure strategies referred to "*ongoing dialogue with TriOptima as a possible means of issues being flagged*".[43] These views fail to reflect the confidentiality obligations contained in the Compression Services Agreement between TriOptima and LCH. In accordance with the agreement, [✂] is significantly constrained in providing customers with information about its interactions with LCH. Confidential information is defined broadly as:[44]

[✂]

3.16 Confidential information cannot be used [✂][45]

3.17 [✂]

3.18 By way of example, when a compression run fails, customers typically wish to understand why the run has failed. In June this year, one of TriOptima's compression cycles failed due to an LCH system error. [✂] While LCH was open with its customers about the first system error, which arose due to the incorrect implementation of a US public holiday, "Juneteenth", TriOptima was unable to explain to customers why the second run had failed. [✂]

---

42 Available at, https://www.gov.uk/government/publications/mergers-consumer-survey-evidence-design-and-presentation.

43 Provisional Findings, paragraph 5.72.

44 [✂]

45 [✂]

LCH can readily reverse foreclosure strategies if they are detected by customers and implement alternative strategies

3.19 The CMA has failed to recognise that any foreclosure strategy pursued by LCH could be implemented in a small and incremental manner. As explained in [✂] previous submissions, there are a number of foreclosure mechanisms LCH could implement, either simultaneously or incrementally over time.

3.20 Adopting a consecutive approach would enable LCH to implement a strategy and see whether TriOptima and/or customers detect a degradation in service. To the extent that a particular strategy goes undetected by TriOptima and/or customers, LCH could continue implementing that mechanism and look to implement further mechanisms incrementally. If customers raise concerns in relation to particular conduct (which is unlikely for the reasons explained above) LCH could assess whether the risk of customer responses were credible at that stage and decide whether to roll back that particular foreclosure mechanism and introduce others.

3.21 This strategy is effectively risk free as LCH would always have the opportunity to reverse any conduct that was viewed as unacceptable by customers and look to implement an alternative foreclosure strategy.

3.22 [✂] has identified nine foreclosure strategies, many of which, such as sharing TriOptima's confidential information with Quantile, providing enhanced customer trade itinerary data to Quantile but not TriOptima, and not cooperating or "going slow" in the application/development of TriOptima's innovations, would be undetectable by customers and could be implemented consistently and repeatedly in relation to each category.

3.23 This situation is very different from most vertical foreclosure theories of harm where the cost of foreclosure typically depends on customers switching to a rival supplier or being able credibly to threaten to switch to an alternative provider. There are no credible alternative CCP providers as LCH has a market share of more than 90%, and it supplies a critical input to compression providers. In typical vertical foreclosure cases, customers can switch to alternative providers without warning and the upstream supplier has to recognise that a foreclosure strategy may result in a loss of revenues. In this case, there are no other credible upstream providers and LCH is able to implement each and every foreclosure mechanism without any risk of customer switching.

LCH has a clear ability and incentive to share [✂]

3.24 Given TriOptima's dependency on LCH, LCH has, and will continue to have, a clear oversight of the entire compression market. In addition, [✂]

3.25 LCH therefore has the clear ability to share information about TriOptima's strategy, customer information and development plans with Quantile. Similar issues were considered by the CMA in the ICE/Trayport merger, and the CMA concluded that information on product developments and customer requests could be disclosed amongst ICE businesses orally by senior employees, which would be "*difficult to detect or prove*".[46] This was found to give ICE a "*significant advantage from obtaining prior warning of innovation from rivals … particularly … if this was combined with the delay or frustration of product developments*".[47] The CMA ultimately found that the transaction would give rise to an SLC, a finding which was upheld by the Competition Appeal Tribunal.[48]

---

46 A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport (17 October 2016), paragraph 8.68.

47 A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport (17 October 2016), paragraph 8.69.

48 See *Intercontinental Exchange, Inc. v Competition and Markets Authority* [2022] CAT 6.

3.26 [✂] As in the ICE/Trayport case, this could be done orally amongst senior employees, making it impossible for TriOptima or customers to detect. The disclosure of this information would give Quantile a significant competitive advantage over TriOptima. This is particularly acute in the context of product innovations, the development of which is dependent on collaboration with LCH.

