ICLA UK Response to BEIS consultation on Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers

1 October 2021

The In-house Lawyers Competition Law Association UK ("ICLA UK") welcomes the opportunity to respond to BEIS' consultation on Reforming Competition and Consumer Policy.

ICLA UK is an informal association of in-house competition lawyers in the UK comprising around 100 members. ICLA UK meets usually twice a year to discuss matters of common interest, as well as to share competition law knowledge. ICLA UK does not represent specific businesses, but rather is made up of individuals who are experts in competition law. As such this paper represents the views of the ICLA UK members and not the companies who employ them, and it does not necessarily represent the views of all its members.

ICLA UK is part of the wider In-house Competition Lawyers' Association of in-house competition lawyers across Europe and in South East Asia which currently numbers more than 450 members based in different countries around the globe.

ICLA UK's response to the BEIS Consultation is set out below. ICLA UK has not sought to respond on every aspect, but rather on the issues most relevant to its members. As such the response focusses on certain key questions contained in Chapter 1 of the consultation on Reforming Competition and Consumer Policy.

Reforming Competition and Consumer Policy - Chapter 1: Competition policy

General observations

1. ICLA UK supports fair and open competition as the bedrock of the UK economy and notes the Government's position that its Building Back Better plan for growth requires markets that support and encourage innovation and investment, which competition policy has a central role in promoting. Further ICLA UK is encouraged by the confirmation that government remains committed to ensuring an economic environment where great UK businesses are able to compete fairly on their own merits, and where the UK is the best place to start and grow a business.

2. ICLA UK notes the references made in the Consultation document to growing evidence, including the CMA's own State of Competition report, that competition in the UK may have weakened over the last 20 years and that this appears to be an overall trend towards less competitive, more concentrated markets. However, ICLA UK has concerns around the current strength of the evidence being relied upon by government. The CMA State of Competition report itself was a relatively high level document rather than a detailed economic study. In its conclusions the CMA stated that its conclusion that competition may have weakened was no more than tentative[1]. It is not clear to ICLA UK that the case for such expansive holistic change has been adequately evidenced and reasoned in the Consultation. Further commentary is provided below in the section on better understanding the state of competition in the UK. In ICLA UK's view, the current system strikes the right balance between fostering growth and innovation whilst protecting

[1] Paragraph 16 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf

consumer welfare. However, ICLA UK welcomes proposals that lead to real efficiency in the competition system.

3. ICLA UK agrees that an effective and efficient competition regime is key to delivering the best outcomes for consumers and the economy. However, efficiency does not always translate into speed.[2] Competition and market dynamics are complex areas requiring fulsome investigation. The penalties for infringements are very high. Any regulatory tools and investigative processes must therefore be appropriate and proportionate to those facts. Indeed, ICLA UK is concerned at, and indeed opposed to, the apparent chipping away of the checks and balances and rights of defence contained within BEIS' proposals which contribute to the robustness of the current system.

4. For businesses to choose a particular country or region in which to start and/or grow and be incentivised to invest and innovate, a clear, certain, predictable and fair competition regime is also required. Competition regimes which create uncertainty as to outcomes and a perception of unfairness, for example through insufficiently defined regimes, few checks and balances and weak rights of defence, tend to have a chilling effect on investment and innovation and may contribute to an impression that a country or region is unpredictable and difficult to do business in.

Response to specific consultation questions

I. A new pro-competition strategy for the UK

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

5. The CMA's research into the state of competition for its November 2020 report ("SOC Report") was conducted against a backdrop of similar reports conducted in other countries that have concluded that competitive pressures are declining across markets. These reports have been produced amid a growing political consensus (particularly across Western democracies) that something is not quite right with how economies have developed over the last 20 or more years (perhaps best evidenced by lower growth and increases in wealth inequalities). It appears that perceived systemic competition problems are being held up as responsible for a broad range of social and economic concerns. While competition problems undoubtedly (and always) exist, ICLA UK is concerned that competition policy is being held up as a panacea that cannot meet the expectations placed upon it.

6. Taking into account these institutional pressures, the analysis contained in the SOC Report is balanced and high quality. Nonetheless, we are concerned that there is a hint of a "solution looking for a problem" about the conclusions that are drawn from the analysis, by both the CMA and BEIS. The CMA acknowledges that its findings on market concentration and mark-ups are "mixed". However, its conclusions focus on interpretations of the data that might indicate problems with competition (especially around the margins earned by the most profitable firms), while not addressing interpretations that are either benign or indicate that competition may be effective.

