Linklaters

Linklaters response to the BEIS consultation on Reforming competition and consumer Policy

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EXECUTIVE SUMMARY

1.1 Introduction

(1) This submission is submitted by Linklaters LLP in response to the consultation document issued by the Department of Business, Energy & Industrial Strategy ("**BEIS**") on 20 July 2021 entitled "*Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers*" (the "**Consultation**").

(2) Linklaters welcomes the opportunity to comment on the Consultation and provide input on the proposed reforms at this early stage. Reflecting on the consultation as a whole, Linklaters agrees that there are various aspects of both the competition and consumer regimes which are not functioning well and where reform is desirable.

(3) As a general remark, we note that the Consultation is extremely broad in scope, and many of the proposals are expressed in high level terms. There is limited insight at this stage as to how the proposals would be designed and implemented in practice. We would, therefore, urge Government to engage in further consultation with stakeholders as the proposals are refined going forward.

(4) Our experience, and that of many of our clients, is that engaging with the Competition and Markets Authority ("**CMA**")[1] has become increasingly onerous and costly in recent years. It is important to place these proposed reforms in a broader context, where businesses are currently operating in an already challenging economic environment. We are supportive of a number of the proposals aimed at greater efficiency and flexibility, and facilitating greater alignment with international counterparts. We also note, however, that a general theme that runs through the Consultation is the increase in powers accorded to the CMA, both in terms of its ability to gather evidence and its enforcement functions. While greater enforcement powers may be merited in some instances, it is important to balance the interests of competition law enforcement against the burden that these reforms will likely have on businesses if adopted. We would encourage Government to give careful thought to the checks and balances that are required to protect parties' rights of defence and to take steps to ensure that the CMA adopts a proportionate and reasonable approach to the exercise of its functions.

(5) We fully appreciate that it is important for Government to address wider concerns over a perceived lack of antitrust and mergers enforcement, increasing market concentration and a weakening of public faith in the market system. We support the policy goal of more efficiently and effectively addressing issues of abuse, the acquisition of private market power, or the exploitation of unchecked market malfunction. However, the democratic solution to unchecked private power is not unchecked power in the hands of the state: we are concerned by any direction of travel that proposes to combine heavier powers with lighter scrutiny and oversight. This applies notwithstanding that public interest efficiency and good faith intentions are the motivations behind the accumulation of greater powers and sanctions.

(6) While increased powers for the CMA may be appropriate in certain instances, this will not solve all problems with the regime, particularly where there are structural issues with how the CMA currently operates. It is, therefore, critical that both its existing and any new powers are subject to effective checks and balances that will ensure the CMA remains fully

[1] Where applicable, references to the CMA includes sector regulators that exercise concurrent competition powers (including the FCA, Ofcom, Ofgem, Ofwat, etc.) and where appropriate the Office of Fair Trading ("**OFT**") and the Competition Commission ("**CC**").

accountable for the quality of both its decision-making processes and its decisions themselves.

(7) Government's goal to reform the competition and consumer regimes for the twenty-first century is much needed but it must be done consistently with Government's wider policy goals to demonstrate that, post-Brexit, the UK is 'open for business' with an effective but regulatory system that promotes competition rather than weakening the UK's competitive position.

(8) We have set out below a high-level overview of Linklaters' key views on the proposed areas of reform.

1.2 Competition policy

(9) Linklaters appreciates the importance of ensuring the CMA has an effective strategic approach to its work but, in our experience the CMA is already well-placed to consider and identify those sectors of the economy which may require investigation or, ultimately, intervention.

(10) To the extent that Government guidance is required, Linklaters considers this should be fundamentally evidence-based (rather than subject to the political winds of the day). Government may also consider that steers to the CMA should also highlight areas (such as sustainability) where the CMA could issue more guidance for businesses on how they can collaborate with other firms while still complying with competition law.

1.3 Market inquiries

(11) Linklaters agrees with Government that the current markets regime has significant shortcomings. In particular, it can be unduly slow, burdensome, and inflexible – resulting in unnecessary and disproportionate costs for both consumers and businesses.

(12) Ensuring potential consumers harms are addressed swiftly and efficiently is important – but it must not be at the expense of market of market participants' legal rights and the due process that is the cornerstone of the CMA's international reputation. Market inquiries have far-reaching consequences for firms and consumers, and key decisions must consequently be evidence-based with proper opportunities for consultations with stakeholders, and sufficient scrutiny of decisions (particularly regarding remedies). The same legal standard for imposing remedies in both market studies and investigations must therefore apply.

(13) Linklaters strongly urges Government to ensure that second-level scrutiny of decisions and remedies is carried out by a sufficiently independent decision-making body that is able to provide meaningful challenges to the CMA case team and which is accessible to parties.

(14) We consider that the existing two-stage market study and market investigation system should also be retained, rather than replaced with a single-stage inquiry. Although the current system can be unduly slow and prolonged, a single-stage inquiry risks simple and less problematic cases becoming subject to additional scrutiny over a longer timeframe than would be otherwise be the case.

(15) Streamlining the market inquiry process can start with the current regime where there is already scope for greater efficiencies between the market study and market investigation stages. Where appropriate, the CMA also already has the power to refer a market investigation without first conducting a market study (which would have an effect similar to the proposed single-stage regime).

(16) Linklaters has strong concerns about empowering the CMA to impose interim measures from the outset of a market inquiry. Interim measures can be hugely costly and damaging for market participants but, unlike in Competition Act 1998 ("**CA98**") cases, interim measures in a market inquiry would be targeting presumptively legal and permissible ordinary course conduct by businesses. Imposing interim measures would, therefore, be a particularly severe intrusion on the legal rights of those firms which are subject to them.

(17) Enabling the CMA to accept legally binding commitments at any stage of a market inquiry where solutions can be agreed with all relevant market participants would be an effective and desirable means of resolving competition concerns in a market.

1.4 Merger control

1.5 Changing the turnover test from £70m to £100m is a welcome but largely cosmetic reform. Irrespective of this, the share of supply test will continue to capture almost all deals that the CMA would otherwise have reviewed where target turnover is between £70m and £100m.

1.6 The £10m worldwide turnover safe harbour is equally welcome but, again, largely cosmetic. A significant number of "small" CMA deals have target turnover of <£10m but acquirer >£10m. Based on Linklaters' research, the safe harbour would have applied to a single case of the subset of cases sent to Phase 2 since 1 January 2018 to date.

1.7 The extension of the share of supply test to remove the increment (where one party has UK turnover >£100m) would also remove the jurisdictional requirement of a UK nexus for the transaction. This is a step in the wrong direction. It would result in the substantive SLC test as the only nexus test.

1.8 While not requiring an increment to share of supply would result in a welcome removal of the inelegant "gymnastics" to which the CMA has lawfully resorted to construct an increment and assert jurisdiction in incumbent/challenger deals, that in itself does not justify the proposed change. Instead, if the CMA's intention is to capture non-horizontal mergers below the turnover threshold, a separate nexus requirement (e.g. transaction value of the UK-part of the target) should be introduced.

1.9 A UK transaction nexus requirement is important, as is recognised in the proposed SMS merger reforms, which presuppose a UK transaction nexus requirement. The same should apply to non-SMS mergers.

1.10 If Government's policy goal is that the CMA should have power to review the full universe of potential competition cases even without any UK nexus, then we would question the wisdom of that policy. And in that case, Linklaters considers it would be more honest and sensible to have no limit rather than expanded jurisdictional boundaries that are so elastic as to be largely cosmetic. Ironically, it would provide greater legal certainty: the Government would want the CMA to be able to review any transaction, period, and firms can dispense with jurisdictional uncertainty.

1.11 On the other hand, if the policy goal is that the CMA should have *some* jurisdictional limits based on UK nexus, the net effect of the three proposals (two largely cosmetic reductions in jurisdiction and one step change expansion) is a substantial net increase in jurisdiction, with a net increase in legal uncertainty for parties with UK turnover >£100m.

(18) In principle, Linklaters considers that the proposed non-jurisdictional reforms are broadly sensible. However, the principal problem with UK merger control, that calls a legislative solution, is not tabled in the consultation, and is a combination of:

(a) undue timetable pressure at Phase 2 and the CMA's duty to consult on Provisional Findings ("**PFs**"); and

(b) the Phase 2 duty of the CMA to consult on public PFs which the merger parties receive only after the CMA has already publicly committed to its position – with meaningful time (in adverse cases) only left for remedies thereafter.

1.12 CMA Panel decision-making

(19) In principle, Linklaters is supportive of a smaller pool of dedicated full-time Panel members, providing that there is continued breadth of experience across Panel members (including specialist experience).

(20) Reducing the role of Panel members to exclude them some administrative decisions, such as granting derogations, is sensible. However, reducing the role of Panel members to making final decisions on substantive theories of harm and remedies (i.e., having no or limited role in crucial earlier decisions, including PFs) would be a step backwards for the regime and undermines the value of the "fresh pair of eyes" rationale provided by the Panel. It risks the appearance of rubber-stamping, regardless of reality.

(21) It is crucial that parties have proportionate rights of access to ultimate decision makers, whether the Panel or other bodies, at the crucial stages, before any decision is taken (i.e. prior to PFs). Currently, the main party hearings and PFs process do not meaningfully serve the function of a "day in court" in any way analogous to other regimes, including those with administrative models. The main parties' access to decision-makers is highly rationed, partly due to structural legislative constraints (see timetable and PFs comments) but also simply because that is the way it has always been done. The live interaction between parties and Panel does not in standard procedure follow a format that allows for the case against a merger to be presented, and responded to, in front of the Panel (as applies in a tribunal setting, and as applies at Phase 1 in an Issues Meeting – which lacks a Phase 2 equivalent), after which the Panel decides. These issues could be addressed without prejudice to shrinking the size of the Panel system; indeed they would augment such a change as a more dedicated Panel system would make for better "judges" to hear the case for remedial intervention i.e. SLC (presented by CMA staff) and against (presented by the parties).

(22) Linklaters also recommends Government and the CMA consider expanding the role of the Procedural Officer, which has been a welcome introduction but whose role is currently absurdly limited in scope.

1.13 Antitrust

(23) Linklaters considers that, in principle, reforms to the jurisdictional requirements and immunity thresholds are reasonable.

(24) Linklaters agrees with Government that the increasing significance of follow-on damages in various jurisdictions is a likely significant factor in the reported decline in leniency applications but we are also concerned that one of Government's key objective Government's proposed reforms is "to restore public confidence in the market system" – which risks being undermined by reforms that would prevent firms that have engaged in anticompetitive conduct being held accountable to those that have suffered harm and even allow them to retain the financial benefit from the cartel. As such, Linklaters considers that a system of partial leniency may be more appropriate in striking a balance between ensuring effective enforcement and effective accountability.

(25) Linklaters also has concerns regarding the proposed changes in relation to interim measures. It is crucial that any businesses that may be subject to interim measures retains its legal rights of defence and has a fair opportunity to review sufficient evidence against it to challenge the measures.

(26) Linklaters considers that reforms to the CMA's tools for gathering evidence in CA98 investigations, early resolution agreements and the proposals to protect documents are reasonable, in principle, subject to a number of concerns regarding their implementation.

1.14 Appeals

(27) Linklaters is strongly of the view that the existing "full merits" standard is the appropriate level of judicial scrutiny of the CMA's decisions in CA98 investigations. Changing the level of scrutiny to a "judicial review" standard would critically undermine the Competition Appeal Tribunal's ("**CAT**") ability to "provide robust quality assurance of the CMA's interpretation of competition law" – one of Government's key objectives – as well as risking violating the fundamental requirements of Article 6 of the European Convention on Human Rights.

(28) A CA98 infringement decision can have severe consequences for the company and its management / directors – including not only financial penalties by potentially director disqualification and criminal enforcement. It is therefore essential that the facts in each alleged infringement are capable of ultimately being assessed and determined by an expert and impartial court.

(29) Fundamentally, the duration of an appeal is extremely limited relative to the prolonged periods of time for which the investigation itself is carried out by the CMA – if there is a need for greater speed and faster resolution of cases, then the appropriate place to start is with the CMA's own administrative processes.

1.15 Investigative powers and penalties

(30) Linklaters supports the need for the CMA to conduct investigations efficiently and to obtain accurate information from respondents. However, it is not clear that the CMA's existing evidence gathering tools are preventing it from achieving these aims – neither the Consultation nor the Penrose Report provide any evidence of CMA cases being disrupted or hindered by an inability to obtain information from respondents.