3.27 As explained in further detail below, TriOptima [✂] Upon completion of the Quantile acquisition, LCH would have strong incentives both to share the development with Quantile and to stifle/delay TriOptima's new development. [✂]customers would be unable to detect either foreclosure mechanism:

(a) if LCH were to share this information on TriOptima's new innovations with Quantile, and Quantile subsequently develops a new solution ahead of TriOptima, [✂]customers would consider this to be competition "on the merits" and TriOptima would have no concrete way of knowing whether LCH improperly shared its innovations with Quantile; and

(b) combined with a strategy in which LCH delays or frustrates TriOptima's product developments, customers would ultimately blame TriOptima for not bringing the developments to market. This is apparent from customer reactions in other contexts. LCH recently implemented a number of changes to how it processes compression runs which resulted in a significantly shorter period of time for TriOptima to prepare compression proposals for customer validation. This in turn had the effect of significantly shortening the times which customers have to validate TriOptima's compression proposals[✂]

3.28 Each of these foreclosure mechanisms can be implemented against a background where [✂]

3.29 Information sharing concerns also arise in relation to other parameters of competition, including price and quality of service, as well as innovation. By having detailed insight into TriOptima's business, including access to commercially sensitive information, Quantile will be aware of the costs and key service aspects of its only material competitor, which will provide it with a significant competitive advantage and will compound the detrimental impact on competition of any foreclosure strategy imposed by LCH. This was a factor highlighted by the E.CA in its Ex-post evaluation of vertical mergers which it noted in the context of vertical foreclosure risks that "*particularly significant* [is] *the misuse of sensitive information by vertically integrated firms. There is a danger this may occur where the firm has acted as a supplier of downstream competitors and has in the process gained access to commercially sensitive information, such as information on sales, product specifications or pricing strategies*".[49] The significance of this competition concern cannot be overstated, and explains why the sharing/unilateral disclosure of such information as between TriOptima and Quantile would constitute a very serious infringement of the Chapter 1 prohibition of the Competition Act 1998.[50]

3.30 As it will be effectively impossible for TriOptima to detect the sharing of TriOptima's confidential information as between LCH and Quantile, and impossible for TriOptima to prove that LCH either deliberately stifled its innovation, or delayed its implementation, there are no costs or risks to LCH in implementing such a foreclosure strategy.

The CMA's contention that future innovation is unlikely is incorrect

---

49 E.CA Ex-post Evaluation of Vertical Mergers, page 21.

50 See *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag OJ* Case C-8/08 EU:C:2009:343.

3.31 The Provisional Findings state that "*future innovation is unlikely to be an important aspect of future competition*".[51] This is incorrect.

3.32 This conclusion is stated in a footnote without reference to any supporting evidence. It is a surprising assertion to find in the Provisional Findings as the CMA has compelling evidence in its possession which shows that innovation is a very important aspect of competition in the market for compression services:

(a) in response to a question from the CMA asking to "*estimate how important further innovation that could be deterred in multilateral compression is likely to be*",[✂] explained that "*innovation remains very important.* [✂]

(b) [✂] has also explained that competition creates "*incentives for providers to continuously innovate and improve their compression algorithms*";[52]

(c) [✂]TriOptima continues to innovate and develop its compression offering,[53] and [✂]

(d) LSEG's own rationale for the acquisition of Quantile states that the transaction will provide "*additional opportunities to innovate and further improve*" Quantile's product offering;[54]

(e) the merging parties' own response to the Issues Statement states, under the heading "Expected growth", that "*Quantile will one day have the backing and investment required … to offer its services and innovate*" and that this has been a key driver for early investors in Quantile;[55]

(f) in the LSEG/Refinitiv case, LSEG stated that it "*strives to constantly innovate and increase value for its customers, e.g. through its compression services, which reduce customers' clearing costs and increase overall clearing volumes in the market*";[56]

(g) at phase 1 the CMA was rightly concerned that foreclosure in relation to compression is likely to "*reduce quality and innovation*";[57] and

(h) in its Issues Statement, the CMA repeated its concerns that foreclosure may cause a reduction in innovation.[58]

3.33 In reality, TriOptima is continuously engaged in developing improvements and innovations to its compression services. [✂]

3.34 In the last two years alone, TriOptima has successfully obtained a number of patents:

(a) an application relating to a method to increase the efficiency of compression of certain Swaps, so called zero coupon trades, was granted by the United States Patent and Trademark Office on 3 May 2022;[59]

---

51 Provisional Findings, footnote 189.

52 [✂]

53 [✂]

54 Provisional Findings, paragraph 2.13.

55 LSEG response to the Issues Statement, paragraph 9.

56 LSEG/Refinitiv, paragraph 2193.

57 CMA Phase 1 Decision, paragraph 153(a).

58 CMA Issues Statement, paragraph 27.

59 [✂]

(b) an application relating to a method to significantly reduce the number of trades created as part of a compression event was granted by the United States Patent and Trademark Office on 25 January 2022;[60]

(c) an application relating to a method for trade refactoring was granted by the United States Patent and Trademark Office on 13 October 2020.[61]

3.35 Moreover, [✂] has a number of recent patent applications awaiting approval which relate to compression services, including:

(a) an application for data object compression and reduction, with priority date 19 December 2019;

(b) an application for accumulation-based data object processing, with priority date 31 August 2020; and

(c) an application for pre-compression data object convention conversion, with priority date 16 May 2022.