7. In order to ensure balance, ICLA UK highlights below a couple of ways in which the data can be interpreted to indicate that competition may be working effectively in the UK. This should not be

[2] Indeed, it is widely accepted that the CMA and sector regulators will need to manage larger and more complex investigations in a post-Brexit environment and it may be difficult to reconcile this increasing complexity with significantly more speed within the system

taken to be an exhaustive critique of the SOC Report – the main purpose is to highlight that the CMA and BEIS should be more circumspect in how they rely on the report to justify legislative and policy change. ICLA UK would welcome the CMA conducting more work of this nature that seeks to get further into the data, on a sector by sector basis, and which seeks to identify what is working well alongside any concerns.

a. Mark-ups versus EBIT margins:
    i. While the CMA found that mark-ups had increased by 7% over two decades, it found that EBIT margins (which take into account fixed costs) are broadly flat over the period. A logical explanation for this is the realignment of the economy towards firms with lower incremental costs and higher levels of fixed costs.
    ii. For example, in the last 20 years the wider technology, media and telecoms (TMT) sector has increased its overall share of economic activity. Relative to economic activity as a whole, the TMT sector has higher fixed costs, greater scale efficiencies, and very low incremental costs: as the proportion of economic activity accounted for by the TMT sector increases, one would expect margins and market concentration to increase in the aggregate. The business models of TMT companies typically require the reinvestment of a significant proportion of business margins into new infrastructure, products and services – a failure to do so would lead to business failure. For example, telecoms companies (relatively concentrated markets, who have nevertheless seen their market valuations decline considerably over the last ten years) deploy billions each year into network infrastructure development. The investment is driven by competitive rivalry: a failure to invest would lead to loss of network quality, loss of customers to rivals, and ultimately business failure.
    iii. The CMA identifies further workstreams (at para 17 of the SOC Report) that may help to address this obvious interpretation of the data – in particular, conducting analyses at a sector level would be very useful. ICLA UK would welcome such work.

b. Declines in ROCE indicate competition is working
    i. The CMA notes that the falls in ROCE over the period may in part be explained by a corresponding fall in the cost of capital over the same period. This may be correct. The most obvious interpretation of this would appear to be that competition has prevented firms from maintaining higher returns as their cost of capital has declined: it would be more balanced if the CMA could acknowledge that this may in fact be an indicator of competition in action.

8. While the above examples are intended to be illustrative only, it seems far from clear that competition is declining in the UK; and this should not be used as the justification for reform.

9. At para 1.29 of the consultation, BEIS draws very broad conclusions from the SOC Report and a number of US reports to conclude that market power is increasing and this is reducing business investment incentives, which in turn undermines productivity growth. This requires a number of conceptual leaps that are not based on sound evidence.[3] In particular, BEIS should be cautious about relying on US data to reach conclusions about the UK economy. US commentators have

[3] See "Fully Grown: Why a Stagnant Economy Is a Sign of Success", by Dietrich Vollrath (February 2020). The author identifies the shift from a goods-based economy to a service economy, and decreases in labour mobility, as the two trends most responsible for declines in the rate of productivity growth since 2000. The author analyses the impact of market power on productivity growth in the US, and finds its effects to be ambiguous.

identified concerns that are peculiar to the US and not necessary present in Europe – in particular, antitrust enforcement in the US has been historically weak over the past two decades, and large firms have significantly more lobbying power in the US than they do in Europe. The CMA makes similar points in its SOC Report (at para 1.14).

10. ICLA UK cautions against any conclusions based on findings of "market power" (if broadly defined as the ability to price above incremental cost). We encourage BEIS to acknowledge that in an economy with no market power there would be no investment and no productivity growth at all. Competition law has for decades steered clear of identifying market power as a problem (focusing instead on "significant" market power and abuse of power), as it is also the driver of economic growth.

11. Of course, too much market power can also reduce investment and impact productivity. However, the analysis of changes in market power in the UK over time is in its infancy and no firm conclusions can yet be drawn. While ICLA UK agrees that the CMA should conduct further work in this area, and that there is space for reform, that reform cannot rest on a conclusion that there is some sort of endemic UK-wide problem around market power and competition. ICLA UK encourages BEIS not to allow this type of perception to enter into the general political discourse around competition policy, as it will likely raise expectations above what the CMA can deliver, setting it up for failure and increased levels of political interference, which may then lead to poorly judged interventions.

