6 June 2025

CLLS REFLECTIONS ON THE MARKET STUDIES AND INVESTIGATIONS REGIME IN THE UK

1 Introduction

1.1 Following constructive discussions with DBT and the CMA in the context of the UK merger control regime, this document outlines the Committee's initial reflections on the efficiency and effectiveness of the market studies and market investigations regime ("**MIRs**") in the UK (referred to collectively as the "**Markets Regime**") under the Enterprise Act 2002 ("**EA02**"). This document also makes suggestions for future use of the Markets Regime based on the Committee and our clients' experience for the purposes of driving growth, investment and confidence in the UK.

2 Role and scope of the Markets Regime

The role of the Markets Regime

2.1 The Committee considers that the CMA's Markets Regime is a significant tool in the UK enforcement landscape, and recognises that it is one that is admired by authorities in other countries worldwide. In particular, the Markets Regime: (i) can help UK competition authorities to gather evidence and to better understand how markets work in the UK, **without attributing fault or liability on any firm or party**; (ii) has led to **material interventions aiming to improve competition and/or associated customer benefits** (e.g. *Open banking* and *BAA Airports*) or **improve industry standards** across the market (e.g. *Groceries*); and (iii) has been a way of scrutinising the **effectiveness of state/regulatory involvement** in certain markets in the UK and providing evidence-based policy recommendations to the Government (e.g. in *Rolling Stock Leasing*, *Energy, children's social care and housebuilding*).

2.2 However, MIRs (or the threat of MIRs) impose a significant cost on business. MIRs are lengthy, heavily resource-intensive and can lead to potentially drastic remedies being imposed on businesses (including price caps and structural divestments) without the need for there to be any finding or allegation of fault. MIRs can therefore have a significant chilling effect and create uncertainty for an industry (which may, e.g., impact on investment, innovation, share prices and M&A activity) for a prolonged period of time. The Committee considers furthermore that the net benefit to the UK economy of some MIRs conducted in the past is not clear cut given the resources involved. Moreover, there will always be a tension between an overall process that lasts for a minimum of two years (assuming a market study or other fact-finding exercise prior to an MIR, and now potentially a remedies testing phase) and at least two of the pillars of the CMA's "4P" framework (pace and predictability are exceedingly hard to achieve, and there will often be question marks about proportionality and process as well).

2.3 The Committee therefore sets out some suggestions as to how the MIR tool, if it is to be deployed, could be deployed in practice with a view to minimising uncertainty for businesses.

Case selection / information gathering

2.4 Given the impact of an MIR, the Committee considers that the Markets Regime would benefit from greater transparency in the decision-making processes in choosing which markets to review. This could for instance include: (i) publishing a high-level cost-benefit analysis when

deciding on whether to initiate an MIR taking into account the regulatory burden on businesses; and (ii) clarifying the role of the Government in prioritising case selection. Given the commercial implications for business, we welcome the CMA's continued use of its technical and business analyst resources to assist in deciding whether to open an MIR.

2.5 More generally, given the downsides to businesses and to the overall economy of long-running investigations with uncertain outcomes, we consider that the CMA's informal market reviews and call for inputs (as well as first-phase market studies) can be a helpful and more flexible tool for the CMA to better understand the functioning of the market (in e.g. CMA's review of *AI Foundation Models*, *Groceries* and *Road Fuel*), without being bound by statutory processes and the pressure of being seen to be taking remedial action (see further below).[1] However, these informal tools should be used in a very disciplined way. Lengthy informal processes which simply lead to an MIR (rather than being used as an alternative to an MIR) would exacerbate concerns regarding the business uncertainty of long-running investigations, rather than mitigate them.

The scope of the issues being investigated

2.6 One risk of the Markets Regime is that investigations become unduly broad in scope which can make it difficult for the CMA to undertake a fulsome review of relevant issues in a market and place a disproportionate burden on businesses to comply, as well as creating undue expectations that the CMA will be able to "solve" all issues in a market. The Markets Regime may benefit in certain cases from the terms of reference being precisely and more narrowly defined from the outset, while allowing the necessary issues to be considered. To this end, the CMA Board could take a prominent and transparent role in scoping and specifying the issues under investigation in an MIR.

Outcomes and remedies

2.7 We would welcome the CMA actively scoping the types of remedies and issues being considered at an early stage of its MIRs. While we recognise the need to undertake a sequential assessment of any adverse effects on competition ("**AECs**") and remedies (and only imposing remedies where they are appropriate and proportionate), there would, in appropriate cases, be a benefit in publicly taking remedies (especially the most interventionist remedies) off the table as early as possible.

2.8 Given the length of time and the public cost of carrying out MIRs, there is potentially a risk of bias towards intervention to demonstrate that an MIR process was worthwhile. However, the Committee considers that there may also be benefits from actively scrutinising a market and giving it a clean bill of health; this can help to disprove misconceptions, which can foster trust and confidence in a market.

2.9 We believe the CMA could also make use of opportunities to engage directly and constructively with businesses on possible interventions without the need for an MIR. The threat of an MIR provides strong incentives to businesses to work with the CMA to proactively resolve any issues. This will not be appropriate in every case, but we believe there are cases where such improvements could be agreed informally with businesses accountable to the public through their public comments (and the threat of potential future intervention) or

[1] We recognise that the CMA lacks formal legal powers to compel evidence which means that they may not be suitable in certain cases (although granting the CMA statutory powers to require information outside of an MIR context could address this issue).

formally using the CMA's power to take undertakings in lieu of an MIR, with or without a market study (which, we note has never been used in the CMA era[2]).