3.36 [✂] has also implemented the technology underlying a number of the patents that have been granted into its compression services. In this connection, TriOptima has successfully rolled out trade refactoring to customers [✂]

3.37 Implementing these innovations necessarily requires close collaboration with LCH. If LCH were to "go slow" in working with TriOptima to implement these initiatives, or share TriOptima's strategic information with Quantile, enabling Quantile to build a competing service, frontrunning TriOptima's own innovations, this would significantly disadvantage TriOptima and deter future innovation, to the detriment of competition and customers.[62]

3.38 [✂]

3.39 Accordingly, innovation is a key element of competition in the provision of compression services, and [✂] The CMA's conclusion that innovation is unimportant is therefore not a conclusion that is reasonably open to it based on the evidence.

Customers have no credible ability to respond to foreclosure strategies

Customer complaints are unlikely to be credible or dealt with by LCH

3.40 The Provisional Findings indicate that the CMA considered and placed reliance on customers being able to "*explore what LCH was doing, for example through customer directors*".[63] Yet this would appear to be highly unlikely to happen because, as the CMA itself observed, "*previous complaints about [✂] multilateral compression [✂] were not taken to the Board*".[64] Moreover, it is very unlikely that LCH's management would update its board, which includes customer directors on compression related issues. LCH submitted that "*iNEDS would not typically be involved in operational matters unless such matters raise strategic issues for LCH*". It is even more unlikely that LCH's management would update the board on the foreclosure strategies it was implementing against TriOptima, as raising these issues would be likely to be self-defeating.

---

60 [✂]

61 [✂]

62 The importance of innovation and dynamic competition in merger control is reflected in detail in section 5 of the CMA's Merger Assessment Guidelines, which were recently substantially revised to reflect the increasing importance of such concerns.

63 Provisional Findings, paragraph 5.74.

64 Provisional Findings, paragraph 5.32(f).

3.41 [✂] notes that customers have recently complained to LCH about scheduling clashes between TriOptima and Quantile in respect of particular holiday periods. For example, in 2020 both TriOptima and Quantile scheduled USD compression runs on Friday 30 October 2020 and Friday 13 November 2020. In the context of LIBOR cessation at the end of last year, LCH restricted the available dates for compression cycles for GBP, JPY, and CHF which meant there were scheduling clashes between Quantile and TriOptima. LCH did not accommodate customer complaints about scheduling issues and refused to implement a solution. This is an example of customer complaints not being resolved by LCH, with customers being left in a position where they are unable to effectively resolve the problem themselves.

There is no realistic prospect of narrow retaliation

3.42 In seeking to assess the costs of foreclosure, the CMA asked customers to estimate: [65]

> "*the likelihood of them moving a material volume of their current or future OTC IRDs trades from LCH to other CCPs in response to LCH disadvantaging TriOptima*"

3.43 The vast majority (c. 85% or 11 out of the 13 customers who responded) stated it was "very unlikely" or "fairly unlikely" that they would switch to another CCP provider.[66] These customers explained that the choice of CCP is mainly driven by liquidity and clients' preference and, as such, moving trades from LCH (where these customers thought the largest liquidity pool currently is) for reasons that are not linked to those two factors would be costly and inefficient – for example, it would increase trading and margin costs.[67] As set out above, the CMA's analysis in relation to 'ability' further confirms that customers have no prospect of engaging in narrow retaliation (e.g. as LCH supplies a critical input, it has a very high market share, and there are network effects and barriers to switching).

3.44 Yet despite this clear and compelling evidence, the Provisional Findings conclude at paragraph 5.101, which relates to both narrow retaliation and wider retaliation, that the "*large majority*" of customers were confident that they had retaliatory mechanisms available to them that would be sufficient to prevent LSEG taking steps to foreclose TriOptima. In relation to narrow retaliation, this is plainly incorrect as the vast majority of customers do not consider that narrow retaliation is possible.

3.45 Of the two customers who stated that it would be "*fairly likely*" for them to move their OTC IRD trades to rival CCP providers, the CMA summarised their rationale as requiring them to act collectively:

(a) customers would need to "*convince clients to switch*" directing new trades away from LCH;[68]

(b) switching would only be credible if "*a number of dealers independently threatened to move trades away*";[69]

(c) "*moving to another CCP is hard for* [the individual customer] *but more realistic for many banks acting collectively*"[70] and a "*collective move by a number of banks in a concerted way would be worthwhile*";[71] and

---

65 Provisional Findings, paragraph 5.82 and footnote 206.

66 Provisional Findings, paragraphs 5.83 and 5.84.

67 Provisional Findings, paragraph 5.83.

68 Provisional Findings, paragraph 5.84(b).

69 Provisional Findings, paragraph 5.85(a).

70 Provisional Findings, paragraph 5.85(c).

71 Provisional Findings, paragraph 5.85(c).

(d) a threat to switch away would only be more than an idle threat if it was "*posed by multiple customers at the same time*".[72]

3.46 Even if narrow retaliation was possible (which for the reasons set out in this section it is not), [✂]

(a) [✂][73]

(b) [✂][74]

3.47 The CMA also recognises that the fact that the vast majority of LCH's clearing member fees are composed of flat fees, which do not directly respond to changes in the number of trades, could weaken the effectiveness of narrow retaliation.[75] In other words, even if customers switch trades to other CCPs this will not have an impact on LCH's revenues (at least in the short term).