12. ICLA UK believes there is merit in the CMA state of competition report, and in the use of the metrics identified by the CMA in the first SOC Report. ICLA UK would welcome future reports, which could focus more on specific sectors, and encourage coordination with sectoral regulators where appropriate. ICLA UK would also encourage the CMA to identify evidence that indicates that competition may be working well, in addition to evidence that may indicate concerns, to ensure a sufficiently balanced and evidenced report. Particularly if the CMA is to take on a role as a micro-economic partner to the Bank of England. The CMA could consider publishing draft reports for comments from interested parties prior to publishing a final report.

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

13. ICLA UK does not support the CMA having any statutory power to require business to provide evidence for it to conduct its state of competition reports, as this would represent a significant additional burden on business. However, the CMA could consider contacting companies to seek voluntary participation in its reports. Should the CMA identify that a particular sector raises a number of concerns, it can use its market study powers (including information gathering powers) to undertake further investigation, again coordinating with sectoral regulators to establish which agency is better placed.

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

14. To ensure effective competition and good decision-making, without risk of artificial market distortion to suit political ends, it is important that decisions are taken by an impartial, independent regulator. Effective competition policy that actually ensures a fair and level playing field across all UK business and industry requires an economic effects, evidence based approach to competition policy and enforcement. It is important therefore that any Government intervention is light touch to avoid competition policy being overly influenced by political

considerations and lobbying. Indeed, the separation and independence of the CMA is a success story of the UK competition regime.

15. The "strategic steer" is less than 10 years old and cannot be classified as something the government "traditionally" does. Any strategic steer by its nature limits the independence of the CMA. A steer that was more frequent than one per parliament would risk forcing the CMA to devote resources to short term political projects (that may undermine the CMA's long term statutory objectives) at the expense of the more difficult work that leads to long term change. It may also dilute the focus of the CMA on actual complaints. ICLA UK therefore cautions against any increase in the frequency or the detail of the strategic steer. ICLA UK would not object to the CMA setting out more clearly and regularly how it is responding to the steer.

II. <u>More effective market inquiries</u>

16. Market investigations are a very powerful tool within the UK competition regime and their use can be effective to address features of a market which might not function effectively. However, investigations also have a significant impact on businesses with the imposition in some instances of very intrusive remedies, including structural separation, in scenarios in which the company in question has not broken any law. It is therefore essential to maintain appropriate safeguards and checks and balances to ensure that businesses are not disadvantaged by the system.

17. ICLA UK recognises that the process end to end (market study followed by a market investigation) can be lengthy. It is a substantial burden for sectors being examined as they are left in a state of uncertainty until the conclusion of the investigation (and until the recommendations / remedies are finalised). We agree with the statement that a quick, efficient and proportionate conclusion to an investigation is in the interests of business but we have concerns with some of the proposals set out in the consultation document.

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

18. In the current system, market studies and market investigations have different objectives. The market study is intended to be a flexible tool to explore problems in a market and does not engage in the same rigorous analysis that is required as part of a market investigation. In addition, a market study process contains fewer legal safeguards, largely because the CMA currently has no powers to impose remedies to address any concerns that it highlights. If such power was available to the CMA, any distinction with the market investigation tool would blur. Stronger safeguards would of course have to be introduced which would delay the process (including a need for review by a second pair of eyes, the Panel, engagement with the parties on remedies etc.). That would not make the process more efficient and raises concerns of fairness.

19. A market study on its own would not lead to assessing with sufficient certainty whether any particular competition problem exists and whether any particular remedies would address such concerns (even with an extended timeframe for considering the proposed remedies). It is also not clear what the "certain remedies" the CMA may contemplate at the end of a market study actually are, as opposed to remedies available in other forms of investigation. ICLA UK presumes that structural remedies would be available only in a market investigation but that would not allay any concerns as there are remedies which can have a very similar effect such as mandating access.

20. The consultation suggests that, if the option to impose remedies at the end of the market study was adopted, the CMA's board would be the responsible decision maker when deciding to impose

remedies. ICLA UK has several concerns in relation to this proposal. ICLA UK believes that the role of the CMA's independent panel should be preserved, and this is particularly important for intrusive remedies when the firms involved have not broken any rule. Institutional checks and balances play a clear role and the panel's role as an independent second pair of eyes should not be underestimated. ICLA UK does not believe that the CMA's board would be able to be objective and if the CMA board was to impose remedies ICLA UK would have a number of concerns:

a. First, decision-making behind closed doors would be a concern. Procedural fairness requires that decisions to impose remedies be subject to open scrutiny.
b. Second, the parties should have access to the decision makers and it is not clear how that could take place.
c. Third, the independent panel fulfils a key role ensuring appropriate checks and balances. Given the CMA Board is part of the CMA it cannot be considered as independent and therefore those check and balances would, at the very least, be diluted if not lost.

