

CITY OF LONDON LAW SOCIETY

CONSULTATION RESPONSE TO THE UK GOVERNMENT'S PROPOSED REFORMS TO THE UK COMPETITION REGIME – “REFINING OUR COMPETITION REGIME”

1. EXECUTIVE SUMMARY

- 1.1 The City of London Law Society Competition Law Committee (the “**Committee**”) welcomes the opportunity to respond to the Government’s proposed reforms to the UK competition regime set out in its paper published on 20 January 2026, “Revising Our Competition Regime: Driving growth and enhancing competition for businesses and consumers” (the “**Consultation**”).
- 1.2 The City of London Law Society (“**CLLS**”) represents approximately 21,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. The members of the Competition specialist committee can be found on the CLLS website: <https://clls.org/committees.html>.
- 1.3 The Committee supports the Government’s stated objective of promoting effective competition and supporting economic growth and investment in the UK, as well as the Competition and Markets Authority’s (“**CMA**”) commitment to the “4Ps”– pace, predictability, proportionality and process. Many of the proposed changes are beneficial to the regime. However, the Government’s headline changes to CMA decision-making in complex mergers and market investigations raise serious concerns around whether the UK regime will continue to produce objective, politically independent, evidence-based decision-making with appropriate checks and balances. In addition, we have concerns in relation to the proposed change to the legal test for market reviews from an “adverse effect on competition” to an “adverse effect on consumers”, the potential revisions to the jurisdictional thresholds for mergers and the proposed introduction of ministerial approval for CMA guidance.
- 1.4 We justify these concerns in the sections below and make recommendations as to how the Government’s underlying objectives can be achieved without compromising legal certainty, integrity and the checks and balances built into the existing regime.

2. ENHANCING ACCOUNTABILITY FOR CMA DECISION-MAKING IN MERGERS AND MARKETS

Q1. What impact do you think the proposed reform would have on the consistency and predictability of decision-making in merger and markets cases? Please explain your views.

Q2. Would the proposed reform for greater accountability for the CMA Board for merger and markets decision-making be something you would welcome? Please explain your views. [No]

Q3. Do you support the proposed membership requirements for the mergers and markets sub-committees/committees? Please explain your views. [No]

- 2.1 The proposal to abolish the CMA's independent panel system represents one of the most significant institutional changes to the UK competition regime in decades. For approximately 80 years, the panel system has been a defining feature of the UK mergers and markets regimes, intended to enshrine independent, evidence-based decision-making in in-depth merger and market investigations. The Monopolies and Mergers Commission and the Competition Commission ("CC") both operated through appointed members who were assembled into groups or panels to investigate specific cases. This led to an expert, technocratic, evidence-led process in which panels provided a "fresh pair of eyes" to review the first-instance mergers and markets decisions of the Office of Fair Trade ("OFT").
- 2.2 When the OFT and CC were merged to form the CMA in 2014, the Enterprise and Regulatory Reform Act 2013 consciously retained the independent panel system for Phase 2 decisions. Any CMA Board member involved in the Phase 1 reference decision was statutorily prohibited from joining the Phase 2 inquiry group, maintaining a clear separation of Phase 2 decision makers (but not staff) from those responsible for the initial decision. Panel members were also bound by the requirements contained in paragraph 49 of Schedule 4 (Independence of Groups) to the Enterprise and Regulatory Reform Act 2013, which were designed to ensure panel decisions were both free from political influence and taken independently of the CMA Board, thereby guarding against confirmation bias and politically influenced outcomes.
- 2.3 When it has been suggested that the current judicial review standard for CMA mergers and markets decisions should be changed to a prosecutorial model as found in the US and Canada, the "fresh pair of eyes"/ merits review function discharged by the panel has been

cited as recently as 2022 by Government¹ and in the House of Lords² in justifying the retention of a judicial review standard before the Competition Appeal Tribunal (“CAT”) as a sufficient safeguard.