3.48 The customer evidence presented in the Provisional Findings is consistent with the evidence considered by the European Commission in LSEG and Refinitiv. In its assessment, the Commission referred to one customer which explained why it did not change CCPs:[76]

> "*Overall, the cost and the complexity. Also, other CCPs do not support (or have zero liquidity) in many of the currencies we, as a global dealer, transact in. Specifically, given the nature of OTC IRD trades, it would be necessary to close out our positions in one CCP and re-open them in another. We do not consider there to be sufficient liquidity to achieve this. Furthermore, ongoing risk management in a different CCP presents challenges. Moreover, we need to consider the risk of base effect if we use a minority CCP. Finally, no other CCP has the operational processes and procedural sophistication necessary to allow us to be comfortable processing our significant trading volumes with them.*"

3.49 The Commission also referred to evidence from Banco Santander, BBVA, Nomura, Swiss Re, Alliance Bernstein, Commerzbank, Pension insurance corporation and Bank of Montreal which indicated that each of these customer seeks a CCP provider that has the highest liquidity.[77] Similar comments were made by Société Générale.[78] Notably, none of these customers refer to compression services as a driver for their choice in CCP provider.

The CMA's conclusion that customers would act collectively is both implausible and premised on conduct which is a serious breach of competition laws

3.50 The Provisional Findings correctly conclude at paragraph 5.88 that:

> "*The evidence … shows that narrow retaliation would be difficult and costly for customers to execute. In particular, it could not be done unilaterally and would require several steps (in particular convincing clients) over potentially several years. At the same time, customers told us that narrow retaliation could be a non-negligible threat to LCH as customers might collectively be able to move new trades in the medium/ long-term. Overall, we consider that the threat of individual customers switching away from LCH for clearing OTC IRDs is not realistic. However, we consider that, if a sufficient*

---

72 Provisional Findings, paragraph 5.79.

73 [✂]

74 [✂]

75 Provisional Findings, footnote 214.

76 LSEG/Refinitiv, paragraph 2250.

77 LSEG/Refinitiv, paragraph 2252.

78 LSEG/Refinitiv, paragraph 2260.

number of customers were motivated to do so, there would be a non-negligible threat that customers could collectively switch away from LCH." (emphasis added)

3.51 Quite apart from the fact that the conclusion is based on the contention that such collective action "*might*" enable new trades to be moved in the "*medium/long term*",[79] which is pure speculation, the provisional decision is based on the view that in order to have any prospect at all of switching from LCH to a rival CCP provider, customers would need to engage in a collective boycott of LCH to move new trades away from LCH in the medium/long term.[80]

3.52 However, such collective action would constitute a collective boycott, which is a serious breach of the Chapter 1 Prohibition of the Competition Act 1998. The OFT has previously concluded that collective refusals to supply are by object infringements,[81] the Competition Appeal Tribunal has stated that collective boycotts are "*of their nature among the most serious kinds of infringement*"[82] and the High Court in *R (Cityhook Ltd) v OFT* [2009] EWHC 57 (Admin) considered collective boycotts may be either a by object or effect infringement.[83] The European Commission has also held that collective boycotts have a "*manifest anti-competitive object*".[84]

3.53 In this connection, banks and financial institutions are sophisticated businesses with, of necessity, a detailed understanding of competition law issues. In recent years many banks and financial institutions have been subject to significant competition law investigations by the European Commission and have had very significant fines imposed on them (for example in relation to LIBOR). Accordingly, they now have sophisticated compliance programmes, training and monitoring in place to avoid competition law infringements. [✂] own experience of engaging with these customers is that they are very wary of competition law risks in respect of their day-to-day activities.

3.54 Moreover, as many of the banks and financial institutions that would (hypothetically) take part in such collective action have already been investigated and fined for competition law breaches, they would be particularly cautious about engaging in conduct that might constitute an infringement as any fines could be increased by up to 100 per cent for recidivism.

3.55 The likelihood of customers seeking to retaliate against foreclosure activities undertaken by LSEG by acting or threatening to act collectively against LCH/LSEG is therefore implausible.