(31) Linklaters therefore considers that the CMA's existing tools are sufficient and effective, and there is no need for increased penalties or additional accountability.

(32) As regards the CMA's proposed new enforcement powers, Linklaters notes that such powers must not apply retrospectively and, in line with our views elsewhere in this response, any penalties imposed must be subject to appeal at a "full merits" standard.

1.16 Consumer rights

(33) Linklaters welcomes Government's proposals to modernise consumer laws and to update them for the digital age. In particular, Linklaters welcomes Government's proposals to focus on specific practices (including tackling subscription traps, preventing online exploitation of consumers including through fake online reviews, and introducing better pre-payment protections) to the extent that doing so better protects consumers.

(34) However, it is important that Government ensure the reforms: (i) provide certainty for businesses, particularly on the scope and application of consumer laws for online businesses; and (ii) do not introduce an unrealistic compliance burden for businesses.

1.17 Consumer law enforcement

(35) In broad terms, Linklaters considers that Government's proposal to introduce an administrative model for consumer law enforcement is reasonable – although subject to the concerns raised above with respect to the CMA's administrative decision-making process. In particular, as with antitrust enforcement, Linklaters strongly considers that a "full merits" standard is the appropriate level of judicial scrutiny of the CMA's decisions made in consumer law investigations.

(36) Linklaters considers that Government's proposal to enable the CMA to impose fines of up to 10% of global turnover for traders that breach consumer protection law would go well beyond what is necessary for deterrence purposes, as reflected by the fining powers in other jurisdictions.

(37) Linklaters has set out several high-level recommendations to Government as to how it can better support consumers enforcing their rights independently. We agree that the Alternative Dispute Resolution ("ADR") landscape could be reformed in order to improve clarity, awareness, processes, and timelines. We would caution, however, that any development in ADR in the consumer/competition field align with developments in general civil disputes/proceedings.

(38) As regards collective actions and collective redress, Linklaters considers that legislative reform at this stage would be premature, given the progress currently being make by the courts in determining how existing mechanisms apply.

COMPETITION POLICY

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

(39) Linklaters notes that the CMA used the following metrics in its 2020 State of Competition report previously:[2]

- concentration levels – the structure of industries and the extent to which industry turnover is taken by the largest firms;
- indicators of dynamic competition – the rates of business entry and exit, and the stability of the positions of the largest firms in the economy;
- profitability and mark-ups – the levels of UK businesses' profits, the markups of prices over costs charged by businesses and the distribution of profits among businesses;
- profit and mark-up persistence – how likely the most profitable businesses are to remain the most profitable businesses;
- consumer surveys – broad measures such as trust in and satisfaction with consumer markets;
- high frequency data on business formation and closure during the pandemic; and

[2]The State of UK Competition 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf

- data on consumer and business experiences during the pandemic.

(40) We consider these metrics to be generally reasonable. However, it is important they are considered in a holistic manner: no single metric can effectively capture the competitive dynamics of an industry. For example, despite a market being structurally concentrated, intense competition and high levels of innovation can still exist. Additionally, metrics such as customer surveys may reflect issues that are not a product of ineffective competition and, in absence of other metrics, are not necessarily a reliable indicator of competition on service.

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

Further mandatory information-gathering powers may place material burdens on companies

(41) As discussed below, the burdens on parties associated with market inquiries, merger reviews and CA98 investigations has grown exponentially over the past decade. Linklaters would therefore caution against introducing further mandatory information-gathering powers which may impose considerable additional burdens on companies that do not have the spare resources or budget to deal with what may be very broad and expansive requests, requiring the diversion of staff (including senior management) from other activities, without a clear understanding of the extent or way in which the data gathered and provided is actually going to be used in the CMA's analysis.

(42) If Government remains committed to regular state of competition reports, we recommend the CMA is requested to take a more targeted approach, with carefully scoped voluntary requests for information, and clearer communication as to how the information is going to be used.

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

The CMA's independence must not risk being compromised by political steer

(43) The independence of the CMA, free from political intervention, remains a fundamental principle of the UK's competition regime. We consider that the CMA is well placed in and of itself to consider and identify those sectors of the economy which may require assessment or, ultimately, intervention.

(44) To the extent that Government does provide such strategic and policy steers to the CMA, Linklaters considers that it is crucial that such guidance is provided based on well-founded evidence (for example, based on the state of competition reports if they are provided regularly) rather than specific sectors potentially being targeted for purely political reasons and there may be little objective merit in the CMA investigating those sectors.

(45) It would also be useful for Government to highlight areas where competition and consumer law may in some instances be hindering businesses from complying with wider laws and policy goals as effectively as possible. In such cases, it could propose the CMA provide additional guidance and encouragement on how businesses can pursue such goals within the remit of competition law. A current much-discussed example is sustainability, and the CMA is due to provide advice to the Secretary of State for BEIS on how competition and consumer law can help the UK reach net zero and sustainability goals in the coming months. Other examples where collaboration between competing firms may have wider policy benefits could include modern slavery, more environmentally-friendly packaging, etc., where firms would benefit from sharing ideas on best practice, pooling resources, or sharing non-commercially sensitive information regarding supply chain integrity concerns.

MARKET INQUIRIES

(46) Linklaters welcomes Government's commitment to reassessing the CMA's market inquiry tool so that it is better able to facilitate competition, innovation, and growth in markets across the UK. While the markets regime has driven a number of welcome reforms in various markets in recent years, such as banking, the Government is correct that the regime has significant shortcomings. In particular, it can be slow, burdensome, and inflexible, resulting in unnecessary and disproportionate costs on both consumers and businesses.

(47) As Government notes, market studies and market investigations are a uniquely powerful means for the CMA to identify and address competition concerns and structural weaknesses in markets of all types, whether they are highly dynamic and rapidly evolving digital markets or more traditional markets where incumbents are facing challenges from innovative new disrupters. Linklaters notes that many of these challenges can also be addressed *within* the current regime and the existing legislative framework.

(48) We strongly support the Government's focus on ensuring potential consumer harms are addressed swiftly and efficiently, but this must not be at the expense of market participants' legal rights and due process that are the cornerstone of the CMA's international reputation. Market inquiries can have far-reaching consequences for market participants and consumers, and it is critical that key decisions are evidence-based with proper opportunity for consultation with relevant stakeholders.

(49) The current markets regime places significant burdens on market participants – end-to-end, a market study and market investigation can take three years, plus additional time for the design and implementation of remedies where required. During this time, consumers, businesses, and investors often face considerable uncertainty about the future of the market, which may have the unintended consequence of slowing down investment and innovation. CMA inquiries (including responding to extensive information requests and preparing submissions) invariably take up significant resources. These are not only financial but very often include key staff being diverted from their roles to focus on the inquiry and senior management being diverted from the core tasks of running the business.

(50) Crucially, market inquiries impose burdens on firms that have neither actively invited a review as the result of a transaction (as with mergers), nor given cause for reasonable grounds to suspect unlawful conduct (as with antitrust investigations). While there is, therefore, merit in streamlining the process to reduce the burden on all parties and to resolve any consumer harms as swiftly as possible, this must not be at the expense of the level of scrutiny afforded to the investigation and especially to potential remedies. Linklaters also considers it important that the CMA's State of Competition work does not in practice result in an extension of the markets regime, with companies finding themselves initially subject to burdensome "State of Competition" requests for information, and then a full market inquiry.

(51) Linklaters notes Government's concern that market studies and investigations have declined due to the time and resources involved. However, it is notable that four of the eight market studies opened, and two of the four market investigations opened (either by the CMA or a sector regulator) since 1 April 2014 were completed more than three months before the statutory deadline.[3]

[3] The four market studies completed more than three months before the statutory deadline are electric vehicle charging, statutory audit, heat networks and investment consultancy and fiduciary management services. The two market investigations are funerals and investment consultancy and fiduciary managements services.

(52) Ultimately, Government's goal in these reforms should be a markets regime that is proportionate, adaptable, and flexible, taking into account the nature of the market, the number and nature of stakeholders, the substantive issues arising and the potential remedies that may (or may not) be appropriate.

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

The same legal standard for imposing remedies must apply to both market studies and investigations

(53) In principle, empowering the CMA to impose certain remedies at the end of a market study process, without the need for a full market investigation, may be an effective way of streamlining the market inquiry process and enabling clear-cut adverse effects on competition to be remedied more swiftly.

(54) However, this proposal faces significant practical challenges. It is critical that accelerating the remedies process does not compromise its integrity. The same level of evidence must be required and, as Government proposes, the same legal standard, i.e., an adverse effect on competition, must be met as is currently the case at the end of a market investigation. This would effectively mean that remedies could only be imposed at the end of a market study in cases where *both* the adverse effect on competition *and* the remedial measures necessary are so clear-cut and readily evidenced that further investigation is unnecessary.

Only behavioural remedies should be available at the conclusion of a market study

(55) Linklaters agrees that structural remedies, such as divestment of assets or IP licensing, should be reserved for use in full market investigations given that, compared to behavioural remedies, they are generally more intrusive, impose greater costs and are longer-term/permanent in nature. While the same legal and evidential standard must be met for both behavioural and structural remedies, it is appropriate that firms that may be subject to structural remedies, and the CMA, have more time to explore the need for, and consequences of, structural remedies.

(56) Alternatively, given the practical challenges identified above, Linklaters considers that it may be more effective for the CMA to impose interim measures ("**IMs**") at the end of a market study (prior to a market investigation) rather than final behavioural remedies.

The CMA should extend the statutory timetable when it proposes remedies at the end of a market study

(57) Empowering the CMA to impose certain remedies at the end of a market study process increases the risk of a rushed outcome. There is both a risk of under-enforcement (e.g., because the CMA did not consider it had sufficient evidence to impose remedies, leading to an adverse effect on competition continuing) or over-enforcement (e.g., because the CMA lacked sufficient time to fine-tune more nuanced remedies, potentially imposing a disproportionate burden on market participants and consumers). In addition to the above, Government risks creating a *perception* by third parties (whether market participants, consumers, or the media) that the CMA's accelerated process has resulted in under- or over-enforcement, a view which risks damaging public and business confidence in the effectiveness and independence of the regulator.

(58) In practice, the markets investigated by the CMA (not least in digital and novel markets) are often very complex. Even (perhaps especially) where there are pre-existing perceptions

around the alleged adverse effect on competition and the resulting consumer harm, significant work may be required for the CMA to gain a full understanding of the operation of the relevant market, and it may be unrealistic to expect that the requisite level of evidence could be requested, collected and analysed, and behavioural remedies designed and implemented, within a 12-month period (in circumstances beyond those where market participants are already willing to offer undertakings-in-lieu ("**UILS**") of a market investigation reference ("**MIR**")). A rushed process would disadvantage not only consumers and businesses (facing unnecessary costs or increased restrictions from poorly thought through remedies) but also the CMA itself (facing greater risks of appeals and damage to its reputation where remedies do not work as anticipated).

(59) We note Government is considering extending the statutory timetable for market studies in order to allow for a thorough consideration of the proposed remedies. We agree this may be necessary and consider that, in order to alleviate the above concerns, an extension of up to six months (as opposed to three) would be most appropriate.[4]

Second-level scrutiny by a decision-maker must be meaningful and accessible by parties

(60) In terms of the appropriate decision-maker for market study remedies, it is crucial that there is a substantive second level of review, and there may be merit in Government's proposal that this is the CMA Board. However, in contrast to a decision whether or not to refer a market for a full MIR, the CMA Board would need to consider a large amount of detailed technical information provided by the case team in order to assess the appropriateness, sufficiency, and proportionality of the remedy being proposed. Further, providing a fresh review and 'second pair of eyes' for the imposition of remedies (as opposed to its current role approving consensual UILs) will require far more extensive and substantive access to the CMA board by third parties (and, in particular, market participants that would be subject to remedies). Providing a meaningful level of scrutiny and challenge to proposed remedies would require the CMA Board to be involved in, e.g., detailed hearings with parties so they have the opportunity to make representations directly to decision-makers.

(61) We therefore encourage Government and the CMA to consider whether the CMA board is well placed to assume this role, or whether a Remedies Group could be formed from the CMA Panel to take decisions of this nature.