21. ICLA UK was surprised to read that BEIS believes that the CMA should have greater flexibility to define the scope of the market investigation; the CMA already has such power. In ICLA UK's view, market investigations could be made more efficient if the CMA were to scope better the remit of the inquiry and ensure focus on key issues.

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

22. ICLA UK does not believe that a single stage market inquiry tool, in the form suggested in the consultation, would have a positive impact. In a single stage enquiry, CMA panel members would be brought in at the provisional finding stage if binding remedies are under consideration. If the purpose is to render the process more efficient, it would be unrealistic for panel members to be able to analyse properly all the evidence in a short period of time. CMA panel members would likely have to rely on various summaries of the CMA staff and that would lead to undermining their role as an independent second pair of eyes.

23. If BEIS was to introduce a single stage inquiry tool, then it should be entirely redesigned and not just adapted from the current system. Very strong safeguards would be required, appropriate checks and balances, with a proper and effective role for the independent panel which would have to be involved early on in reaching any finding that could lead to intervention in a market. ICLA UK would also expect appropriate timeframes, to ensure that complexities of markets are fully understood, and an appropriate statutory threshold for initiating such an inquiry.

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

24. ICLA UK has very serious concerns, about the proposal to grant the CMA the power to impose interim measures at an early stage of a market investigation, and even more so in market studies. The analysis of markets is complex and it is not possible to explore all issues until the investigation is finalised. The CMA has, in the past, identified potential concerns at an initial stage only to drop those concerns following completion of the full market inquiry.[4] If the CMA had the power to issue interim measures from the beginning of a market inquiry, at a stage where it had not yet analysed the market in detail and when any initial concerns identified may subsequently be proven incorrect, this could lead to unjustified intervention and damage to an entire market. The

[4] Such was the case for example in the Energy market investigation.

damage would remain even if the CMA had the power to review or rescind the measures during the inquiry.

25. Further, as the consultation itself recognises, the use of interim measures could risk prejudicing regulatory incentives and lead to unintended market distortion. This would be very difficult to remedy further down the line. In the case of the imposition of interim measures in a market study, issues of fairness arise as the market study process lacks the same rigour of a market investigation.

26. ICLA UK is aware that the CMA could use that power in very specific and limited circumstances, such as when it was dealing with COVID-19 test prices and speed of intervention was critical. Whilst this may be useful in such a case, ICLA UK is concerned that the power would be applied to many other scenarios where the benefit would not be immediately obvious and where the danger of premature intervention is high. Issues like the Covid-19 test price may be better handled under consumer law or with proposals to Government to legislate.

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

27. In ICLA UK's view, if parties want to offer commitments, it should be possible for the CMA to accept binding commitment from the parties at any stage of the process.

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

28. ICLA UK has concerns in relation to the proposal, raised in paragraphs 1.81 to 1.83 of the consultation, to grant the CMA the power to require businesses to participate in implementation trials. It is clearly in the interest of the CMA and the businesses involved that possible remedies (and the way they are implemented) are discussed in-depth to ensure their effectiveness in addressing the concerns highlighted. However, ICLA UK does not believe that obliging businesses to participate in different implementation trials is appropriate. Trialling different scenarios could be costly, time consuming and might have a negative impact on the market and on consumers' engagement.

29. In relation to the points raised in paragraphs 1.84 to 1.88 of the consultation, ICLA UK believes that, especially in fast moving markets (but also in many traditional markets), it is important that remedies that have been imposed can be modified or withdrawn quickly without requiring a burdensome market investigation. The possibility for the CMA to review and, if necessary, vary (and ICLA UK would add 'withdraw") the remedies it imposes would benefit companies and consumers. However, it is important that legal safeguards remain in place (especially if remedies remain or are modified). In particular, the proposals to allow the CMA to monitor and review remedies must remain founded on evidence that the original AEC still exists before expanding/ supplementing remedies.

30. That said, it is also important that this does not become regulation of a sector through the backdoor leading to a perpetual review and the risk of making the CMA a sectoral regulator for all industries, without the deep knowledge that a sectoral regulator gains from day to day involvement in the industry. The proposal increases the risk that the CMA looks to make constant amendments seeking to improve competition, which is a very different activity to identifying and remedying impediments to effective competition and may result in over regulation and unintended consequences. ICLA UK believes a mandatory cooling off period of several years

would be welcome, unless there have been serious and substantial market circumstances that warrant the revision.