- 2.4 The Government’s proposal to replace the panel system with sub-committees of the CMA Board are, therefore, a radical departure from this tested model. The stated rationale is to improve pace, consistency and accountability to Parliament while aligning the merger and markets regime with the decision-making model used for the new digital markets regime. Other than the separation of CMA management from Phase II mergers and market investigation decision-making (which, as noted above, is a deliberate feature of the current regime), limited evidence is provided of the specific problems created by the current model. The decision-making model for the digital markets regime – cited as inspiration for the proposed changes – is also largely untested, with only three designation decisions in the 15 months of the regime’s operation. Moreover, rather than addressing clearly articulated concerns, we have serious concerns that this proposal threatens the credibility and independence of the UK’s competition regime, thereby reducing the attractiveness of the UK as an investment destination.
- 2.5 We have heard it explained by officials from the Department for Business and Trade (“DBT”) and CMA that the proposed sub-committee structure is designed largely to replicate the current panel system, and to continue the involvement of independent decision-makers in Phase II mergers and market investigations work, simply with the added feature of involvement (but not majority decision-making) by members of the CMA Board. It will have become evident from the volume of commentary in response to DBT’s consultation that, coming off the back of a number of high-profile controversies (such as the CMA’s decisions relating to *Microsoft/Activision*) and Government’s dismissal of the prior CMA Chair, there is a strong public perception that this proposal is designed to increase Government influence on CMA decision-making in these important areas. Even if this is not the intention of the current proposal, this perception – and its potential impact on investor confidence – must be recognised as an important factor in determining the future shape of the CMA process. Moreover, even if it is not the intention of the current Government to exercise greater influence over CMA decisions, the current proposal does not include sufficient independent checks and balances to prevent a future Government taking a different approach.

¹ See “*Reforming competition and consumer policy: government response*” dated 20 April 2022 (www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response)

² See HL Deb 18 July 2002 vol 637 col 1234 (<https://publications.parliament.uk/pa/ld200102/ldhansrd/vo020718/text/20718-29.htm>)

- 2.6 It is against this backdrop that we make the following more specific comments on the CMA sub-committee proposal.

Lack of appropriate checks and balances on decision-making.

- 2.7 Replacing an independent panel with a Board sub-committee, whose members may include senior executives with responsibility for taking Phase 1 decisions, removes a vital “fresh pair of eyes” that guards against confirmation bias in some of the most consequential decisions the CMA can take. The CMA is empowered under the Enterprise Act to prohibit an anticipated merger; order its unwinding if already completed; order the divestment of assets; or impose wide ranging behavioural remedies in the absence of any allegation of wrong-doing under its market investigation powers. The Government’s proposed reform would consolidate investigation and decision-making within the same organisational hierarchy, undermining the structural separation that has long defined the UK system and served as a key justification for its limited appeals standard.
- 2.8 The presence of non-executive Board members and independent experts is insufficient to avoid this outcome, given that executive Board members would, under the proposals, make up half of any sub-committee. DBT’s proposal to continue with the current system of requiring a two-third majority for sub-committee decisions would also provide an inadequate check and balance in the absence of additional requirements for sub-committee membership (including a minimum number of independent experts). Unless the relative weighting of members is specified to avoid such a result, executive Board members may often be able to prevent a two-thirds majority arising unless the conclusion accords with their views. More fundamentally, it is also questionable whether independent experts – or non-executive Board members – would be comfortable voting against an executive Board member, given the influence and importance of senior CMA executives.
- 2.9 In competition agencies in peer regimes globally, it is generally preferable, as a matter of good administration and to avoid confirmation bias, to separate individuals responsible for investigation from those responsible for final decisions.³ While the role of panel members combines both functions to a degree, the risk of confirmation bias is reduced by their lack of involvement in initial Phase 1 investigations and decisions on market studies. Administrative systems in which initial and in-depth decision-making is housed within the same institution, such as the German Federal Cartel Office and the European Commission, have additional features, like access to file in Phase 2 and an appeal before the national or European courts (with a standard closer to merits or enhanced judicial review). These

³ See “*The institutional design of Competition Authorities: Debates and Trends*” by Frederic Jenny, dated January 2016, pages 23 to 27.
(<https://www.europarl.europa.eu/cmsdata/100755/Frederic%20Jenny%20The%20institutional%20design%20of%20Competition%20Authorities.pdf>)

features incorporate additional and appropriate checks and balances on what would otherwise be unchecked and highly intrusive agency power. However, the UK regime – as it stands and under the new proposal – contains neither of these features. Removing the panel system in the way currently proposed would, therefore, set the UK apart from peer jurisdictions as an international outlier, being the only major jurisdiction combining executive-led decision-making with limited internal checks and balances, no access to file and judicial-review only appeals.

Reduced organizational integrity and investor confidence.