The requirement to consult on an MIR within six months should be removed

(62) If the current two-stage market inquiry format is retained, we agree that the CMA's obligation to consult on an MIR within the first six months could be removed. In practice, this statutory timeframe acts to compress the information-gathering and decision-making periods of the market study into the initial six months and is unduly restrictive. The CMA should have the capacity to decide whether or not to make an MIR at any point during the market study, giving it the flexibility to make this decision as soon as it can while ensuring that it has the time to collect and review the requisite evidence and give full consideration to the appropriate next steps, including possible remedies.

The CMA does not require further flexibility to define the scope of market investigations

(63) While we agree in principle that it is efficient for the CMA to focus on specific issues that have been identified during market studies, in Linklaters' experience this is not a primary source of delays. The CMA already has the power to make an MIR for "any feature, or

[4] Consultation, para.1.60.

combination of features, of a market".[5] Additionally, in practice, the CMA publishes a Statement of Scope when launching a market study notice, which sets out the specific parameters of the study (including which parts of the market the CMA does and does not intend to investigate). Similarly, following the MIR, the CMA's Issues Statement identifies the issues and potential theories of harm on which it intends to focus (which are themselves often interrelated).[6] The CMA does not, therefore, currently lack, at a legislative level, the ability to narrow the scope of its inquiries to just the concerning elements of a market.

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

The existing two-stage market study and market investigation system should be retained

(64) Linklaters considers that there is a significant advantage to retaining the existing two-stage market study and market investigation system. While the current process can often be burdensome, unduly slow, and prolonged, replacing the two-stage process with a single-stage market inquiry tool risks relatively simple or unproblematic cases (e.g., where no remedies are required, or the CMA considers that the issues are best addressed via recommendations or guidance) becoming subject to additional scrutiny over a longer timeframe than would otherwise be the case. The continued distinction between market studies and market investigations should at least ensure that markets are only subject to an extended in-depth review where there are substantive concerns in the market that merit such a review. For example, the electric vehicle charging market study is an example of a market study where issues could be readily identified within a short timeframe, and recommendations made to Government and local authorities who are best placed to take action to address these (with the CMA opening a targeted CA98 investigation to assess particular issues that are better addressed via that process).

(65) The Government is concerned that "the time and cost of running both a market study and a market investigation may deter the CMA from opening market investigations".[7] However, by this logic, the prospect of resourcing and opening a single-stage 24-month inquiry is likely to be more off-putting than opening a first stage market study (particularly for simpler cases which could be resolved without the need for a market investigations). It is notable that, since 1 April 2014, two thirds (8 out of 12) of market studies opened by the CMA or a sector regulator have concluded without an MIR (and all seven of those which have so far concluded have nevertheless resulted in some form of remedial action).[8] Moreover, the two-stage process has introduced a number of benefits, including greater procedural transparency and certainty stemming from the formal process that provide a real benefit to both businesses and the CMA.

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[5] s.131 Enterprise Act 2002.

[6] See, e.g., funerals, retail banking and energy.

[7] Consultation, para. 1.54.

[8] Figure comprises cases whose statutory deadline to publish a final report falls between 01 April 2014 and 01 April 2022.

Market studies opened by CMA (Legal services; Digital comparison tools; Care homes; Heat networks; Statutory audit; Online platforms and digital advertising; Funerals and crematoria services; Electric vehicle charging; Children's social care provision).

Market investigation references by CMA or sector regulator (Energy; Retail banking; Investment consultancy and fiduciary management services; Funerals and crematoria services).

Figure does not include Children's social care provision (interim and final reports not yet published). Remedial action recommended in Legal services, Digital comparison tools, Care homes for the elderly, Heat networks, Statutory audit, Online platforms and digital advertising, Electric vehicle charging.

There is already scope for greater synergies between the market study stage and the market investigation stage should be created

(66) Notwithstanding the sound advantage of retaining the existing two-stage system, there are material inefficiencies in the current process, most notably at the outset of the market investigation. Some previous investigations have appeared to use very little of the information provided by parties in the market study, which can be frustrating for parties who have invested significant time and resources in the process. Where the CMA, rather than a sector regulator, undertakes the market study it would be more efficient if the second stage investigation was treated as an extension of the study, rather than starting afresh.

(67) These efficiencies could be addressed within the two-stage system by strengthening synergies between the two stages – if the latter part of the market study were used to narrow the scope of issues for the market investigation, this would allow the CMA to better focus at the start of the market investigation – saving time and resources for all. While Linklaters agrees a 'fresh pair of eyes' is important (see further our response to Question 13 below), taking advantage of synergies on the transfer of information provided during the market study would be beneficial without necessarily compromising the independence of the second stage review.

In self-evidently complex cases, the CMA can already use its power to refer a market investigation without first conducting a market study

(68) Alternatively, moving straight to a market investigation for self-evidently complex cases (or, e.g., where concerns are around concentration and any remedies are likely to be structural) would streamline the process, remove duplication, and give the CMA more flexibility over its timetable –the same benefits as the proposed single-stage market inquiry would be afforded to the market inquiry process. As Government notes, the CMA already has the power to refer a market investigation without first conducting a market study. However, it has not used this power since its formation in 2014. The Office of Fair Trading, by comparison, referred four markets to the Competition Commission without a market study.[9] Although a market investigation only lasts 18 months, it can be extended by a further six months – in line with the 24 months proposed by Government for a single-stage market inquiry. For complex cases where remedies are more likely to be imposed, this would nevertheless be a meaningful improvement over the current timeframe of up to three years.

(69) If a single-stage process is implemented, it will still be crucial to ensure that there is sufficient scrutiny of decisions from an independent decision-maker, (see further the response to Question 13 below), to ensure a 'fresh pair of eyes' which would challenge the provisional conclusions of the case team, with access from market participants.

[9] The four markets in question were groceries, domestic bulk LPG, payday lending and statutory audit; Consultation, figure 2.

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

IMs in market inquiries would be a particularly severe intrusion on the legal rights of those firms subject to them

(70) We agree that it is important that any adverse effects on competition and consumer harm within a market should be addressed by the CMA as soon as reasonably possible. However, in a market inquiry it is not appropriate that this is done at the outset (or indeed, in the early information-gathering stages) of the investigation in the form of IMs.

(71) As Government notes, the CMA can impose IMs in CA98 investigations where it is necessary as a matter of urgency for the purpose of preventing significant damage to a particular person or category of person, or to protect the public interest. The CMA also has the power to impose IMs where it is undertaking a merger control review of a transaction. However, these situations are categorically distinct from that of a market inquiry. In particular:

- in a CA98 investigation, the CMA can only open an investigation and impose IMs where it has reasonable grounds to suspect a breach of the CA98, supported by evidence (e.g., from information supplied by a leniency applicant or a complainant or following a market inquiry);
- in a merger review, one or more parties have proactively engaged in a transaction resulting a structural change in the market (with potentially anticompetitive consequences), and IMs are only imposed to ensure the status quo and the possibility of remedies are protected pending the outcome of a merger investigation; whereas
- in a market inquiry, there are typically no reasonable grounds to suspect unlawful behaviour by individual market participants, nor have businesses entered into a relevant merger situation resulting in a change of market structure.

Any IMs would, therefore, be targeting presumptively legal and permissible ordinary course conduct by businesses. As a result, imposing IMs would be a particularly severe intrusion on the legal rights of those firms subject to them.

(72) In contrast to the information that the CMA is likely to have gathered prior to the opening of a CA98 investigation (and the relatively readily available fact that a transaction has completed or is likely to complete in a merger situation), the CMA is unlikely to have carried out extensive or substantial evidence gathering prior to the start of a market inquiry. It is therefore very unlikely to have the necessary evidence available to it to target IMs effectively and proportionately. Rather, any IMs risk being unwieldy, potentially excessive, and disproportionate, with the potential to distort the market and harm businesses and their legitimate conduct (particularly if, following a market inquiry, the CMA determines that an equivalent remedy is not necessary).

IMs can have far-reaching and profoundly damaging consequences, for businesses and markets.

(73) It should be reiterated that, although IMs may theoretically be temporary (although by no means short-term, given a market inquiry could last from one to three years), their consequences can be far-reaching and profoundly damaging. Imposing untargeted IMs measures without a sufficient level of supporting evidence risks permanently damaging innocent firms and, consequently, their customers and end consumers. Practical problems

around implementation when firms are suddenly subject to IMs without warning is likely to cause significant disruption. In addition, the prospect of IMs possibly being suddenly imposed may also create uncertainty and discourage investment or innovation by businesses and investors operating in markets which may be considered likely candidates for a market inquiry (e.g., based on government priorities, media interest).

Not all IMs are created equal…

(74) A distinction must also be drawn between IMs (as in mergers, where IMs are most frequently used by the CMA) which are intended to preserve the status quo and IMs intended to change the situation (which is most likely to be the case where there are perceptions that markets are not working effectively). IMs in the latter case are likely to be far more damaging to businesses than the former.

Imposing IMs early in a market inquiry would impair procedural fairness

(75) More generally, imposing IMs early in a market inquiry would have significant implications for procedural fairness. As Government observes, regulatory incentives risk being distorted, not least as it could offer a 'quick and easy' way of being seen to address public or political concerns around a market. The measures imposed may also prejudice eventual decisions about which remedies are appropriate, with the IMs potentially being seen as either the inevitable or the minimum remedy, and any suggestion of a lesser ultimate remedy resisted by the CMA at the end of the inquiry for fear that this would imply that it had gone too far in the original interim measure.

(76) There may be cases where there is evidently consumer exploitation or harm, but these are likely more appropriately targeted directly under consumer law rather than using competition law as an ill-fitting stopgap measure.

(77) See our response to Question 18 for our comments on the approach to IMs in CA98 cases.

Given that the use of IMs has already been assessed as unwieldy in the context of CA98 investigations, it makes little sense to align the use of IMs in market inquiries

(78) Government has conceded that the current IMs tool is "ineffective",[10] and points out that there have been various calls to reshape the tool. Eight years of data as to the use of IMs in CA98 investigations suggests that the tool would be used infrequently (only once thus far). It would be pointless to introduce a tool that the CMA will not use, and which would add a disproportionate level of uncertainty for businesses operating in markets under inquiry. In light of the differences between market inquiries and CA98 investigations set out above, it would be even less appropriate to introduce a tool which levies burdensome and severe consequences on businesses in line with the proposed – lowered – standards as contemplated for CA98 investigations.

[10] Consultation, Para 1.166

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

Commitments provided before the end of a market inquiry will be less effective, less proportionate, and less fair

(79) Enabling the CMA to accept legally binding commitments at any stage in the market inquiry process where solutions can be agreed with *all* relevant market participants would be an effective and desirable means of resolving competition concerns in a market. This is most likely to be applicable in relatively simple cases where competition issues are relatively clear, and remedies are not especially burdensome for firms – as is currently the case for undertakings given in lieu of a market investigation.

(80) However, it is difficult to see how binding commitments could be accepted as part of a fair process unless all relevant firms are willing to agree to provide commitments. In particular, there are a number of practical issues **and procedural fairness concerns** where only some firms provide legally binding commitments during the market inquiry:

- Market participants would, in practice, need to collectively agree on the terms of the commitments or else some market participants could end up subject to greater restrictions/obligations than others, which may undermine the goal of enabling fair competition. In addition, discrepancies between negotiated commitments and any eventual remedies imposed on other firms would also need to be managed so that firms that offer commitments are not disadvantaged.

- Accepting commitments from some, but not all, relevant firms is unlikely to create substantial efficiency savings when the inquiry must continue with respect to other parts of the market – the CMA will still need to investigate any aspects of the market that are not addressed by the commitments, and firms that have provided commitments may still be required to engage with that process (e.g., by responding to RFIs).

(81) Accepting binding commitments would, therefore, only be practicable and fair where all relevant market participants are willing to offer them on the same terms (i.e., in line with the current undertakings in lieu of an MIR which can be provided at the end of a market study). As such, while there is value in enabling the CMA to accept legally binding commitments at any stage of the inquiry, this may not lead to significant efficiencies. Ensuring that firms are not disadvantaged by either providing commitments or waiting until the end of an inquiry in line with their legal rights will be particularly difficult given the two processes are either likely to lead to differing outcomes or – if the same outcomes are reached – may bring into question the integrity and fairness of the remedies process.