III. Rebalanced merger control

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

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

31. ICLA UK responds to Questions 10 and 11 together.

32. Whilst on paper the UK operates a voluntary and non-suspensory merger regime, in practice the difficulties of advising on the outcome of a share of supply jurisdictional test, due to its unpredictable nature, means that for many in-house legal advisers, and therefore the businesses they advise, the UK has become a de facto mandatory regime.

33. The share of supply test aims to bring into the CMA's jurisdiction transactions which may have a material impact in the UK, despite the turnover test not being met. However it has been interpreted very widely and unpredictably by the CMA in recent years in cases such as Google/Looker, Sabre/Farelogix and Roche/Spark, with jurisdiction being seized in unpredictable ways, including based on respectively: grouping non-substitutable products in the same category of services being supplied; a tripartite supply arrangement where the involvement of the only UK based company was minimal; and having a number of employees in the UK and the existence of patents. The risk of a disproportionate burden on benign or low risk mergers increases with such unpredictability.

34. The proposals for new additional tests will catch more acquisitions by large companies with strong market positions, regardless of the target's turnover or market presence. The uncertainty created by the current merger control regime will be aggravated if the UK were to adopt a new threshold to address "killer acquisitions" based again on the share of supply test (this time applied only to one party). The proposed new threshold only focuses on one merging party (which typically will not be the target start-up or new entrant) and risks constituting an unsophisticated large net wholly unfit for the purpose of singling out killer acquisitions. The CMA will be able to review transactions with no nexus to the UK, purely on the basis of the acquirer's business activities in the UK.

35. ICLA UK understands that, given its voluntary regime, the CMA is wary not to allow problematic mergers slip through its merger control net. However, these proposals, coupled with the CMA's already expansive interpretation of the share of supply test, will result in an extraordinarily wide jurisdiction for the CMA with the risk of undue burden being placed on benign and low risk mergers. In the current environment, where the CMA is commonly adopting a proactive stance, many more transactions will be prone to being unnecessarily notified. This will be costly for the CMA which reviews such notifications and to businesses which continue to lack legal certainty. ICLA UK notes that BEIS is also proposing mandatory reporting by digital companies and a mandatory merger threshold where strategic market status is allocated. If the Government's enforcement gap is more concerned with large digital companies, is this gap not not closed by those digital reforms, such that these proposals for the general regime are surplus to requirement?

36. In any event, ICLA UK would support an alternative reform of the jurisdictional tests to remove the share of supply test altogether and replace it with a turnover test, combined with a consideration test. This would have the following benefits:

   a. a turnover test element, without a test based on share of supply or market share, would align the UK with the practice of most regulators, as well as the ICN's Recommended practices for merger notification and review procedures, creating more certainty for all parties and stakeholders;
   b. a combination of the turnover test with a consideration test would enable the CMA to capture not only acquisitions by large companies active in the UK, but also strategic acquisitions whose impact on a given market may be beyond what can be deduced from its turnover at the time of acquisition. This is the test applied in Germany and Austria for example, where Germany has a consideration threshold of €400 million and Austria of €200 million. This would address "killer acquisitions" in a more targeted way, without placing undue burden on merging parties through an acquiror only turnover test. This will would create a more efficient process and a more appropriate balance of not unduly burdening benign or low risk mergers, while ensuring robust scrutiny of mergers that raise concerns. This will avoid the chilling effect of unpredictable decision-making and incentivise greater investment and innovation in the UK.

37. Failing the replacement of the current jurisdictional tests with the turnover/consideration combination suggested above, at the very least the share of supply test ought to be replaced with a market share jurisdictional test. Market share tests are used by the vast majority of regulators that apply such share based jurisdictional thresholds and are more predictable and familiar than the share of supply test, leading to more certain and consistent outcomes than exist today.

38. Finally, given how the CMA's jurisdiction has been stretched in recent years, if there was to be any further extension or change, this should carry clear guidance on the application of the relevant test.

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

Merger investigation procedures

39. Plans to improve efficiency during merger reviews are welcome.

40. ICLA is supportive of the proposals to enable the CMA to agree binding commitments earlier during in Phase 2 and to restrict the CMA to refer on the issues identified at Phase 1, especially given the initial phase of investigation including Pre-notification and Phase 1 can last for at least four months (depending on whether the merger is complete or not) giving the CMA ample time to identify all of the relevant issues. ICLA UK agrees that implementing these proposals will give the CMA and the relevant parties more tools to make the merger control process more efficient, without comprising the quality of the investigations.

