RESPONSE TO THE CMA'S CONSULTATION ON STREAMLINING THE CMA'S APPROACH TO ISSUING DIRECTIONS

HSBC welcomes the opportunity to comment on the Competition and Markets Authority (***CMA***)'s consultation dated 8 December 2022 (the ***Consultation***) on streamlining the CMA's approach to issuing directions in the course of enforcing market and merger undertakings and orders.

HSBC has some concerns regarding the CMA's proposals to streamline its approach on issuing directions. In particular, we are concerned that the removal of the current two-stage process (for firms to provide representations on both the principle of imposing directions, and the subsequent stage through which firms can provide specific representations on the specific requirements of draft directions) increases the likelihood of confirmation bias and adversely impacts procedural fairness.

Directions impose legally binding obligations on businesses and will have significant impacts from an operational perspective to ensure ongoing compliance. It is therefore critical from a procedural fairness perspective that businesses are given appropriate and reasonable opportunity to put forward representations. We consider the new approach disproportionately prioritises speed and efficiencies over due process and the procedural safeguards required for robust and fair enforcement, with potential advantages gained in terms of efficiency heavily outweighed by the adverse impacts on due process.

Without prejudice to the preceding arguments, should the CMA proceed to streamlining the process, we do not consider that a minimum period of two weeks to provide representations on both decision points is appropriate or reasonable. The time period should be extended to at least four weeks to reflect the additional work that firms will face in having to provide two sets of submissions at the same time.

We set out our views on each of these points below.

Risks to procedural fairness

The CMA considers that the current guidance results in a '*duplicative approach*'. We do not consider this to be the case. The current two stages for providing representations serve different purposes and reflect two distinct decisions within the CMA's decision-making process, the first being the CMA's decision regarding the appropriate enforcement action; and the second being the decision on the content and scope of directions. Representations made by firms at each stage will likewise serve different purposes, differ in substance and therefore not be duplicative.

Under the proposed approach, the CMA has suggested that stakeholders can provide the same representations in a single stage process, and that as a consequence the CMA will provide parties with a set of draft directions at the same time as its 'minded to' decision. This could harm procedural fairness for a number of reasons:

- First, we are concerned that the new approach will increase the likelihood of confirmation bias and reduce the ability of parties to influence the CMA's decision on whether directions are the most appropriate enforcement tool. The proposal to merge the two decisions is likely to cloud the CMA's judgement and increase the likelihood of the CMA reaching a decision that supports its prior provisional stance, which ought to be assessed separately and objectively.
- Second, whilst the CMA has now built up some experience of the typical types of directions issued for different types of breaches, each breach and each firm's approach to dealing with breaches will vary and be fact-specific, which the choice and scope of enforcement action must reflect. Representations made in response to the CMA's 'minded to' decision should therefore be a key input into any decision on the scope and content of directions, specifically because they are likely to include representations on appropriateness and proportionality in light of the specific facts. Better and more appropriate directions are more likely to be produced only after the CMA have considered a party's initial representations. The suggestion that there will be

scope for the CMA to alter the draft directions at a later stage is unlikely to address the adverse impact on firms' ability to make proper representations on enforcement action.

- Third, directions often result in significant operational and financial impact on the party to whom they are addressed. [**Redacted**]. Whilst it is not disputed that such directions are often necessary to remedy the impacts of non-compliance, businesses must be afforded a reasonable opportunity to review and assess the feasibility, appropriateness and impact of each direction in the context of the relevant business. Businesses should therefore be provided with a reasonable and separate opportunity to comment comprehensively on the scope and content of directions. Furthermore, requiring representations regarding the two decisions to be made simultaneously could reduce the impact of the individual representations. Parties will need to submit representations 'in the alternative' which can have the effect of weakening the primary representations.

Maintaining the current two-stage process would be consistent with the CMA's approach for two-stage consultative processes regarding remedy compliance enforcement action, in particular where the enforcement action imposes a significant impact on the parties concerned. For example, the CMA provides a two-stage consultative process regarding the appointment of a Monitoring Trustee in the context of ensuring compliance with interim measures. In these cases, the CMA provides the merging parties first with an opportunity to comment on the CMA's provisional decision to appoint a monitoring trustee, and once the decision has been taken regarding the appointment, the parties are provided with draft directions and a subsequent opportunity to comment on the content of such directions. Directions imposed in the context of market and merger remedies result in similar impacts on businesses as compared with the impact of appointing a monitoring trustee, and therefore should be afforded the same due process.