(82) In order to prevent the offer of commitments from delaying or compressing the inquiry timetable, Linklaters considers that it is sensible that the CMA only consider commitments which have a high likelihood of remedying the CMA's concerns and which could be offered by all market participants to the extent necessary. Allowing the CMA to 'stop the clock' while such commitments are being considered would also help ensure that it has sufficient time to give the commitments due consideration without leading to a time crunch on the wider inquiry.

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

(83) Government has proposed the following reforms to the remedies process:

- giving the CMA power to require businesses to participate in implementation trials, allowing the CMA to test and trial how best to implement its remedies; and
- granting the CMA powers to expand or supplement the remedies where it finds this is required to implement the objectives of the remedies comprehensively and effectively.

Implementation trials must be a two-way street

(84) Linklaters agrees that enabling implementation trials may facilitate more effective remedies. However, if this type of mechanism is introduced, it should be a collaborative process with the opportunity for the relevant business to participate fully in the design and execution of such trials (as it will often be best placed to advise on practical design issues, including how to minimise disruption and maximise engagement with consumers). The purpose of such trials should also not be only to "*ensure [the CMA] is better able to deliver its obligation to design the most comprehensive remedies possible*",[11] but also to ensure that remedies are as proportionate as possible (i.e., the trials would also focus on considering what is *not* necessary to include as part of a remedy). The CMA should also be required to ensure that such trials are conducted in a way which is as non-disruptive for businesses and their customers as possible.

Review and variation of remedies and commitments resulting from a market inquiry will improve outcomes

(85) Linklaters also agrees with Government that the CMA should have greater capabilities to review and vary the remedies or commitments that have resulted from a market inquiry. Such reviews should consider whether the remedies/commitments should be reduced in scope or removed as much as whether they should be expanded or altered.

(86) The current system is not only inefficient as the CMA is unable to review remedies without pursuing a new market investigation, but it also applies unnecessary pressure on the remedies process itself as remedies must be 'right first time' even though there may be limited ability to predict how the remedies will play out in practice, particularly in new and evolving markets, such as the electric vehicle charging market. Enabling the CMA to periodically review and amend remedies would provide it with greater flexibility – not only in adapting remedies but potentially also in testing out different remedial options to determine which are most effective and proportionate over time.

(87) If the CMA does retain the power to amend remedies over time, the framework and terms of such review must be clearly established at the outset in order to maximise certainty for businesses and to limit the scope and burden of future reviews. As part of its decision to accept remedies, the CMA must be explicit on: (i) the frequency of any future reviews; and (ii) the specific criteria and metrics for amending the remedies (e.g., if a certain level of X is reached, no further remedies would be necessary, but if it is not reached then the following supplementary remedy may be necessary).

(88) Determining the criteria, metrics, and evidence threshold for judging the success of remedies is particularly important, not only as it will provide greater certainty for the parties but also

[11] Consultation, para, 1.83.

because the CMA will be most informed about the market at this point in time and is best placed to opine on remedies. This will enable the CMA to limit the time and scope necessary for a subsequent review.

(89) A mandatory cooling off period of several years following a review is sensible and would allow time for reforms to bed in before being revisited. In practice, we consider this period should be at least five years, although the CMA should have the flexibility to specify a longer minimum timeframe for review in its decision if it considers that appropriate.

(90) As is currently the case, parties should retain the right to request a full review of appropriateness of the remedies at any time in the event of a change in market circumstances.

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

The CMA should adopt a proportionate approach to evidence gathering

(91) In Linklaters' experience, parties to market studies and market investigations are frequently required to provide significant amounts of data and internal documents to the CMA. We welcome the willingness of the CMA in some instances to engage in discussions with parties on draft questionnaires, and receive representative samples of internal documents rather than requiring an exhaustive search for all possible relevant documents. We would encourage this to become standard practice in the future to ensure that requests are appropriately targeted to the issues under investigation and proportionate in scope.

MERGER CONTROL

(92) In principle, Linklaters considers that the proposed non-jurisdictional reforms are broadly sensible. However, the principal problem with UK merger control, that calls a legislative solution, is not tabled in the consultation, and is a combination of:

- undue timetable pressure at Phase 2 and the CMA's duty to consult on Provisional Findings ("**PFs**"); and
- the Phase 2 duty of the CMA to consult on public PFs which the merger parties receive only after the CMA has already publicly committed to its position – with meaningful time (in adverse cases) only left for remedies thereafter.

(93) Notwithstanding the high calibre of Panels and staff, this structural problem harms parties' rights of defence and the CMA's decision-making quality. The findings are provisional in name only – PFs are, effectively, draft decisions. It is very difficult for the CMA to have second thoughts about a complex decision, even if they are in the public interest.

(94) Overall, the need for speed is a generic concern for those parties who have not been through the process; it does not apply to parties that are facing a prohibited, unwound or abandoned deal (i.e., around 70% of Phase 2 cases since 1 January 2019). Such parties prefer quality over speed, and reform would increase the perceived fairness and legitimacy of the Phase 2 process, such that businesses feel they have had their CMA equivalent of a "day in court", even if – and especially if – the end result is adverse to them.

(95) Linklaters also considers that Parties should be allowed to respond to confidential PFs or "case against" in both a hearing and a writing. The process should mandate access to file, as already applies to antitrust cases and Commission Phase 2 merger cases.

(96) In order to deliver more effective and efficient merger investigations, Government should strongly consider more closely aligning the UK Phase 2 review timing with the CMA's international counterparts. Government's proposal to refer only the issues identified at Phase 1 is welcome in this regard, as is the proposal to allow the CMA to agree binding commitments earlier during Phase 2. To further strengthen parallel processes with other jurisdictions, Government should also empower the CMA to stop the clock / extend the process. The European Commission ("Commission") and the U.S. Phase 2 procedures have vastly more latitude to pause Phase 2 timetables than the CMA.

(97) Further reforms that the CMA should consider in order to improve effectiveness and efficiency of merger investigations include replacing the "fast track" route with an "automatic reference" mechanism, expressing the Phase 2 timetable in working days (consistent with the CMA's approach in Phase 1 and the approach taken in many other jurisdictions) and concluding on jurisdiction at Phase 1. These suggestions would have the benefit of avoiding timetable compression and would afford Parties increased legal certainty during the review process.

Linklaters also points out that the CMA's jurisdiction is likely to expand, in light of Government's proposed reforms and notwithstanding the post-Brexit increase in workload. Government must ensure that sufficient resources and expertise are made available within the CMA to ensure that an efficient and effective briefing paper/inquiry letter process continues to operate.

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

(a) Changes to turnover thresholds

(98) We note the CMA's intention to: (i) raise the current turnover-based threshold for the target of a merger from £70m to £100m; and (ii) create a safe harbour for mergers between small businesses where the worldwide turnover of each of the merging parties is less than £10m.

Amending the turnover threshold to £100m is a cosmetic change with limited practical effect

(99) We recognise the need to amend the turnover threshold to reflect the impact of inflation since the £70m threshold was adopted in 2002 and, in principle, welcome this proposed change.

(100) However, our support is qualified by the fact that it is largely cosmetic; we cannot see it making any practical difference in more than 95% (and arguably close to 100%) of cases.

(101) Current CMA practice is to apply the turnover test where it is met, as that is the simplest basis for jurisdiction, but this tends to be a minority of cases. In other words, share of supply is doing the lion's share of the jurisdictional work, because the majority of deals the CMA investigated (at least pre-Brexit) involved targets with turnover of below £70m.

(102) For example, considering the subset of Phase 2 in-depth inquiry cases as a proxy, our statistics suggest that:

- out of 38 cases referred to Phase 2 since 1 January 2018, only 10 were qualified based on turnover, with 28 (or around three quarters) qualifying under share of supply;
- of the 10 that were qualified on turnover, eight had turnover of over £100m so the new test would make no difference;

- of the remaining two, whose turnover was over £70m but less than £100m, these would fall outside the turnover test only to be caught by share of supply. Indeed, those cases, *TopCashback/QuidCo* (2018) and *Yorkshire Purchasing/Findel* (2020), would readily have qualified under share of supply, without even requiring of the CMA the ingenuity it has applied to share of supply in some cases:
    - in *TopCashback*, the combined national share was 90-100%, an increment of 40-50%; and
    - in *Yorkshire* the combined national share was 30-50%, an increment of 10-20%.

(103) That leaves no horizontal cases sent to Phase 2 in recent years (since 1 January 2018) in which this change would make any difference.

(104) In theory, the change in text would exempt a purely vertical transaction (i) not caught by share of supply and (ii) whose turnover is >£70m but <£100m. However, as to condition (i), given the elasticity of the latter even in cases where the central theory of harm is vertical (cf. *ICE/Trayport* (2016) *Live Nation Gaiety/MCD* (2019), such cases are exceedingly rare, even before considering condition (ii).

(105) Therefore, we anticipate that this change will make relatively limited practical difference. Nor will it therefore, in our view, assist with maintaining "*the balance intended when the UK's merger control regime was created*".[12]

Introducing a "safe harbour" exemption based on £10m worldwide turnover of each party will have limited practical effect

(106) We welcome the clarity and certainty that will be offered to certain market participants from the creation of the safe harbour, although our understanding is that the practical effect of the safe harbour may again be limited.

(107) Our statistics are limited to Phase 2 cases, but our research indicates that there has only been one case (*Crowdcube/Seedrs*) since the start of the CMA era which has been referred to Phase 2 where the parties' individual worldwide turnovers were each less than £10m when the CMA began its investigation, according to our research (conducted using publicly available information and sources). As to the CMA's estimate in the impact assessment of 1-6 cases per year, we appreciate that the CMA does not historically record worldwide turnover but for the purposes of legislative change it would be entirely possible and proportionate to arrive at a more robust estimate, by assessing how many mergers subject to CMA review would have been caught by this exemption in e.g. the last three years (by way of internet research supplemented as necessary with RFIs).

(108) Finally, we note the CMA's clarification[13] confirming that the new jurisdictional safe harbour should be "*distinguished*" from the existing *de minimis* exception available to the CMA.[14] If the change were adopted, however, it has the potential for substantial overlap with the *de minimis* exception (i.e., where both the merging parties' turnover is less than £10m and the annual value in the UK, in aggregate, of the market(s) concerned is less than £15m). It would be coherent given the turnover-based changes and post-Brexit context for the CMA

[12] Consultation, para. 1.98.

[13] Consultation, footnote 65.

[14] The discretion under section 22(2)(a) and 33(2)(a) of the Enterprise Act 2002 to decide not to refer a merger for an in-depth "phase 2" investigation if the CMA believes that the market(s) to which the duty to refer applies is/are not of sufficient importance.

to revise and expand the *de minimis* exception (which, as a discretion, does not have a "safe harbour" quality and could therefore be considerably extended without depriving the CMA of power to review and, where appropriate, to intervene). However, in the context of legislative reform and the proportionality of the review of small transactions, we would recommend:

- changing the de minimis exception to focus on "mergers" and not "markets" of "insufficient importance" and
- to use the parties' turnover (which are objective, verifiable measures) and not market-wide turnover (which is often a debatable topic and hard for the parties to assess at the deal planning stage).

(b) Changes to share of supply test

(109) We note with concern the CMA's intention to add a new jurisdictional threshold, enabling it to review a merger if any business which is a merging enterprise to the merger has both: (i) a share of supply of at least 25% of a particular category of goods or services supplied or acquired in the UK or a substantial part of the UK; and (ii) a UK turnover of more than £100m.

(110) The extension of the share of supply test to remove the increment (where one party has UK turnover >£100m) would also remove the jurisdictional requirement of a UK nexus for the transaction. This is a step in the wrong direction. It would result in the substantive SLC test as the only nexus test.

(111) While not requiring an increment to share of supply would result in a welcome removal of the inelegant "gymnastics" to which the CMA has lawfully resorted to construct an increment and assert jurisdiction in incumbent/challenger deals, that in itself does not justify the proposed change, which is devoid of a transaction nexus to the UK, as follows.

The proposed change is retrograde by removing target nexus to the jurisdiction

(112) Most ICN peer regimes establish jurisdictional *transaction nexus* by means of "two party" test – that is, *more than one* party must have domestic revenue above a certain threshold, which will always include the target in a bilateral "A acquires B" acquisition. Alternatively, where tests are based on the domestic nexus of just *one* party, it is best practice to select the *target* (such as the UK's £70m target turnover test) because that is the entity over which control is changing as a result of the transaction, and not the acquirer.