41. As regards the proposal to enable parties to request, if they wish, automatic reference to Phase 2 without accepting at the time of the request that the merger could result in a SLC (including the introduction of an optional three week extension to Phase 2 for evidence gathering). ICLA UK is

also supportive and agrees that it may also contribute to more efficient merger control processes.[5] However, ICLA UK does not believe businesses will be incentivised to take up this option if the proposals to reduce the number of CMA Panel members is implemented for the reasons set out in ICLA UK's response on that question below.

Reducing unnecessary delays at Phase 2

42. ICLA UK is supportive of the proposal to introduce a requirement for the CMA to seek the parties' consent prior to extending the Phase 2 merger investigation time frames. ICLA UK believes that the parties will generally be aligned with the CMA's position on extension in most cases – after all, if the CMA feels it has not had enough time to review a merger its decision is likely to be more conservative rather than permissive. However, introducing an element of consent will assist in keeping all stakeholders, i.e. the parties and the CMA, more mindful of the impact of delay (e.g. longer uncertainty) on the relevant market(s).

43. ICLA UK believes that the requirement for the parties' consent should also apply in the context of the CMA coordinating with its international counterparts on a global solution. As BEIS itself observes, coherent remedies can significantly reduce costs for businesses involved and in the majority of cases the parties are likely to be aligned. However, where the parties may have specific concerns, the requirement for consent would enable the parties to have those concerns fully taken into account and dealt with.

IV. <u>Streamlining CMA Panel Decision Making</u>

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

44. ICLA UK supports the retention of the CMA Panel in its current form. ICLA UK does not support a reduction in the number of panel members or a narrowing of the panel members' role to making decisions on theories of harm and remedies only.

45. The current CMA Panel system is fit for purpose. Under the current system businesses can be confident that the CMA Panel provides an independent, fresh pair of eyes with business experience. The CMA takes invasive decisions with huge commercial implications for the businesses involved, including structural remedies to markets and businesses. To ensure a robust and effective competition regime that both ensures a fair and level playing field and incentivises investment and innovation in the UK, requires businesses of all types to trust in the system. A large part of that trust is created through the existence of appropriate checks and balances including the current CMA Panel decision making process. These are well recognised and respected by business.

46. The reduction in the number of panel members and their deeper involvement with CMA case teams will inevitably lead to greater incidences of confirmation bias, less independence and the dilution of diversity. Having to give up other interests may render a CMA Panel role less attractive to potential members and over time will reduce their independence and increase the risk of capture and confirmation bias.

[5] Although note, in practice there may be an impact on pre-notification timetables (i.e. shifting the delay elsewhere) as well as impact on affected third parties who will have a very intense period of engagement direct at Phase 2 (unless there is pre-notification market engagement).

47. Any dilution of the checks and balances brought about by the current CMA Panel will result in a loss of confidence in the UK regime. This in turn will lead to an uptick in companies bringing appeals against CMA decision, with the knock-on unintended consequence of ultimately longer cases.

V. <u>Stronger and faster enforcement against illegal anticompetitive conduct</u>

Q14. Should the jurisdictional requirement 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?

48. ICLA UK considers that the extension, of the CMA's jurisdiction to anticompetitive agreements which are "likely to have" direct, substantial, and foreseeable effects within the UK, is overly broad. The term "likely to have" could be interpreted extremely widely by the CMA such that agreements with no material impact in the UK could be caught, going beyond the CMA's duty to protect competition and consumers in the UK. Such a broad extension would decrease business certainty and predictability, and increase the risk of businesses, in the event of an infringement, being fined twice for the same conduct. ICLA UK proposes that the wording "likely to have" be removed. Alternatively, if it is to be retained, it ought to be limited to a reasonable and specific time frame, such as six months[6], and be based on actual evidence rather than speculation.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

49. The reasons not to apply for leniency are varied and depend on the specifics of the industry and the company in question. Whilst it is true that the risk of damages claims is one factor weighing against applying for leniency, it is far from the only one.

50. There are many situations in which a company will decide not to apply for leniency. In many cases the conduct is not ongoing and comes to light after the elapse of time; it also may not be clear whether the conduct constitutes actual cartel activity or a lesser infringement. In these types of cases, in-house counsel will very likely take remedial action internally (through targeted training etc). They may decide not to recommend, or make (or prepare to make) a leniency application, on the basis that the conduct has come to an end, has not been reported by anyone else, and remedial action has been taken. Applications for leniency – and their preparation - are very labour intensive and disruptive for a business, and this consideration on its own is often enough to weigh against leniency as an option. The possibility of generating third party damages claims (particularly opt out class action damages where the threshold for certification is now so low) may add some incremental additional weight against a leniency application, but will only be decisive in the most finely balanced of cases.