3.56 It is notable that the European Commission did not consider the possibility of collective switching in the context of trading venues and CCP providers in its analysis of the vertical foreclosure concerns that arose in LSEG/Refinitiv. The Commission exhaustively considered customers' individual abilities to switch to alternative CCP providers.[85] The representative body of the largest customers of LCH (the SwapClear Banks) expressly rejected the prospect of collective switching. OTCDerivNET stated that "*the use of a clearing service is a matter decided upon solely by the SwapClear banks individually in their capacity as users of clearing services*" and stated that OTCDerivNET has "*no role to play in determining whether or where bank users may choose to clear*".[86]

---

79 Provisional Findings, paragraph 5.88.

80 Provisional Findings, paragraph 5.88.

81 *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, paragraph 75.

82 *Eden Brown Limited v Office of Fair Trading* [2011] CAT 8, paragraph 75.

83 *R (Cityhook Ltd) v OFT* [2009] EWHC 57 (Admin), paragraph 134.

84 *Pre-insulated Pipes Cartel*, Commission Decision of 21 October 1998, paragraph 148.

85 LSEG/Refinitiv, paragraphs 2286-2313.

86 LSEG/Refinitiv, paragraph 2322.

3.57 Accordingly, it is submitted that the CMA cannot reasonably rely on customers acting collectively as a means of deterring LCH from engaging in foreclosure strategies.

Customer evidence supports the conclusion that individual narrow retaliation is not practicable

3.58 The Provisional Findings explain in detail the numerous practical difficulties customers would face in seeking to switch CCP providers (which apply individually, but would also make a collective boycott unlikely, even if such conduct were legal):

(a) the Provisional Findings conclude that "*there are strong network effects in the provision of clearing services, which may reinforce LSEG's existing strong position*". This is apparent from the CMA's conclusion that "*a CCP that clears a large proportion of the market is likely to be more attractive than a CCP that clears a much smaller proportion of the market*".[87] Relevantly, the Provisional Findings conclude that LCH has a [90-100%] market share, with the next closest competitor CCP having a [0-5%] market share;[88]

(b) the Provisional Findings conclude that it is "*detrimental to customers, as it requires them to leave their preferred* [CCP] *option*".[89] In essence, narrow retaliation requires customers to respond in a manner that is adverse to their commercial interests;

(c) customer choice of CCP is not driven by compression, it is based on "*liquidity and clients' preference and, as such, moving trades from LCH (where these customers thought the largest liquidity pool currently is) for reasons that are not linked to those two factors would be costly and inefficient*".[90] Quality of compression provider received an average rating of 2.8 out of 5 by customers when considering their choice of CCP, quality which "*did not significantly differ between CCPs*";[91]

(d) switching CCP providers is "*difficult to implement*",[92] dependent on "*relative cost increases*"[93] and that customer banks would also need to convince their own clients to switch to an alternative CCP.[94]

(e) network effects are "*the result of greater volumes increasing liquidity, which is a very important factor when choosing a CCP*";[95]

(f) liquidity was identified by both CCPs and customers as an important driver of customer choice in clearing OTC IRDs;[96] and

(g) customers are unlikely to move a "*material amount*" of trades, as "*customers tend to concentrate trades in one clearing house (LCH) to maximize margin netting*

---

87 Provisional Findings, paragraph 5.13.

88 Provisional Findings, Table 1.

89 Provisional Findings, paragraph 5.88.

90 Provisional Findings, paragraph 5.83.

91 Provisional Findings, paragraph 5.15.

92 Provisional Findings, paragraph 5.84(a).

93 Provisional Findings, paragraph 5.84(b).

94 Provisional Findings, paragraph 5.84(b).

95 Provisional Findings, paragraph 5.11.

96 Provisional Findings, paragraph 5.11.

benefits and lower clearing costs".[97] Accordingly, switching some trades away "*may lead to lower benefits and higher costs*".[98]

3.59 These conclusions are also consistent with the European Commission's conclusions in the LSEG/Refinitiv merger which found that:[99]

"*it is difficult for customers of OTC IRD clearing services to switch CCPs because there are few alternative suppliers and they face high switching costs. As such, in addition to being currently the dominant player in CCP clearing of OTC IRD contracts, LCH SwapClear's dominance is reinforced and strengthened by the difficulty for customers to switch*".

3.60 Notably, the Commission concluded that:

(a) it is very unlikely that customers would start clearing fewer OTC IRDs in reaction to one of the customer foreclosure strategies;[100]

(b) customers "*clear where the market clears*"[101] and are therefore unlikely to gradually and individually switch to another CCP provider. In reaching this conclusion the Commission noted that:

(i) switching is logistically difficult and costly as "*the time and cost associated with such an individual and gradual switching strategy is unclear to a number of market participants, which further lessen the prospect and likelihood of customers switching*";[102]

(ii) an "*individual and gradual switching strategy would be difficult, if not improbable*";[103]

(iii) even where both buy and sell-side customers have other CCP connectivity, the Commission still found that "*even for these customers, switching away from LCH SwapClear and transitioning their risks to another CCP (including by closing items in one CCP and re-establishing the open risk position in another CCP) is very costly, lengthy, and risky*";[104] and