(113) It is the opposite direction of travel of international best practice for a major regime to introduce a new law asserting jurisdiction on the basis of acquirer (or seller) nexus alone, regardless of the presence, if any, of the target. Indeed, some regimes such as Brazil and Ukraine have (in response to persistent criticism) changed their merger laws to move away from mandatory filings in the absence of any target presence.

(114) Turning to the proposed new test, for any company with a material UK presence (turnover of >£100m), the unparalleled elasticity of share of supply among the world's merger regimes means that the working presumption for that company, in practice, is that the CMA could probably find that it has a 25% share of supply on some measure or other on some geographic area or other (UK-wide or a substantial part of the UK).

(115) Given that starting point, <u>any</u> transaction by the large number of firms caught by the above criteria -- acquisition of rental property in New Zealand or a solar-powered data centre in Arizona, or a supermarket chain in South Africa -- would be caught by UK merger control and the company would incur the frictional legal and others costs of managing that issue.

(116) Less extreme but still unproblematic cases would yield increasing numbers of briefing papers as firms err on the side of caution in notifying the CMA, with upward pressure of public and private resources, because, however moderate the perceived risk, two factors come into play: (i) firms lack legal certainty that the CMA will choose at its discretion not to review a transaction over which it has jurisdiction, and (ii) the downside disruption of CMA global hold-separates post-closing is so severe, which may translate into a small chance of a very costly event. These incentives will drive engagement with the CMA on deals that raise no real competition issues.

(117) Nor is it wholly satisfactory to say that the regime is voluntary and such transactions are unlikely to interest the CMA: the guiding principle for any legislative expansion of UK merger jurisdiction should be UK nexus.

There are better ways to capture non-horizontal mergers with the inclusion of a sensible UK transaction nexus

(118) If the CMA's intention is to capture non-horizontal mergers below the turnover threshold, a separate nexus requirement should be introduced. A UK transaction nexus requirement is important, as is recognised in the proposed SMS merger reforms, which presuppose a UK transaction nexus requirement. The same should apply to non-SMS mergers and there should be a coherent (though not necessarily identical) approach to UK nexus as between SMS mergers and non-SMS mergers.

(119) The digital SMS merger regime consultation has proposed a UK nexus but without any specifics as to metrics and thresholds. Our comments in that Consultation are therefore not as well-developed as if there were specific proposals, but are nevertheless reproduced in part below, as the same points apply.

- The digital SMS merger consultation currently provides that "*a 'UK nexus' could be established by reference to certain conditions such as the target business having either assets or revenues, users, employees, R&D activities or legal presence in the UK*." This is an expansive definition, and it is not clear how these metrics correlate to "*transactions where there is a material impact on UK consumers*". There are too many metrics in the current alternatives or mandatory review – these closely resemble the broad menu of the voluntary regime's share of supply test. Therefore, clear parameters as to what constitutes a UK nexus are required.

- We favour metrics *directly related to customers a*s a proxy for competitive / consumer welfare effects, whether in the form of revenue (for paid-for activities) and/or monthly active users (for free services). However, a transaction value test i.e. of the UK portion of the value of the target, is also worth exploring, and for which there is precedent (e.g. under the US HSR rules)

- Metrics we think are less likely to be good candidates include legal presence (which is a poor proxy for market effects) and supply-side metrics, such as employees or R&D spend, raise measurement difficulties and are well outside the norms in international Competition Network jurisdictional best practice (which note that revenues or assets are the most common metrics).[15]

- We see merit in considering not just *absolute* thresholds (such as minimum UK revenue for paid-for services, and minimum monthly active users for free-to-

[15] See ICN Recommended Practices for Merger Notification and Review Procedures, 2017.

consumer services) but also thresholds based on the *relative* UK nexus, for example the proportion of global revenues or users accounted for by the UK. This approach takes into account that the UK is typically going to be a reviewing authority not acting unilaterally and in isolation, but alongside other regimes. If a target achieves 1% of its revenue in the UK or has 0.5% of its users in the UK, there is a question of what proportionate value a mandatory filing has in the UK over and above review by (multiple) larger regimes. A sensible proportion for a relative nexus approach might be 25%, which is itself used as a materiality threshold in the share of supply test itself; at its most expansive, a threshold of less than 10% appears unreasonable and disproportionate.[16]

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

Replacing the share of supply test entirely with a better nexus test

(120) If Government's policy goal is that the CMA should have power to review the full universe of potential competition cases even without any UK nexus, then we would question the wisdom of that policy. And in that case, Linklaters considers it would be more honest and sensible to have no limit rather than expanded jurisdictional boundaries that are so elastic as to be largely cosmetic. Ironically, it would provide greater legal certainty: the Government would want the CMA to be able to review any transaction, period, and firms can dispense with jurisdictional uncertainty.

(121) On the other hand, if the policy goal is that the CMA should have *some* jurisdictional limits based on UK nexus, the net effect of the three proposals (two largely cosmetic reductions in jurisdiction and one step change expansion) is a substantial net increase in jurisdiction, with a net increase in legal uncertainty for parties with UK turnover >£100m.

(122) Building on the above comments, in Linklaters' view there are strong first principles arguments in favour of more radical wholesale reform to remove the vagaries and legal uncertainty of the share of supply test altogether and replacing the test with a well-though through test(s) based on sensible UK nexus metrics that would still empower the CMA to review a broad range of transaction fact patterns, including incumbent/challenger transactions and non-horizontal transactions, but with more legal certainty, ability for parties to self-assess, and less "gymnastics" involved in the assertion of jurisdiction.

(123) However, this welcome debate would first require more progress and clarity on what the CMA would consider reasonable nexus metrics and thresholds to which stakeholders could respond.

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

(124) Overall, we broadly welcome the proposals for establishing a more efficient merger control regime set out in the Consultation. In addition to the proposals we have made at the start of this section on merger control, we welcome the restriction to refer only the issues that are identified at Phase 1 in order to narrow the scope of its Phase 2 investigation.[17] In our

[16] This proportionate approach would potentially be novel for a jurisdictional threshold but it underlines the "two-thirds rule" that is used to allocate cases between EU and national level within the EU merger control system of which the UK was long part: that is, a national regime was "best-placed" to review a deal where the parties concerned had two-thirds of their EU-wide revenue in one and the same Member State, such that the national regime had jurisdiction and the EU did not.

[17] Consultation, para. 1.118.

experience, this could in principle align Phase 2 review in the UK more closely with the CMA's international counterparts where the transition from a Phase 1 to a Phase 2 review is more joined up. Allowing the CMA to agree binding commitments earlier during Phase 2 would also have the benefit of closer alignment with the process in the EU and other jurisdictions, enabling parties to multi-jurisdictional transactions (which may involve global remedies) to have constructive discussions with multiple agencies in parallel.

The current 'fast track' route should be replaced with an 'automatic reference' mechanism

(125) On the topic of the 'fast track' route, we agree that the requirement to formally accept that there is a realistic prospect that the merger will substantially lessen competition may be a dissuading factor for many companies. For complex cases, the use of the fast track route may also be counterproductive if the overall statutory timetable remains compressed. In our view, the aim of this type of process is to maximise efficiency but without necessarily shortening the overall timetable to a material degree (we note Lord Roth expressed a similar view in CAT proceedings in 2018, in which he stated that "*The public interest does not benefit if the period in which the inquiry has to be completed is unreasonably compressed*.").[18]

(126) We therefore agree that enabling an 'automatic reference' to Phase 2 without requiring a formal concession that the reference test has been met, with the ability to add time to the Phase 2 timetable may have the benefit of avoiding some of the procedural requirements of Phase 1 (that are redundant in an obvious Phase 2 case), but without unnecessarily compressing the overall timetable.

The Phase 2 merger timetable should be expressed in working days and there should be a non-prejudicial power to "stop the clock" with the parties' agreement

(127) Finally, on the topic of timing we note, and support, Lord Roth's recommendation[19] that the Phase 2 merger timetable should be expressed in working days (consistent with the approach in Phase 1, and consistent with the approach in the EU and many other jurisdictions), which would have benefit of avoiding timetable compression over key holiday periods such as Christmas and Easter.

(128) We also strongly urge that there be a more flexible approach to extensions, including providing for the possibility of an extension with the agreement of the merging parties to provide additional time for evidence gathering and/or to facilitate international coordination, but without the prejudice of having failed to respond to an information request in time (the current focus of the s109 stop the clock power).

The CMA should conclude definitively on jurisdiction at Phase 1

(129) Jurisdiction, unlike the substantive question of SLC or competitive effects of a merger, is a binary question. Either a merger control authority has it, or it does not.

(130) While the UK's jurisdictional criteria are typically not "bright-line" (notably, share of supply, material influence, associated persons and even the concept of an "enterprise"), it is a hallmark of a jurisdictional regime that is suboptimal when it does not presuppose that the CMA can and should answer the binary question of its own jurisdiction by no later than the end of Phase 1 (which, given pre-notification of several months, plus 40 working days of Phase 1 timetable, is no longer a "quick-look" screen).

[18] *J Sainsbury plc and Asda Group Limited v Competition and Markets Authority* [2019] CAT 1, [76].

[19] *J Sainsbury plc and Asda Group Limited v Competition and Markets Authority* [2019] CAT 1, [76].

(131) We can think of no parallels to a regime where an in-depth Phase 2 inquiry is required in order to ascertain whether there was jurisdiction at first instance (at Phase 1). Therefore, a key other point which it seems to us would make a significant difference to the efficiency of the merger review process (and in connection with the changes to the Panel role discussed at Question 13 below) would be for the CMA to be required to reach a definitive view on its jurisdiction over a transaction at Phase 1 rather than this determination being delivered at the end of a long, and burdensome Phase 2 review. In our view, this change would give parties significantly more certainty, which would be particularly welcome given the concerns outlined in response to Questions 10 and 11 above.

(132) It would also mean that if parties disagree with the assertion of jurisdiction, they can challenge that decision in the Competition appeal Tribunal at an appropriate juncture -- at the end of Phase 1 -- rather than having to wait until the end of Phase 2 (see *Sabre v CMA* and earlier cases) as is the case under the current regime. With the question of jurisdiction resolved, the focus of Phase 2 can appropriately be on substantive issues.

The CMA must have sufficient resources and expertise to cope with its increased workload

(133) Finally, we would also note that, in light of the expansion to the jurisdictional thresholds discussed above and the increase in workload due to the impact of Brexit, it is important that sufficient resources and expertise are made available within the CMA to ensure that an efficient and effective briefing paper/inquiry letter process continues to operate.

CMA PANEL DECISION MAKING

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

A smaller pool of dedicated Panel members would alleviate practical challenges but should not compromise the Panel's current (and commended) breadth of experience

(134) In principle Linklaters is supportive of a smaller pool of dedicated full time Panel members. We agree that this would help alleviate practical challenges (for example, around timetable/diary management) and result in greater depth of expertise in handling inquiries and assessing competition issues, which would improve legal certainty for stakeholders. We consider that one strength of the existing Panel regime is its diversity among legal, economic, finance and business practitioners, and would encourage continued breadth of experience in a smaller Panel.

The Panel plays an important role in providing a 'fresh pair of eyes', so proposals for reducing its role should be given further consideration

(135) Linklaters agrees that the role of the Panel members could sensibly be reduced in relation to some primary administration tasks. For example, we agree that derogation decisions pursuant to an initial enforcement order or interim order need not be escalated to the Panel, and could be dealt with more efficiently by case team members with relevant expertise in requests of this nature.

(136) However, we are not persuaded that reducing the role of Panel members to making final decisions on theories of harm and remedies (and thus, by implication, having a limited or no role in relation to the initial steps of a merger or market investigation or the provisional findings stage of such investigation) would be beneficial for the regime. As the Consultation recognises, the Panel plays an important role in providing a 'fresh pair of eyes' in a Phase 2 merger review or a market investigation, but it is not clear what Government has in mind

when proposing to limit the role of the Panel to the final decision on theories of harm and remedies only. In particular, it is not clear when the Panel would be appointed, what oversight they would have over the work of the case team, or at what stage (if any) the parties to an investigation would have access to the Panel (for example, via site visits or main party hearings). We note that the Consultation expresses some reservations regarding the relatively late appointment of Case Decision Groups in CA98 investigations, by which time significant evidence has been gathered and processed, resulting in potential delay while the members of the Group acquaint themselves with the evidence. The same concerns would equally apply to a proposal involving the appointment of a Panel to a merger or market investigation only *after* a provisional finding's decision.