51. In the, thankfully extremely rare, event that a full blown hardcore cartel comes to light, it may be very difficult to recommend to a company Board (who are the answerable to shareholders) not to apply for immunity and miss out on achieving protection from the immediate risk of substantial

[6] i.e. "likely to have within six months, direct, substantial, and foreseeable effects within the UK".

fines and criminal investigation, simply because of the longer-term risk of private actions. This is particularly the case since, once a cartel is discovered, a business becomes aware of the risk that another participant may blow the whistle first, thus diminishing the level of the immunity available and triggering private damages in any event.

52. ICLA submits that one reason for the decline in leniency applications may be that compliance with competition law has increased considerably since the introduction of the Competition Act, due in part to the increased introduction of competition law compliance programmes and the growth in the number of in-house competition counsel across industry.

53. The proposal to introduce immunity from damages for the first applicant envisages that any harm caused by the first applicant to third parties would have to be compensated by the other cartel participants, given the principle of joint and several liability[7]. This would be the case even if the first immunity applicant was the cartel ring-leader. In ICLA UK's view this would be a hugely disproportionate and unfair burden on those other cartel participants, which in financial terms would amount to multi-million pound amounts.

54. Given the above factors, ICLA UK does not believe that the proposed additional immunity from liability for damages caused by the cartel is an appropriate reform.

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

55. Interim measures should be used sparingly and subject to strict procedural safeguards because they are imposed before a comprehensive investigation or finding of unlawful conduct. The use of interim measures is likely to have a significant impact on the business concerned, for example by forcing it to end certain commercial activity or relationships or by preventing it from implementing a commercial strategy or process, to the detriment of, for example, revenues, commercial relationships and recouping the cost of investment into a particular activity or system. Preserving legal certainty and procedural rights is therefore critical: burdening a company with legally binding measures mid-investigation without granting access to the file allegedly justifying such measures can pose serious fairness risks. The threshold to reach to allow an interim measure should be commensurate to the seriousness of an issue identified in an investigation, and there ought to be a corresponding right of review and appeal.

56. In ICLA UK's view, the proposals to remove access to the CMA's file and change the standard of review to one of judicial review, undermine rights of defence and leave businesses exposed to the possibility of being restricted by incorrect interim measures for months and possibly years, at significant commercial and financial cost, whilst the CMA proceeds with its investigation.

57. Access to file in such an administrative process is imperative for business to be able to fully understand a CMA decision and have a fair right to respond and challenge. The CMA should need evidence in support of a decision and business should be able to see that evidence.

58. The possibility of appeal on the merits is essential to ensure that, where interim measures are not justified or appropriate, businesses have an opportunity to prevent them from being applied for

[7] "Parties suffering harm from anticompetitive conduct could continue to recoup their losses from the other cartelists, who are not holders of full immunity in the public enforcement process." Paragraph 1.161.

months/years on end, whilst the CMA investigates, with significant commercial and financial detriment. This is all the more important given that the CMA is not required to give a cross indemnity for damages.

59. Rather than seeking to amend an administrative process for issuing interim measures and introducing speed at the cost of appropriate scrutiny, ICLA UK suggests than an alternative method to expedite interim measures and keep adequate checks and balances in place would be to require the CMA to apply to the Courts for interim measures in all cases, save where the parties to the investigation agree to the interim measures being proposed.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

60. If introduced, ICLA UK agrees that Early Resolution Agreements should require the approval of the Competition Appeal Tribunal before they became binding. Settlement payments may be significant and appropriate safeguards are therefore required. The analogy to the safeguards in the Deferred Prosecution Agreements in criminal enforcement is appropriate to provide confidence that the use of an ERA was indeed appropriate and in accordance with the interests of justice.

61. For the avoidance of doubt, ICLA UK believes that the current commitments tool, as well as an early settlement tool, is essential to ensure that the CMA and the relevant parties have a range of early resolution tools available and are able to select the most appropriate in each case. Commitments remain a relevant tool, especially in the investigation of horizontal cooperation agreements which are similar in impact to mergers and JVs but jurisdictionally fall within the scope of the Competition Act. In such cases, commitments can be appropriate in order to satisfy the CMA that the horizontal cooperation agreement is on balance pro-consumer, by resolving specific concerns cooperatively with the parties and other interested parties who have the opportunity to comment on proposed commitments packages.

62. In any streamlining of the process, ICLA UK does not support the removal of the checks and balances contained in the Competition Act 1998 (Competition and Markets Authority Rules) Order 2014 S.I. 2014/458 ("CMA Rules") .