(c) the one-off transfer of a customer's entire outstanding portfolio is unlikely as it is "*costly to a degree that it would prove prohibitive for many customers*". This was confirmed by internal documents shared with the Commission which indicated that senior LSEG officials also consider there are "*hurdles and costs associated with switching CCP*".[105]

LCH can target different customer segments

3.61 The CMA has focussed on the ability of large banks to react to any foreclosure strategy. However, whilst large banks are an important part of the compression customer base, compression is provided to a broad range of customers beyond tier 1 banks, including

97 Provisional Findings, paragraph 5.14.

98 Provisional Findings, paragraph 5.14.

99 LSEG/Refinitiv, paragraph 2286.

100 LSEG/Refinitiv, paragraph 2287.

101 LSEG/Refinitiv, paragraph 2290.

102 LSEG/Refinitiv, paragraph 2296.

103 LSEG/Refinitiv, paragraph 2299.

104 LSEG/Refinitiv, paragraph 2301.

105 LSEG/Refinitiv, paragraph 2308.

smaller banks, hedge funds, insurers and pension funds, which all participate in compression runs. For example, the 14 SwapClear banks account for [✂].[106]

3.62 In contrast to large banks which multisource compression services, many of TriOptima's smaller customers only procure services from one compression provider. Virtually all of these customers clear trades through LCH and will pay significantly higher clearing costs than tier 1 banks. In this regard, the merger raises a number of concerns:

(a) smaller customers may be disproportionately affected by any foreclosure strategy by LCH. In the Provisional Findings, the CMA has not considered the impact of foreclosure on different sized customers, but has drawn a general conclusion that the possible actions of a few customers would be sufficient to remove the incentive for LCH to foreclose TriOptima in its entirety. The following examples demonstrate that LCH could implement foreclosure strategies that are targeted and harm different customer segments more than others:

(i) [✂]

(ii) [✂]

(b) LCH will have a strong incentive to bundle clearing services together with Quantile's compression services by implementing a cap on the total fees smaller customers would pay on both clearing and compression. In order to capture TriOptima customers, LCH could practically offer compression services for free as a bundled product.

There is no realistic prospect of wider retaliation

3.63 In seeking to assess the costs of foreclosure, the CMA asked customers to:[107]

> "*estimate the likelihood of them moving a material volume of their spend on other LSEG services (ie excluding OTC IRDs clearing) to alternative providers of those services in response to LCH disadvantaging TriOptima*"

3.64 The vast majority (c. 85% or 11 out of 13) indicated they were "very unlikely" or "fairly unlikely" to switch their spending away from other LSEG services.[108]

3.65 Of the two customers who indicated it was "*fairly likely*" that they would switch their spend to other services, one indicated that they "*would consider making adjustments*",[109] and the other apparently stated that it would "*consider a wider retaliation action for the rest of services*"[110] if raising an issue with LSEG did not lead to a change in LCH's behaviour.

3.66 But in the Provisional Findings, the CMA concludes that some customers "*would switch away from other (new or existing) LSEG or Quantile services*".[111] This is clearly incorrect; *considering* a course of action is very different from actually implementing the course of action. The Inquiry Group's conclusion at paragraph 5.101 that a "*large majority*"[112] of

---

106 See [✂]

107 Provisional Findings, paragraph 5.92 and footnote 222.

108 Four indicated they were "*very unlikely*" and seven indicated "*fairly unlikely*". See Provisional Findings, paragraph 5.954 and footnote 223.

109 Provisional Findings, paragraph 5.94.

110 Provisional Findings, paragraph 5.94.

111 Provisional Findings, paragraph 5.98.

112 Provisional Findings, paragraph 5.101, "*The evidence supported the confidence that the large majority of these customers had that the retaliatory mechanisms available to them would be sufficient to prevent LSEG taking steps to foreclose TriOptima*".

customers had a retaliatory mechanism available to them is therefore incorrect in the context of wider retaliation, as well as narrow retaliation.

3.67 The Provisional Findings also note a number of logistical and coordination issues that would make wider retaliation implausible for customers. The Provisional Findings state that:

(a) customers consider that "*LSEG services are independent from each other and that it would be difficult to coordinate the various divisions within their businesses to move spend from LSEG*".[113] Customers (who are often multi-faceted and complex businesses) would therefore need to undertake significant internal coordination within their own businesses to implement such wider retaliation. Different businesses may also have different reporting lines within their business, each with their own internal performance targets, and therefore they may not be prepared to take action that penalises that part of the business in favour of another;

(b) other customers indicated that they would "*be unlikely not to choose a new service from a provider such as Quantile because of that provider's poor conduct in another market*".[114] In choosing whether to procure a new service from Quantile or LSEG outside of the compression market, the Provisional Findings indicate that customers would not take into account the fact that LSEG is foreclosing TriOptima in the compression market. As LSEG's activities in compression would not effect a customer's procurement decisions in relation to other services, it is implausible to suggest customers would engage in wider retaliation;