(137) We would therefore recommend that these proposals are given further consideration. In particular, it is important that Parties are given proper rights of access to ultimate decision-makers well before any decision is due to be taken.

The role of the Procedural Officer should be enhanced

(138) Linklaters would also recommend that government and the CMA consider expanding the role of the Procedural Officer. This role was a welcome introduction in providing independent recourse to parties requiring a second opinion on issues relating to the protection of confidential information. However, the role is absurdly limited in scope.

(139) In the event that the role of the Panel is reduced in relation to decisions of an administrative nature (which we largely support) we consider there would be strong grounds for expanding the scope of the Procedural Officer to cover a broader range of issues that may be the source of disagreement between parties and case teams, thus resolving mitigating the need for parties to consider more drastic means of escalation.

ANTITRUST

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

Government's proposed amendment can be simplified in a manner which will avoid introducing an additional limb to the legal test and facilitate consistency with existing case law

(140) Linklaters considers that, in principle, removing the jurisdictional requirements is sensible and consistent with the approach applicable in other jurisdictions.

(141) However, at a practical level, Government's proposed amendment to Chapter I can be simplified (in a manner which will avoid introducing an additional limb to the legal test and facilitate consistency with existing case law) by removing the requirement set out in s.2(3) CA98 that agreements should be, or be intended to be, implemented in the UK.[20] Effects

[20] S.2(3) CA98 says that "[s]ubsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom."

within the UK are already captured by s.2(1) CA98, i.e., agreements are caught if they may affect trade within the UK and have anticompetitive objects or effects.[21]

(142) Similarly, rather than introduce an additional limb to the legal test within Chapter II, a simpler option is to remove the requirement in s.18(1) CA98 that a dominant position should be within the UK.[22] Effects within the UK are already captured by s.18(3), i.e., abuses are caught if they may affect trade within the UK.

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

Linklaters considers that the proposal to revise the threshold for immunities for small agreements and conduct of minor significance to £10 million is reasonable. This will provide an effective deterrence in smaller markets.

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

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

17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will: (i) 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; and (ii) should there be an absolute prohibition on the disclosure of a whistle-blower's identity unless the CMA relies on the whistle-blower's evidence as part of its infringement decision?

Partial immunity from private enforcement would be a preferable alternative to Government's suggestion

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

(145) We agree with Government that the increasing significance of follow-on damages in various jurisdictions is a likely significant factor in the reported decline in leniency applications globally (although, as set out below, we anticipate this may not be the only factor at play). However, as Government observes in the Consultation, there is a challenging policy trade-off between, on one hand, ensuring that culpable parties are effectively punished for unlawful anticompetitive conduct (deterring both direct participants and other businesses from

[21] S.2(1) CA98 says that "[s]ubject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part."

[22] S.18(1) CA98 says that "[s]ubject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom."

engaging in such conduct in the future) and ensuring those who have suffered harm as a result are effectively compensated and, on the other hand, ensuring effective enforcement of cartels that may otherwise go undetected – with a significant cost for society.

(146) In light of this trade-off, we doubt that any system of law which permits an infringing party to avoid both fines and compensation to those who have suffered harm as a result of its conduct is likely to be acceptable. In this context we note that a key objective of Government's proposed reforms is "*to restore public confidence in the market system*" and that "*it is important to ensure that people see that competitive markets make their lives better*".[23] It would be inconsistent and even self-defeating to therefore enable firms that have engaged in unlawful behaviour to escape responsibility from the need to effectively "right the wrong" (and, indeed, to actually retain the economic benefit from the cartel behaviour), in addition to the need to pay a financial penalty determined by the CMA.

(147) Complete immunity from all damages would reflect an approach which, as far as we are aware, is not a feature of any jurisdiction which offers immunity to cartelists and would run contrary to the overriding trend internationally of boosting private actions in recent years.

(148) As such, in attempting to balance these competing objectives: of on the one hand incentivising leniency applicants to come forward and reveal covert activity and on the other, not suffer a disadvantage in doing so by being the obvious target of claimant law firms, Linklaters recommends that a form of *partial* immunity from the private enforcement process would be preferable. Linklaters considers that such a system could take a number of forms but may involve, for example:[24]

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

18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions (by removing a firm's right to access to file as a matter of course and only providing reasons) and/or (b) changing the standard of review of appeals against the decision (from full merits to JR principles)?

(149) Linklaters has a number of concerns regarding the proposed changes to the firms' rights of defence in relation to IMs

Businesses subject to IMs must retain legal rights of defence and have a fair opportunity to review sufficient evidence against them.

(150) Government correctly notes that IMs have an impact on the commercial and reputational interests of the business concerned, but it is important to recognise not only how deeply damaging and disruptive the imposition of IMs is to a business' operations, but also that a natural consequence of IMs is that many of its customers or consumers are likely to assume

[23] Consultation, para. 0.4.

[24] By way of comparison, in the US leniency holders are not subject to treble damages in private actions.

that it has already been found culpable of unlawful conduct. IMs could potentially be in place for several years given that CA98 investigations often continue for lengthy periods of time.

(151) It is, therefore, crucial that a business that may be subject to IMs retains its full legal rights of defence and has a fair opportunity to review sufficient evidence against it before the imposition of IMs. For the CMA to only provide "the reasons" for a proposed IMs decision would provide the addressee with no meaningful opportunity to assess the strength of the case against it, or to contest the CMA's decision in court (irrespective of the standard of review that is applied).

(152) If the CMA's IMs powers are burdensome to use, it is because the consequences are extremely serious for a business. IMs may also have significant implications for the operation of the relevant market more generally. As such, the legal threshold that the CMA must meet must be correspondingly high. Removing a business' legal rights to examine the evidence against it would be easing the burden on the CMA, not by reducing the procedural administration surrounding access to file, but by de facto enabling the CMA to impose IMs at a lower evidential standard because the business has been deprived of the right to review, and potentially contest in court, the relevant evidence against it. Although a business may not require full access to file, it should at the very least be provided with all documents on which the CMA is relying and those which may contain exculpatory evidence. The CMA must be able to substantiate its proposed decision with sufficient evidence and it should not be afraid – having made that decision – to provide such evidence to affected parties and, if need be, the court. If the CMA does not have sufficient evidence to confidently justify its use of IMs, then it should simply not be resorting to IMs at that stage of the inquiry.

(153) Linklaters also notes that the Furman Report stressed the importance of the access to file process and that "*the CMA is rightly required to disclose files relating to the proposed direction to the parties affected*".[25] Indeed, the Furman Report recommended that "*the CMA has identified the potential to make more use of IMs through confining file access to documents clearly relevant to the interim measure. This process improvement has the potential to make IMs more practicable*".[26] However, Government's proposal goes significantly beyond the scope of the Furman recommendation in restricting file access. In Linklaters' view, the Furman recommendation is broadly in line with the minimum level of evidence that would need to be provided, i.e., those documents on which the CMA relies to support its case and those which may contain exculpatory evidence.

IMs must be subject to full merits appeal because of their serious commercial and reputational implications

(154) For similar reasons, it is crucial that the implementation of IMs remains subject to a full merits review. Linklaters' view on the appropriate review standard for appeal cases is set out in detail in response to Q. 24 below. In summary, the CMA has a unique role as investigator, prosecutor, and judge - effective judicial scrutiny is, therefore, a key check on the execution of its powers. The CMA's decision to impose IMs is – in itself – final and should consequently be judged fully on its merits. Lowering the standard of review would, again, only simplify the administrative burden on the CMA by making it harder for cases *which are not fully legally defensible* to be overturned in court. A CAT appeal is neither a time-consuming process (particularly relative to the period of time for which the IMs may remain in place) nor highly burdensome for the CMA (particularly relative to the burden of the IMs on the business).

[25] Unlocking digital competition: Report of the Digital Competition Expert Panel, March 2019, paragraph 3.126.

[26] Unlocking digital competition: Report of the Digital Competition Expert Panel, March 2019, paragraph 3.127.

Linklaters also notes that the CMA, unlike the business subject to IMs, has the opportunity to prepare its case prior to the IMs being imposed.

19. Will the below reforms improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

a. Enabling the CMA to require an interview from an individual regardless of their connection to a particular business under investigation (currently, this can be required only if there is such a direct connection and the change would align with the existing powers under the EA02 for mergers and markets investigations).

b. Introducing a legal duty to preserve evidence that a person knows or suspects to be relevant to an investigation (to align with the requirements of the cartel offence, as currently the preservation obligation only applies to evidence within the scope of an information-gathering notice). The government is also considering whether breaches of this new obligation should carry criminal sanctions.

c. Granting the CMA powers to 'seize and sift' evidence when it inspects a domestic presence under a warrant (to align with its powers when inspecting a business premise).

The proposals suggested are reasonable, provided appropriate rights of defence must remain fully available

(155) In broad terms Linklaters considers that these proposals are reasonable. However, it is important that appropriate rights of defence remain fully available.

(156) For example, in relation to (b), Linklaters notes that the scope of an investigation under Chapter I or Chapter II is typically described to the relevant parties at the outset of an investigation in very high-level terms, and it may be far from clear whether a particular piece of evidence may be relevant to that investigation. Sanctions should therefore be limited to clear and flagrant breaches of any such obligation.

(157) In relation to (c), it would be important to ensure that the owner or occupier of the domestic premises has effective access to legal advice, particularly in relation to the documents that the CMA proposes to 'seize and sift' before that process commences.

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

ERAs could help to bring complex Chapter II cases to a close more efficiently

(158) Early Resolution Agreements ("**ERAs**") are, in principle, a welcome development and could conceivably help to bring complex Chapter II cases to a close more efficiently, alongside other measures. However, its overall "success" from an efficiency perspective would be dependent on many factors including, in particular, the overall complexity of the case and the number of undertakings involved, as well as the stage of the CMA's investigation when this mechanism would be available to parties.

(159) While there are a range of factors to be weighed when considering whether to engage in the settlement process, the requirement for an admission of liability does act as a significant

disincentive in Linklaters' view, given the increased exposure to private damages claims that results. As damages are of a compensatory rather than a punitive nature, they can dwarf financial penalties imposed by the CMA (which are ultimately capped at 10% of an undertaking's worldwide turnover) in practice. There are a number of ways in which a claim for damages could be framed in the Chapter II context and in reality, the only certainty is that potential claimants will seek to obtain the highest award possible. Businesses which are subject to a Chapter II investigation therefore face considerable uncertainty in this regard.

(160) Accordingly, the option to enter into an ERA will likely be attractive to certain businesses and therefore, such measures could help to bring a Chapter II investigation to a close much more quickly than otherwise may have been the case. While this measure would not rule out the possibility of follow-on damages claims altogether, it does make such actions more difficult and potentially less likely (noting as below, that the proposal envisages a settlement payment which could also serve to offset any damage suffered by potential claimants).

(161) As regards the specific mechanics outlined in the Consultation:[27]

- Any measure should recognise that offering commitments will not always be possible (i.e., historical infringements where ownership has since changed hands) and infringing parties should not be prevented from entering an ERA or otherwise disadvantaged as a result.
- Any settlement payments made should be offset against any further damages award, where applicable.[28]

(162) Due consideration should be given as to the point in the process when the CMA would be willing to engage in an ERA. Taking the CMA's settlement procedure as an example, the maximum discount available for settlement pre-Statement of Objections is 20%, which falls to 10% for settlements post-Statement of Objections. In practice, it is extremely difficult for businesses to understand the nature of the case against them without having access to the Statement of Objections (which sets out the evidence the CMA proposes to rely on in any Infringement Decision). This is a clear disincentive to engage in the settlement process for many businesses. While the ERA mechanism, as proposed, is a different mechanism to settlement these practical considerations remain relevant.

(163) However, as is also the case with settlement, it is conceivable that an ERA may not be reached with all parties to an investigation and, for that reason, the resource and time savings may not necessarily be material in practice. That said, there is no good reason to limit the availability of this measure to Chapter II cases only; the benefits of resolving investigations more quickly apply equally in the Chapter I context.