It is acknowledged that in Competition Act 1998 (CA98) investigations, the CMA has the ability to issue the Statement of Objections and Draft Penalty Notice at the same time, however, we consider the process for imposing enforcement action concerning breaches of orders and/or undertakings to be different to, and distinguishable from, CA98 processes. Enforcement outcomes for a CA98 case are typically limited to either the imposition of a fine or no enforcement action being taken. Potential enforcement outcomes for an affected party are therefore limited, predicable, and based on well-established methodologies. In comparison, the CMA has a number of options regarding enforcement action for breaches of orders and/or undertakings which can take a number of forms including no action, informal action (e.g. private or public letters, or formal action such as issuing directions or seeking a court order seeking compliance. In considering the most appropriate course of enforcement action, the CMA is required to consider "*all relevant circumstances*" of the breach and a number of factors[1] such as the significance of the breach and contextual factors. Given this, representations on the CMA's 'minded to' decision constitutes a key procedural step as it represents the main opportunity for a firm to influence the CMA's decision making and enforcement outcomes. Furthermore, the process for imposing enforcement action for breaches of orders and/or undertakings is not subject to the various procedural steps in place for breaches of competition law (e.g. state of play meetings, oral hearing etc) which provide parties with several opportunities to make representations before the Statement of Objections and Draft Penalty Notice stage. Consultative processes for breaches of orders and/or undertakings are already significantly shorter than CA98 processes, therefore it is important to not further dilute the already limited opportunities for parties to exercise their rights of defence.

Efficiency gains are outweighed by the adverse impacts on due process

In addition to the arguments above, our view is that the efficiency justifications are over-stated.

[1] Merger and Market remedies – guidance on reporting, investigation, and enforcement of potential breaches (CMA 136).

The CMA has stated that the proposed streamlined approach "*will enable the CMA to act with greater agility and pace when enforcing compliance with orders and undertakings*" and that the increased flexibility will "*deliver benefits*" and enable breaches to be "*brought to an end more swiftly*" [2].

Our view is that the efficiency benefits for the CMA from the streamlined approach will be marginal and that the new approach will not result in efficiencies or benefits for the concerned party.

The proposed approach will result in only a slightly shorter lead time until the issuing of the directions but will significantly shorten and condense the opportunity to make representations and does not generate the efficiencies for either the CMA or the firms:

- Limited gain for the CMA – under the proposal the CMA will need to spend more time reaching its 'minded to' decision on account of having to prepare draft directions at the same time. Such an approach may lead to inefficiencies for the CMA as it will have to produce draft directions in every case when they may not be needed. For the reasons noted above, we consider that the current process is just as efficient and will ensure better enforcement outcomes as the CMA will be able to take initial representations into account before producing draft directions, thereby resulting in more appropriate draft directions from the outset.
- Disproportionate impact on firms – from the firms' perspective, the streamlined process is unlikely to result in efficiencies or benefits. Firms will have half the time to provide two sets of representations, concerning the provisional decision and the directions themselves. Given the impacts on businesses as noted above, seeking views and comments internally involves engagement with a number of stakeholders across the organisation. Condensing the process and timeframe will place disproportionate burden on the party involved.

For these reasons, we do not agree with the CMA's statements at para 2.4 of the Consultation that the proposed process "*should result in efficiencies both for parties and the CMA in the majority of situations".* Given the significant impact that directions can have on firms and the need to ensure due process over marginal efficiency gains, we strongly believe that parties should be afforded the current two-stage process in *all* circumstances to ensure procedural fairness and robust enforcement outcomes.

If CMA proceeds to streamline the process, minimum time period must be longer

Without prejudice to the foregoing, should the CMA proceed to streamline the process for issuing directions, we do not consider the minimum time period of two weeks to be sufficient.

To ensure due process, firms must be provided with a reasonable opportunity to provide representations on draft directions given the resulting impact on businesses.

Under the proposed process businesses will be required to submit two sets of distinct representations within the time period that they previously had to submit one set.

For the reasons noted above, internal assessment of the impact of draft directions takes times and involves a number of different stakeholders across the organisation, often including heads of business, legal, compliance, control and operation teams, IT as well as audit teams. [**Redacted**]. This highlights the importance with which businesses consider the representation process and the different teams involved at the different stages.

[**Redacted**]. Compressing the existing time periods would inevitability reduce the ability to businesses to make representations, arguably impacting their rights of defence.

For these reasons, we urge the CMA to offer a minimum period of at least four (working) weeks in order to mirror the existing time periods afforded for the current two-stage process.

[2] Consultation, para 1.6

Lastly, should the CMA proceed to streamline the process, but retain the option of separating the two consultations (as proposed at para 2.4 of the Consultation), we urge the CMA to provide more guidance for firms on the circumstances in which it considers a two-stage consultation process necessary and the circumstances where it does not. Greater guidance is necessary to ensure transparency of the CMA's decision-making process and to provide firms with legal certainly regarding the processes to which they could be subject.