2.10 We welcome the CMA deploying its expanding business analyst resources to consider whether remedies would be effective from a commercial perspective. This avoids the risk of spending insufficient time focusing on remedies which will be practicable in light of the realities of the market.

3 Timing and process

3.1 We urge the CMA to consider speeding up the MIR process where possible, recognising the significant cost, resources and uncertainty on businesses brought about by these long-running investigations. There are a number of ways that the CMA could do this (including by taking inspiration from its revised Phase 2 investigation process for mergers):

3.1.1 *Proportionate information gathering*: speeding up and sequencing information gathering in an efficient manner – for example, re-using information received from a previous stage of the investigation (e.g. the market study before an MIR) and considering limiting the scope of very broad and burdensome information requests issued at the start of the MIR. The CMA should also consider whether data provided at the start of an MIR process needs to be continuously updated (as MIRs can span a number of years, which leads to iterative information requests). A more focused scoping of the MIR as a whole (as discussed above) would also be of assistance here.

3.1.2 *Early engagement on remedies*: As outlined above, the CMA could streamline the start of the MIR process by engaging early on the key issues at stake in the market and any AEC. The CMA should also precisely scope the forms of remedies being considered as part of early and substantive engagement with the main parties on remedies (consistent with the CMA's revised Phase 2 mergers process), without prejudicing the CMA's finding of any AECs in the market. We consider that the substantive remedies considerations are often back-ended in the MIR process, which diminishes the predictability and procedural efficiency of the process. In light of the CMA's statutory duty to remedy any AECs identified,[3] it would be pragmatic for the CMA to consider whether any appropriate remedy is within its ambit in parallel to considering its AEC assessment. We welcome the added flexibility in the DMCC Act 2024 to accept undertakings at any stage in a market study or MIR.

3.1.3 *Panel interaction and stakeholder engagement*: The Panel's role is highly valued by clients and by market participants, thus to the extent that it is practicable to improve opportunities for main parties' engagement with the Panel throughout the MIR process (and retaining the flexibility as to the format of such engagement), this would be helpful in improving transparency and robustness of the MIR process. More generally, the Committee supports active and ongoing engagement with participants in the context of MIRs, to avoid long periods of an MIR where there is little communication from the CMA. This could be assisted for instance by publishing working papers iteratively where appropriate, rather than publishing all topics at the same time, often with short periods to respond.

[2] We note it was utilised previously by the Office of Fair Trading in *Postal Franking Machines*.

[3] s. 138, EA02.

3.1.4 *Hearings/site visits*: Our experience indicates that the CMA has adopted a more flexible approach to the structure and format of main party hearings in its MIRs, and we would encourage it do so also for site visits based on the circumstances of the MIR (including considering whether a site visit will add material evidentiary value in all markets – particularly in less tangible / digital markets – or whether an alternative form of early stage engagement with the parties would be more appropriate for certain cases).

3.2 Consideration could also be given to legislative changes to speed up the MIR process by shortening the statutory deadline under the EA02 for the CMA to complete an MIR to (for example) 12 months.[4] This would be consistent with the CMA's drive for pace in its enforcement, but care would need to be taken that this does not undermine parties' rights of defence. This may be possible with more targeted approaches to MIRs to focus on the key issues and scoping of appropriate remedies as proposed earlier in this document.

4 Disclosure and transparency

4.1 The CMA's normal practice in MIRs has evolved to include publication of all submissions received as well as a voluminous amount of documentation at each stage. Whilst we appreciate that this is aimed at improving the transparency of the process and to discharge its duty to publicly consult affected parties in advance of its decisions,[5] we expect that this imposes a significant cost and burden on the CMA and associated parties as well as bottlenecks due to the resource-intensive putback process. The nature of this process can lead firms to be reluctant to engage with the MIRs process.

4.2 It is unclear whether publication of every third-party submission and the entirety of every CMA report / document (some of which can run into the 100s of pages) adds value to the transparency of the process. We are aware that the CMA has shared some of its interim thinking with the parties without publishing the relevant papers in the ongoing MIRs, and this is welcomed. We would also encourage the CMA to adopt the use of digital tools (e.g. to help automate the identification of confidential information) and redaction platforms (e.g. for managing the negotiation of claims) to streamline the putback process.[6]

4.3 The CMA is required to tailor its duty to consult to be "*context sensitive*",[7] and the position on disclosure must be different for the main parties to an MIR who should be provided with adequate information on the case against it for the purposes of their rights of defence. Whilst we appreciate that it can be resource-intensive for the CMA to manage confidentiality of information in market-wide investigations, we would urge the CMA to adapt its approach (further to legislative amendments where necessary) to disclosure to the main parties depending on the circumstances of the investigation (e.g. single firm v. market-wide AECs). The CMA's existing process of sharing "gists" of evidence / analysis may not always be sufficient to protect the main parties' rights to defence. Certain MIRs (in particular where more interventionist remedies are being contemplated) are likely to merit more fulsome access to file for the main parties.

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[4] s.137, EA02

[5] s.169, EA02.

[6] The European Commission has, for instance, adopted the use of an e-Confidentiality platform for its antitrust proceedings. eConfidentiality - European Commission

[7] *BMI Healthcare v. Competition Commission* [2013] CAT 21 at para. 40.