(164) In principle, the proposal does strike the right balance between efficiency and deterrence. Ultimately, businesses which enter into ERAs may still need to make a settlement payment and/or be subject to commitments and a reputational risk still remains (albeit that an

[27] Consultation, para. 1.180.

[28] For example, in August 2019 it was announced that Aspen had committed to pay £38 million to the NHS – without the Government having to launch court proceedings for damages. This payment was made to address the CMA's concerns that, as a result of the impact of Aspen's behaviour, the NHS had paid a higher price for fludrocortisone. The DHSC and the devolved administrations provided an assurance to Aspen that they would offset the payment against any potential future damages action. CMA "*CMA Pharma probe secures £8m for the NHS*", available here: CMA pharma probe secures £8m for the NHS - GOV.UK (www.gov.uk)

admission would not be required).[29] More generally, the CMA's recent appetite for Chapter II cases provides a strong deterrence in and of itself.

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

The introduction of protections necessitates that the voluntary redress scheme is robust and ensures fair compensation

(165) There are clear benefits to incentivising the use of a voluntary redress scheme, including that resolution can be achieved more quickly than pursuing compensation through the courts. For that reason, Linklaters agrees, in principle, that the proposal to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme could help to encourage the use of redress schemes. However, the critical question remains – what will these protections look like?[30]

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

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

It is unrealistic to remove all elements of negotiation and discussion from the process

(167) In principle, Government's proposed reforms will help to speed up the CMA's access to file process, and by implication, the conclusion of CMA investigations. However, a delicate balancing act is required in this regard. In Linklaters' view, it is unrealistic to remove all elements of negotiation and discussion from the process.

(168) As Government recognised, the access to file process is an important part of an allegedly infringing party's rights of defence. That said, it is by nature an incredibly time-consuming process for *all* involved, not just the CMA. However, there is good reason for that. Allegations of anticompetitive conduct are often informed by a range of sensitive and confidential materials from a range of parties. Allowing parties and their advisers access to such documents is crucial so that the parties can understand the case against them and defend themselves. Ensuring that there are sufficient safeguards in place to protect such materials, including that businesses have the opportunity to make representations on the sensitive nature of their information, is important.

(169) Linklaters supports the use of confidentiality rings, in principle, in appropriate circumstances and considers that some form of data room/confidentiality ring will be required in most cases. Government suggests that relevant documents would be placed in a confidentiality ring in their entirety (i.e., without redaction) which would put parties on a level playing field with the

[29] Para. 1.181 provides that the government envisages that Early Resolution Agreements would be published by the CMA.

[30] Linklaters welcomes the opportunity to provide comments on the proposed protections when further detail is available.

CMA which has access to the entire case file. This is a welcome development. However, in Linklaters' view, businesses should have the opportunity to submit confidentiality representations recognising that we would expect very limited (if any) redaction requests, given the narrow scope of disclosure envisaged in this scenario. Furthermore, genuinely irrelevant information should not need to be included in a confidentiality ring.

(170) In any event, it is not realistic to remove all possibility of negotiation relating to the confidentiality undertakings themselves – at least in so far as the CMA's existing template is concerned. For example, there are often good reasons why confidentiality undertakings need to be tailored (for example, owing to different IT protocols/systems) and, in any event, the CMA's standard templates are not, sufficiently robust. At a minimum, there should be an overhaul of the CMA's standard template informed by the recent experience of a range of stakeholders and relatively regular reviews should be carried out on which businesses and advisers would have the opportunity to comment. It is worth noting that there are other steps that the CMA can take to improve the efficiency of this process overall without the introduction of complete standardisation.[31]

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

The existing requirements include important safeguards which should not be removed

(171) In Linklaters' view, there is no reason to remove the requirements from the CMA Rules on the decision-makers for infringement decisions in CA98 investigations. Whilst acknowledging the design of internal decision-making inevitably involves trade-offs, we consider that the existing requirements include important safeguards which should be maintained. Procedural fairness is of utmost importance given the very significant adverse consequences of a competition law infringement finding.

APPEALS

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

The existing 'full merits' standard of the review remains the appropriate level of judicial scrutiny

(172) Linklaters remains strongly of the view that the existing 'full merits' standard is the appropriate level of judicial scrutiny of the CMA's decisions in CA98 investigations. Changing the level of scrutiny to a 'judicial review' standard would critically undermine the CAT's ability to "*provide robust quality assurance of the CMA's interpretation of competition law*" (one of Government's key objectives)[32] and risks violating the fundamental requirements of Article 6 of the European Convention on Human Rights ("**ECHR**").

(198) Government notes that when this question was considered previously, the CAT "*argued strongly that the current standard of review was appropriate*" and that this position "*was*

[31] For example, ensuring discussions regarding the process envisaged for giving access to the CMA's file (including in relation to the confidentiality ring and the undertakings) should be had well before a Statement of Objections is issued and the CMA should ensure that representations on the confidentiality of materials submitted to it are made at the same time such materials are submitted.

[32] Consultation, para. 1.205.

supported by many other respondents".[33] Government ultimately ended up agreeing that a 'full merits' review was the appropriate level of judicial scrutiny for CA98 investigation.[34]

(199) There have not been any recent developments in the intervening period to: (i) warrant reconsidering an issue that was opposed by "*many*" of the respondents last time round, including the judicial body tasked with conducting the review of the CMA's decisions; and (ii) justify a fundamental change to the way in which CA98 cases are considered by the courts. The Consultation presents two possible justifications in support of changing the level of judicial scrutiny for CA98 investigations.

(200) First, the Consultation quotes a report by the National Audit Office which states that "*there are strong incentives for businesses to litigate if they lose a case, which can lead to risk aversion in the competition authorities*".[35] The implication being that the threat of a 'full merits' review reduces the number of CA98 cases undertaken by the CMA and potentially undermines enforcement. This view is not supported by the evidence. In its latest impact assessment for 2020/2021, the CMA states that it has conducted "*11 competition enforcement investigations*" in the last year, compared to "*three such cases"* in 2019/20 (i.e., more than a threefold increase).[36] The CMA goes on to note that its interventions have saved customers "*at least £328.5 million*" in the last three financial years.[37] These figures indicate that the CMA is active in pursuing CA98 investigations and that the level of enforcement is increasing. We note that this increased enforcement is all taking place under the existing 'full merits' appeal standard.

(201) Furthermore, only eight of the 38 (21%) CA98 infringement decisions launched by the CMA or OFT since 2008 have resulted in an appeal to the CAT. Of these eight appeals, only a single case was overturned by the CAT (i.e., only 3% of all CA98 infringement decisions since 2008 have been overturned). Linklaters does not consider that either the rate of appeals or the rate of *successful* appeals is sufficiently regular to deter the CMA from launching CA98 investigations or reaching infringement decisions.

(202) Secondly, the Consultation quotes Lord Tyrie: "*the current standard of appeal encourages resource intensive appeals… and leads the CMA to conduct disproportionately exhaustive investigations and produce lengthy 'gold plated' decisions*".[38] As we explore in more detail below, the consequences of a successful infringement decision can be severe for the company being investigated. If a "merits based" appeal standard ensures that the CMA conducts "*exhaustive*" investigations, then Linklaters considers this to be a strength of the system rather than a downside. The CMA should always aim to conduct thorough and accurate investigations into the conduct it is investigating. Any proposed legislative change which weakens its incentive to do so should be treated with extreme caution. For this reason, Linklaters strongly opposes the validity of Lord Tyrie's justification for proposing to change the current standard of judicial scrutiny for CA98 appeal.

There has been no new justification for departing from the "merits based" review standard

(203) Linklaters considers that the points put forward in response to the previous consultation remain equally valid today. Linklaters notes that these points were persuasive to

[33] Consultation, para. 1.204.

[34] Consultation, para. 1.202.

[35] Consultation, para. 1.203.

[36] CMA impact assessment 2020/21, CMA144, 15 July 2021, paragraph 3.3.

[37] CMA impact assessment 2020/21, CMA144, 15 July 2021, paragraph 3.2.

[38] Consultation, para. 1.203.

Government then and should remain so today – particularly in the absence of a new justification for departing from the "merits based" review standard. These points include:

- A CA98 infringement decision can have severe consequences for the company being investigated and its management/directors. This includes not only the financial penalties imposed on the companies concerned, but also possible director disqualification and criminal enforcement. It is therefore essential that the facts in each alleged infringement are capable of ultimately being assessed and determined by an expert and impartial court.
- Similarly, restricting the grounds on which a company can appeal in circumstances where: (i) the CMA acts as investigator, prosecutor, and judge; and (ii) the penalties are so severe, risks violating the requirements of Article 6 of the ECHR.
- Changing the level of judicial scrutiny of CMA infringement decisions would create inconsistencies in relation to the private enforcement of competition law. For example, in a follow-on action for damages, the CMA's decision is binding and the defendant would have only limited grounds on which to challenge this decision. In contrast, in standalone private actions there would be a full consideration of the merits of the case.

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

(204) As with CA98 investigations, the consequences of a CMA infringement decision in relation to its investigative and enforcement powers can be severe. This Consultation also comes at a time when the rate of the CMA's infringement decisions is accelerating, and quantum of the CMA's fines is increasing.[39]

(205) Therefore, Linklaters considers that the points put forward in support of the "merits based" review of CA98 infringements in response to Question 24 are equally valid for this question. These points include:

- The fact the CMA can impose significant financial penalties and director disqualification orders for failing to comply with its investigative and enforcement powers mean it is essential that the facts in each alleged infringement are capable of ultimately being determined by an expert and impartial tribunal.
- Restricting the grounds on which a company can appeal in circumstances where the CMA acts as investigator, prosecutor and judge risks violating the requirements of Article 6 of the ECHR.

[39] https://www.linklaters.com/en/insights/publications/platypus/platypus-uk-merger-control-analysis/fines

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

(206) Linklaters has no other additional reforms to propose at this stage.

INVESTIGATIVE POWERS AND PENALTIES

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

The CMA's existing evidence gathering tools are already sufficient

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

(208) Linklaters' experience from working with parties to CMA investigations is that companies already take their obligations extremely seriously when responding to the CMA's requests. Companies are mindful not only of the financial consequences and possible individual liability, but also the potential reputational damage resulting from a failure to comply with the CMA's requests. Linklaters' view is that the CMA's existing tools already act as a strong deterrent to stop companies providing late, incomplete, or misleading information. Increasing these penalties would yield little incremental benefit to the CMA (in terms of being able to conclude investigations more quickly) and could potentially be counterproductive to the CMA's stated aims.

(209) With respect to the specific proposals raised in the Consultation, Linklaters notes the following:

(i) **Tougher penalties for companies that slow down or obstruct cases:**

- Linklaters considers that the existing penalties regime already acts as a sufficient deterrent, even for larger global businesses with higher turnover. The Consultation appears to place little weight on the risk of reputational damage which comes from failing to respond to an information request from the CMA. This risk is particularly acute for large, publicly listed firms. Linklaters' experience is that this reputational risk is often a key concern when responding to the CMA's information requests and that the CMA's existing penalties are sufficient. Increasing the penalties further would yield little or no incremental benefit for the CMA.

(ii) **Personal accountability for the provision of evidence:**

- Linklaters considers that this proposal places an unrealistic burden on the director providing the declaration and would likely be counterproductive to the Consultation's aim of encouraging faster CMA investigations. CMA requests for information often capture thousands of responsive documents across the respondent's business. This is especially true for larger businesses and this issue will only become more acute as businesses continue to move their

operations to digital platforms and increasingly operate in a hybrid/remote working environment. It is, therefore, unrealistic in many cases to assume that any one individual will be in a position to provide a declaration that the company's response is fully complete and correct where this would result in personal liability irrespective of the thoroughness or integrity of the search processes.

- If this proposal is adopted, Linklaters' expectation is that directors will not be able to provide signed declarations under current conditions. We expect that the CMA would either have to send more targeted information requests (which is not necessarily a bad thing, but they will yield fewer responsive documents) or provide companies with significantly longer time periods in which to respond to requests and assure themselves of the completeness of their response. Consequently, the net effect of this proposal would be to hinder the CMA's information-gathering capabilities and the pace at which it can gather information.