(c) the meeting minutes between LSEG and its customers "*do not show customers using their position in one LSEG service (or their overall position) to negotiate successfully with LSEG in relation to another service e.g. to reduce fees for that other service*".[115] The CMA also goes on to say that "*Neither do they demonstrate an escalation of a dispute outside the specific business unit*".[116] This indicates that there is very limited (if any) complementarity in procurement between the different LSEG services, and that there is therefore no pre-existing mechanism by which such wider retaliation can take place; and

(d) the CMA accepts that there are "*significant limits to customers' willingness to switch away from other services provided by the merged entity in response to foreclosure within multilateral compression*"[117] on the basis that "*switching spend from the merged entity to alternative providers in reaction to foreclosure is detrimental to customers, as they would need to leave their preferred option*".[118] The CMA also notes that not adopting new LSEG/Quantile services *"would have some of the same problems for customers as moving spend on existing service"*.[119] However, unlike in relation to the assessment of LCH's market position, no analysis is undertaken to understand the magnitude of those costs, whether there are credible alternatives available for the other LSEG services, or whether there are material barriers to switching (e.g. due to liquidity and network effects).

3.68 The Provisional Findings do not consider or identify the "*other services*" provided by the merged entity they would switch away from. This is a material failing, because, in relation to many of the other services which it provides, LSEG has a market leading position and

---

113 Provisional Findings, paragraph 5.93.

114 Provisional Findings, paragraph 5.95.

115 Provisional Findings, paragraph 5.96.

116 Ibid.

117 Provisional Findings, paragraph 5.98.

118 Ibid.

119 Provisional Findings, footnote 230.

therefore customers would have little or no ability to switch away from many of the services they currently purchase from LSEG.

3.69 Accordingly, [✂] considers that the conclusion that TriOptima's customers could move some of their other LSEG business away to credible alternatives is speculative and unsubstantiated, and does not provide a sufficient evidential basis to conclude that the transaction would not give rise to an SLC.

LCH's incentives will change significantly as a vertically integrated provider

3.70 The European Commission noted in LSEG/Refinitiv that the concept of open access was "*more or less a synonym for not being vertically integrated*".[120] These comments were made in the context of a merger which resulted in the vertical integration of Tradeweb, which is a significant trading venue, with LCH's CCP services. There was evidence before the Commission that "*LCH's top management do not hesitate to discuss openly about LCH's open access model, including about profitability considerations that are linked to LCH's commitment to its open-access model*".[121]

3.71 The vertical integration of LCH and Quantile will significantly affect LCH's incentive to cooperate with TriOptima in implementing compression services. There is a need for continual engagement and technical cooperation between LCH and TriOptima to ensure the smooth and efficient operation of the compression service, including by resolving bugs and other technical glitches in the system. [✂] As explained above, as compression services continue to evolve through innovation, timely and effective cooperation is needed to ensure proper integration with LCH's CCP services. Were LCH to allocate less resource or delay the speed at which it resolves technical issues with TriOptima, this would severely impact TriOptima's ability to compete. In this regard, post-merger, LCH has a clear incentive to favour Quantile and to delay or devote less resource to resolving such technical issues with TriOptima.

3.72 Upon completion of the transaction LSEG will have significant vertical links across the spectrum of the trading lifecycle from venues through to post-trade services including compression. LSEG therefore has significant incentives to reconsider its open access model and seek to act as a vertically integrated provider to capture further market share across all of its services including compression. While the CMA concludes that open access is not a legally binding commitment on LCH, it fails to assess the significant change in competitive dynamics vertical integration has on LSEG's business model.

The CMA has failed to follow its own Merger Assessment Guidelines

3.73 The MAGs "*provide a framework for merger analysis*"[122] and whilst the CMA can depart from the MAGs where it is appropriate to do so, the MAGs note that when doing so the CMA will typically set out its reasons.

3.74 The Provisional Findings substantially depart from the framework for assessing vertical mergers set out in the MAGs, but the CMA fails to provide its reasons for doing so.

3.75 Notably the MAGs make no reference to the possibility of considering wider retaliation when assessing the incentives to foreclose. In assessing incentives, the MAGs refer to the potential for a gain in downstream sales and how this compares to the loss of upstream sales.[123] The European Commission also limits its assessment to the effect of foreclosure

---

120 LSEG/Refinitiv, paragraph 2332.

121 LSEG/Refinitiv, paragraph 2335.

122 MAGs, paragraph 1.12.

123 MAGs, paragraph 7.19(b) and (c).

on the profits of the upstream or downstream division.[124] Whilst the MAGs also refer to other costs and benefits,[125] wider retaliation is not mentioned as one of these costs that will be considered.[126] This is understandable as such costs are generally highly speculative. It is unclear why the CMA has chosen to rely on these highly speculative costs in deciding that LCH will not have an incentive to foreclose in this particular case.