Q21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

63. ICLA UK believes that protecting from disclosure documents prepared by the defendant business specifically in order to seek approval from the CMA to establish a voluntary redress scheme may encourage the use of voluntary redress schemes. A business has little incentive to propose a voluntary redress scheme if it believes a significant number of claimants will nonetheless bring actions for damages. Access to the scheme's preparatory documents may contribute to the bringing of such private actions and therefore any steps to encourage use of a voluntary redress scheme is welcome.

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

64. ICLA UK does not recognise the claim that Confidentiality rings can be difficult to negotiate and does not view them as a material cause of delay, however it has no objection to a reasonable legal framework/template.

65. ICLA UK is not aware of any evidence to suggest that civil sanctions are required for breach of confidentiality rings and therefore questions the need to introduce these.

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

66. ICLA UK believes the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations should be retained. The checks and balances of providing a fresh pair of eyes and a collective decision are essential to ensure robust decisions and the avoidance of confirmation bias. Removal of such checks and balances could lead an increase in the number of appeals which would have the, presumably unintended, consequence of drawing out competition cases further.

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

67. It is appropriate, and indeed essential, that CMA decisions under the Competition Act are subject to appeals "on the merits", involving an in-depth review of the law and of the facts by the court including any relevant fresh evidence given the very large penalties and application of intrusive legal requirements related to a particular aspect of the company's business that may be imposed on any business. ICLA UK does not support a switch to appeals limited to judicial review.

68. Appeals to the CAT are not considered by ICLA UK to be long and drawn out, the CMA's success rate before the CAT is high (likely because of the checks and balances that exist within the existing CMA's processes) and ICLA UK does not believe that there is a problem to fix. Consequently, any switch to judicial review would reduce to an unacceptably low level the rights of defence of business, diminishing the quality of the UK's competition enforcement decisions, without delivering a materially more efficient enforcement process.

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

69. ICLA UK believes the existing appeal process on the merits ought to be retained for decisions by the CMA to impose financial penalties for noncompliance with statutory requests for information. This is particularly the case given that Government proposes to increase the level of penalty that may be imposed by a very significant degree.

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

70. ICLA UK responses to questions 27 and 28 together.

71. In ICLA UK's experience companies endeavour to be responsive and accurate in their responses to CMA information requests and their modus operandi is not to intentionally mislead the CMA in any response. The same is as true for voluntary as for mandatory responses. ICLA UK considers the proposal to extend the penalty regime to voluntary submissions unnecessary and it risks having a chilling effect on engagement.

72. ICLA UK does not support the introduction of personal responsibility for Directors which would be disproportionate, unwieldly and impracticable. It would significantly slow down any information gathering process and make it very difficult for businesses to respond within existing timelines set by the CMA, particularly in merger control processes when deadlines are tight. Any director having to give personal accountability is going to require full explanations of all responses, documents and data to be submitted, including in matters where they would not be involved at a granular, detailed level. This will introduce more delays and less efficiency into the system.

73. Some companies, in particular those operating in regulated sectors, will likely already have robust internal governance policies in place to ensure that responses to requests for information are accurate and complete, given the threat of sanctions related to non-compliance. For example, sign-off on content might be required at senior leadership but not C-suite level, i.e. this responsibility would fall on a direct report to the Executive. This is a more proportionate level of seniority and accountability. It is worth noting that already this level of governance requires the relevant company factoring in sufficient time for the relevant senior leader to review and sign off on relevant materials. It would simply be unworkable to expect Directors to undertake this exercise; in particular, noting the often short time frames for response.

74. In requests to third parties for information about mergers not involving that party this requirement would be particularly burdensome. Businesses receive large numbers of information requests for third party mergers in particular. Frequently, these relate to markets in which the business is only peripherally engaged and of there is limited market knowledge. It is already challenging under the current regime to persuade business people of the need to sign off on responses to these types of information request. Elevating such information requests to Director level would make this even more difficult, as well as being disproportionate and unnecessary.

75. Given the above, requiring director declarations is likely to have a chilling effect on the extent to which businesses are prepared to provide detailed and meaningful responses to information requests. This may also force the CMA to issue more mandatory requests and result in the flexibility, to choose between voluntary and mandatory requests as appropriate, being lost.

76. In addition to placing additional burdens on management time (due to the inevitable requirement for internal governance processes to be adhered to for sign-off to be obtained), requiring director declarations is likely to have the knock-on effect of slowing RFI responses down from a CMA perspective – i.e. businesses will be forced to ask for time extensions on a more regular basis.