- As noted above, Linklaters considers that the CMA's existing information-gathering powers are already sufficient. Adopting this proposal would offer little incremental benefit and could be counterproductive. If this change were adopted, then Linklaters suggests limiting its scope such that directors provide confirmation that the responding firm has, to the best of their knowledge, followed a specified approach/methodology when responding to a CMA's information request.

(i) **A wider prohibition against providing false or misleading information to the CMA:**

- Linklaters agrees with the rationale behind this proposal providing that it does not compel firms to respond to voluntary requests for information.

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

Stronger penalties for non-compliance should not apply retrospectively and should be subject to a 'full merits' based appeal

(210) If Government decides to adopt stronger penalties for companies that fail to comply with remedies imposed or accepted by the CMA, this should be done with the following safeguards:

- **Penalties should not apply retrospectively:** directions, orders or undertakings that were given previously were done so on the understanding that they would be enforced using the existing mechanisms in the legislation. To retrospectively change this principle would be detrimental to legal certainty and would undermine companies' confidence in giving equivalent undertakings going forward.

- **'Full merits' based appeal:** the Consultation notes that any penalties imposed by the CMA "*will be appealable by the company affected*". For the reasons outlined in response to Questions 24 and 25, Linklaters is strongly of the view that this should be a 'full merits' standard rather than a judicial review standard.

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

The CMA must satisfy procedural safeguards before obtaining information on behalf of overseas authorities

(211) Linklaters supports the ongoing co-operation between the CMA and other international regulators to enforce competition law. However, we agree that there must be procedural safeguards that the CMA has to satisfy before it can obtain information on behalf of overseas authorities.

(212) Linklaters agrees with the conditions proposed in the consultation[40]

CONSUMER RIGHTS

Questions 30 – 54

(213) Linklaters welcomes Government's proposals to modernise consumer laws to update them for the digital age. It is important that consumer laws are sufficiently broad to capture novel consumer harms resulting from consumers' online presence.

(214) In particular, Linklaters welcomes Government's proposals to focus on specific practices (including tackling subscription traps, preventing online exploitation of consumers including through fake online reviews, and introducing better pre-payment protections) to the extent that doing so better protects consumers whilst also ensuring that it: (i) provides further certainty for businesses; and (ii) does not introduce an unrealistic compliance burden.

(215) However, Linklaters is concerned that Government's proposals may detract from these objectives in the following ways:

Government's proposals should leave no room for doubt as to the intended scope and application of consumer laws vis-à-vis online businesses

(216) First, Government's proposals should leave no room for doubt as to the intended scope and application of consumer laws vis-à-vis online businesses. Specifically, it is important that Government provide full clarity as to the proposed liability of online platforms including e-commerce platforms, search engine providers, comparison websites or other online B2B intermediaries for hosting content authored by third parties falling foul of consumer laws. Government could provide this certainty by confirming that the new proposals do not change the position on intermediary liability pursuant to the e-Commerce Directive as incorporated into English law. We note in other jurisdictions that a platform's responsibilities toward consumers (namely whether it is simply a conduit for other parties e.g., the advertiser) has been the subject of lower and higher court disagreement. See for example: *ACCC v Google*. In addition, we would invite Government to explain how it intends for any such liability to tie together with the liability of businesses commissioning or incentivising fake reviews under its separate proposals (i.e., could the former pursue the latter) and, in turn, who would be responsible for compensating the end consumer.

Government should consider the additional compliance burdens its proposals would entail for businesses

(217) Secondly, Government should carefully consider the additional compliance burdens its proposals would entail for businesses. For example, in relation to Government's proposals

[40] Consultation, para. 1.245.

on fake reviews, it is unrealistic to expect online review platforms to comprehensively assess the authenticity of content posted by third parties, not least because of the potential GDPR issues of doing so (e.g., by having to check whether customers have in fact purchased certain products). In this regard, we would welcome clarification by Government as to the meaning of "*taking reasonable and proportionate steps*" in its proposed amendment to the CPRs adding the following to Schedule 1: "*Hosting consumer reviews of a good or service without taking reasonable and proportionate steps to ensure that they originate from consumers who have actually used or purchased that good or service*".[41] Linklaters notes that many of the businesses facing increased compliance burdens under Government's proposals will also be within the scope of the proposed online safety regime which Government has estimated will cost businesses £1.7bn over the next 10 years on content moderation alone. It is therefore very important that there is coordination between Ofcom and the CMA on the steps expected of online platforms where they host user-generated content that may be offers to sell goods/services, or where the user-generated content could be considered a review.

Government must clearly articulate its proposals to tackle businesses' use of behavioural techniques to affect customers' purchasing decisions

(218) Similarly, we would invite Government to clearly articulate its proposals to tackle businesses' use of behavioural techniques to affect customers' purchasing decisions (as identified in the CMA's market study into online platforms and digital advertising and John Penrose's report). As currently drafted, whilst we understand that Government wishes to focus on specific practices (e.g., 'drip pricing' or advertised search results), it is unclear how Government intends to do so and we are concerned that Government's approach may unintentionally capture a wide-range of other benign online practices. A further example concerns the proposed changes to subscription contracts with auto-renewal or rollover. For the avoidance of doubt, to the extent that Government is considering post-contractual opt-in requirements as part of its proposals, we do not consider that there is any need to require customers to opt in each time that a subscription payment is due, particularly for low-value, high frequency products (e.g. food and consumer goods).[42] By requiring customers to opt in each time that a subscription payment is due, customers for this type of subscription would lose the desired benefit of a subscription (i.e. saving time and admin for regular purchases) while businesses are likely to lose many customers simply because the reminder to opt back in is missed and the subscription lapses.

Government's proposal to introduce new consumer laws targeted at specific practices is not the most efficient approach for reform in all areas

(219) Thirdly, we do not believe that Government's proposal to introduce new consumer laws targeted at specific practices is the most efficient approach for reform in all areas. Some of the measures that Government proposes to introduce would already amount to a breach of existing consumer law. As Government recognises, posting of fake reviews would already amount to a breach of the Consumer Protection from Unfair Trading Regulations 2008. We also note that it is already a requirement to provide information about the minimum duration of and the price per billing period for contracts, including subscription contracts, under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

[41] Consultation, para. 2.41.

[42] In particular, while consumers may forget that they are subscribed to non-physical goods like memberships or phone bills, this is unlikely to be the case where physical goods, such as large bags of pet food or coffee, are delivered to their front door.

In these areas producing guidance as to existing laws, which can be easily amended, rather than introducing new laws aimed at these specific practices which would be more difficult to change, would allow greater flexibility in the future when dealing with novel technologies, practices, or changes in behaviour (both from the consumer and from the trader) that may not currently be envisaged. This would also reduce unnecessary compliance burdens on businesses. More generally, we would advocate for a greater focus on enforcement of existing laws rather than a focus on introducing new ones.

CONSUMER LAW ENFORCEMENT

Questions 55 – 75

Government should not take a blanket approach with respect to aligning consumer and competition enforcement frameworks

(220) As above, with respect to its proposals on consumer rights, Linklaters notes that other jurisdictions with agencies responsible both for competition and consumer enforcement (for example, Australia), have (to varying degrees) sought to align their consumer enforcement frameworks with their competition enforcement frameworks.

(221) That said, there are important distinctions between competition and consumer laws (not least, the significant amount of economic analysis which typically underpins a competition enforcement case outside of the cartels arena) and we do not believe that a blanket approach should be taken in aligning the enforcement framework applicable to each. Whilst we understand the potential efficiencies of procedure in introducing direct enforcement and fining powers for the CMA, Government's proposal to enable the CMA to impose fines of up to 10% of global turnover for traders that breach consumer protection law would go well beyond what is necessary for deterrence purposes, as reflected by the fining powers in other jurisdictions. By way of example, the ACCC currently has the power to fine traders up to 10% of their annual turnover in Australia and the EU's Omnibus Directive provides for maximum fines in respect of turnover in the Member State(s) concerned. It is also noted that under the Omnibus Directive Members States can introduce maximum fines of 4% of turnover, less than the 10% proposed by Government. In addition, we would encourage Government to clarify that, as is currently the case under the CMA's competition powers, such fines would not apply cumulatively to each specific instance of a breach of consumer law.

It is reasonable to introduce an administrative model for consumer law enforcement

(222) In broad terms, Linklaters considers that Government's proposal to introduce an administrative model for consumer law enforcement is reasonable. In this regard, Linklaters repeats its comments made elsewhere in this response with respect to the CMA's administrative decision-making process. In particular, for the same reasons set out in response to question 24 of the consultation in relation to CA98 investigations, Linklaters is of the strong view that a 'full merits' standard is the appropriate level of judicial scrutiny of the CMA's decisions made in consumer law investigations. Linklaters is of the view that any such appeals should be heard by a generalist court and does not consider that a specialised consumer-specific tribunal is necessary. Typically, unlike in competition cases, no expert knowledge (e.g., on economics) is required to understand consumer cases, particularly where the relevant legislation is framed by reference to the "average consumer".

The current landscape of ADR providers and other organisations is confusing and overlapping in some respects

(223) Linklaters has a few high-level observations in relation to ADR. In general terms, we consider that providing consumers with simple and clear information about their options in the event of complaints is critical to providing consumers, vulnerable or otherwise, with satisfactory outcomes. Currently, the landscape of ADR providers and other organisations with a consumer-facing role is confusing and overlapping in some respects. We agree with the consultation proposals aimed at improving the quality and oversight of ADR providers. It is also critical that consumer organisations such as Citizens Advice have sufficient funding and resources to carry out their mandates.

(224) In many cases, companies themselves will be best placed to resolve complaints against them swiftly and satisfactorily, and many companies have made significant investments in effective complaint resolution. Linklaters would therefore caution against reforms that may have the unintended consequence of dissuading customers to engage with companies directly in the first instance.

A nominal fee to access ADR may encourage consumers to first make use of direct resolution options

(225) We agree that a nominal fee to access ADR may, in principle, encourage consumers to make proper use of direct resolution options before turning to ADR, but consider that the proposal of a £10-£20 fee is unlikely to be sufficiently high to achieve this purpose (and falls far below the basic costs of providing ADR services). We would also encourage investment in guidance and other materials to help consumers understand what may (or may not) be realistic and reasonable compensation for common types of complaint.

Shortening deadlines to ensure timely redress for the consumer should be balanced with flexibility to depart from recommended deadlines in complex cases

(226) With respect to balancing the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints, in our view, flexibility is paramount, particularly if the deadlines for responding to complaints are to be shortened. As such, we believe recommended deadlines by which complaints should be addressed are helpful, but that allowing businesses to depart from those recommended deadlines in complex cases (which should be the exception) is essential in avoiding unnecessary escalation. In complex cases, it is of course important that businesses communicate with the relevant customers to ensure that they understand why their complaint will take longer to resolve than is usual.

The parameters of the mandatory requirement to participate in ADR in motor vehicle and home improvement sectors must be clearly specified

(227) In the event that Government proceeds to require mandatory ADR participation for the motor vehicle and home improvement sectors, it will be important to clearly specify the parameters of this mandatory requirement. In our view, it would not be appropriate, for example, for a company that serves as an 'introducer' or an intermediary for a company active in a mandatory sector (but which itself is not active in that sector or contracting with the consumer in relation to the service provided in that sector) to be subject to mandatory ADR requirements.

ADR in the consumer/competition field should align with developments in general civil dispute/proceedings

(228) More generally, Linklaters is of the view that any development in ADR in the consumer/competition field should align with developments in general civil disputes/proceedings. There is currently a specific ongoing consultation about the use of

ADR within the court process (see here) following on from the CJC's recent report supporting compulsory ADR in certain circumstances (see here). The latter also considered many types of online and consumer ADR processes outside the court system. Given the existence of separate overlapping initiatives, we consider that policymakers should ensure their approaches to this issue are joined up across sectors and contexts.

The matters of collective actions and redress should be kept under review

(229) With respect to collective actions, Linklaters is of the view that opening up the possibility of collective actions may have the unintended consequence of encouraging meritless complaints that become costly and time-consuming to resolve. In any event, we consider that it would be premature to do so at present given the progress currently being made by the courts in determining how the existing mechanisms apply (in particular, the recent *Merricks v Mastercard* judgment of the Supreme Court and the pending *Lloyd v Google* judgment awaited from the Supreme Court). Instead, we consider that this matter (and the matter of collective redress) should be kept under review as the jurisprudence regarding the existing mechanisms evolves.