3.76 The MAGs also refer to the need to consider "business strategy" as part of the assessment of incentives. However, the Provisional Findings do not consider this issue at all. This is a particular concern given that the European Commission has recently identified in its review of the LSEG/Refinitiv transaction that "*the transaction would have given to LSEG the ability and incentives to foreclose Tradeweb's rival trading venues and middleware providers*".[127] This suggests that there is a significant risk that foreclosure is at the heart of LSEG's business strategy, across LSEG's businesses.

3.77 But notwithstanding this risk, the Provisional Findings fail to consider the merged entity's business strategy in the context of incentives. It is a well-established principle of administrative law that public authorities are required to follow their guidance unless good reason can be shown to depart from it. In this connection, guidance "*should be given great weight*" and the authority should "*consider* [it], *with great care, and … depart* [from it] *only if it has cogent reasons for doing so*".[128]

3.78 Moreover, assessing business strategies in the context of vertical mergers requires careful consideration in light of the complex interactions that are involved. In this connection, a report prepared for the CMA by E.CA entitled "*Ex-post Evaluation of Vertical Mergers*" states that in assessing vertical mergers it is important to carry out a thorough assessment of all possible market interactions as "*the nature of … market interactions* …[is] *more complex than* …[is] *accounted for by the studied theories of harm*".[129] [✂] considers that the Provisional Findings have not adequately assessed the complex range of interactions that exist within the clearing / compression ecosystem, including by relying on simplistic customer questionnaires and ambiguous responses.

4. THE TRANSACTION WILL RESULT IN A SUBSTANTIAL LESSENING OF COMPETITION

4.1 The Provisional Findings rightly conclude that the merged entity has the ability to engage in foreclosure (against TriOptima) and there are no regulatory or internal LCH governance mechanisms that would prevent LCH from engaging in such foreclosure strategies. The evidence set out in the Provisional Findings does not support the conclusions that are drawn, in fact when properly considered, the evidence clearly indicates that LCH would have very strong incentives to foreclose TriOptima, which will be detrimental to competition and therefore give rise to a SLC.

4.2 In light of the CMA's provisional findings on incentives, it has not considered the effects of foreclosure on competition. However, it is clear that if the merger goes ahead without remedies there will be a substantial negative impact on competition and ultimately customers. In particular, and as recognised in the CMA's Phase 1 decision:

---

124 European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertaking (2008/C 265/07), paragraph 40.

125 MAGs, paragraph 7.19(e).

126 Similar to the MAGs, the European Commission Guidelines do not refer to wider retaliation as a matter which the Commission will take account of.

127 European Commission, "Mergers: Commission clears acquisition of Refinitiv by London Stock Exchange Group, subject to conditions", 13 January 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_103.

128 *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, paragraph 21.

129 E.CA Ex-post Evaluation of Vertical Mergers, page 1.

(a) multilateral compression for OTC IRDs is already concentrated. As TriOptima is the only competitor to Quantile, a successful foreclosure strategy could result in the total elimination of competition in the compression market;

(b) due to the presence of strong network effects, barriers to entry in multilateral compression for OTC IRDs are high and foreclosure may further raise these barriers to entry; and

(c) any reduction in competition will have a negative impact on customers including a loss of choice and potentially increased prices and/or reduced innovation.

4.3 As the CMA will be aware, similar input foreclosure concerns were raised in *LSEG/Refinitiv,* which led to the European Commission concluding that LCH had both the ability and incentive to foreclose competing trading houses in relation to OTC IRDs. In order to remedy the input foreclosure concerns, the European Commission accepted behavioural commitments from LSEG that required LSEG to provide, *inter alia*, non-discriminatory access LCH's CCP services.

4.4 At a minimum, [✂]considers that a similar remedy is essential in this transaction in order to address the SLC, which raises similar input foreclosure concerns to *LSEG/Refinitiv*. An appropriate framework, supervised by a Monitoring Trustee, would need to ensure that LCH provides:

(a) non-discriminatory access to LCH's CCP services in order to provide compression services;

(b) equal access to LCH clearing data to support efficient operation and innovation;

(c) a commitment to support continued innovation, and technology neutrality to ensure LCH does not favour Quantile;

(d) powers for the monitoring trustee to resolve complaints between compression providers and LCH; and

(e) LCH would need to provide a transparent process for setting schedules and include a commitment on compression fees so that it does not amend fees which internally favour Quantile's business.

4.5 It would also be necessary to put in place robust firewalls between LCH's clearing operations and Quantile to protect TriOptima's confidential information being disclosed by LCH to Quantile.[130]

4.6 Absent these measures, TriOptima would be left significantly exposed to a merged entity with significant upstream market power with the clear ability and incentive to foreclose it. [✂] ultimately this reduction in competition would lead to worse outcomes for customers.

130 [✂]