- 2.10 The CMA's recent changes to Phase 2 merger processes (in particular, the initial substantive meeting) have been positive and strongly welcomed by clients. The proposal to abolish the panel system will result in the loss of an otherwise robust and predictable framework of the kind valued by businesses and investors. Independent panel scrutiny gives confidence that far-reaching interventions – such as prohibitions or market-wide/structural remedies – are subject to rigorous and unbiased review. Removing this safeguard, without introducing alternative protections of the types described in further detail below, threatens to weaken the regime's organisational integrity, risks undermining investor confidence and leaves the UK at odds with the Government's stated goal of making the UK a more attractive destination for investment. Without the protections found in peer regimes, it is difficult to see how the reforms make the UK regime "best in class".
- 2.11 The Government states in the Consultation that its reforms aim to improve the pace of decision-making. The proposed model seems to suggest that removing the panel would improve pace because the case team could then deal with day-to-day investigation matters instead. However, the DMCCA model, on which the proposal appears to be based, has not delivered particularly quick investigations to date. Furthermore, the new system risks creating bottlenecks in the process with the CMA's CEO likely being a member of the sub-committee for all the significant cases (alongside their extensive other managerial duties).
- 2.12 The Government also points to the need to strengthen engagement between representatives of the CMA Board and parties to an investigation throughout the process. In fact, it is our experience, particularly in in-depth merger investigations following reforms last year, that there are already sufficient opportunities for the parties to engage with panel members, for example, at the initial meeting, main party hearing and any remedies hearing and that these members engage appropriately with parties on the substance of the issues involved.

Greater scope for political interference and less scope for rigorous testing of evidence.

- 2.13 Finally, the reforms risk materially weakening the CMA's political independence and rigorous testing of evidence, or at least giving the strong perception that this will be their consequence.

- 2.14 As ministerial appointees for 5-year fixed terms, renewable (and removable as the dismissal of the previous CMA Chair demonstrates) at the discretion of ministers, executive appointees are inherently less insulated from political pressure than independent panel members, who (with the exception of the Panel Chair) have no executive or managerial role and 7-year non-renewable terms. Concentrating decision-making power in the CMA Board – whose leadership is more directly answerable to ministers and more exposed to political pressure and lobbying – increases the risk, or at least the perception, that outcomes could be influenced by political considerations or wider industrial policy drivers rather than case-specific, evidence-based assessment. This inherent tension was already evident in the CMA's response to the Consultation, in which the CMA supported the proposed sub-committee model mainly on the basis that it will “*mean that the CMA Board can ensure markets and mergers decision-makers have regard to such CMA policy positions (though outcomes in individual cases will depend upon their own facts), thereby increasing consistency and predictability of CMA casework in these areas*”.⁴ The lack of transparency around whether and how such policy positions may be influencing case decisions – now or in the future – risks diminishing the robustness and predictability of decision-making going forward.
- 2.15 Moreover, the CMA's Chair and CEO are also ultimately responsible for the management of the CMA: a large organization today comprising over 1,000 staff and with multiple functions to oversee. They will simply not have the time to devote to getting into the weeds of specific cases involving complex mergers and markets and the accompanying economic and evidential analysis in the way that is required, further compounding concerns over less rigorous testing of evidence and confirmation bias. This will be particularly acute for the CEO, who will no doubt be expected to be involved (possibly as Chair) on the most important cases, while managing their other duties across the CMA.

Suggested enhancements to the proposed reforms.

- 2.16 For the reasons described above, we do not consider that removal of the panel system is necessary, nor do we believe that it will be a positive development for UK competition law enforcement. However, if the Government is determined to take this approach, then we make recommendations below in relation to the introduction of features which we consider are necessary and will go some way to preserving the perceived integrity of the CMA's mergers and markets work.
- 2.17 If the Government proceeds with abolishing the CMA Panel system, the new decision-making structure must include additional checks and balances to ensure case-level decision

⁴ See “*CMA response to consultation on refining the UK's competition regime*” (https://assets.publishing.service.gov.uk/media/69b020f2cdd628b29e3495b4/CMA_response_to_consultation_on_refining_the_UK_s_competition_regime.pdf).

making is robust, free from confirmation bias and political direction and subject to adequate rights of challenge by the parties who risk being deprived of their freedom to contract and in markets cases, their property rights.

a. Appeal standard.

- 2.18 The most direct and effective means of strengthening the robustness of decision-making would be to reform the standard of appeal of final mergers and markets decisions, moving away from the constrained judicial review standard (irrationality, illegality, unlawful procedure) that was previously justified, in part, by the existence of the independent panel.

Merits appeal.

- 2.19 The most comprehensive option would be to move to a full merits-based review standard, empowering the specialist CAT to determine not merely whether the CMA's decision was lawful and rational, but whether it was "*correct*" based on the evidence and economic analysis before the CMA. Merits-based review would follow many other peer jurisdictions (such as Australia, France and Germany). Such a reform would not be a radical step in the UK: it is the standard already applied by the CAT in appeals against decisions under the Competition Act 1998 and in consumer enforcement cases under the new DMCCA regime. Adopting it for merger and market decisions – with reasonable timeframes as in other jurisdictions – would, therefore, create a consistent appeals framework across the competition regime in the UK and, crucially, align the UK with many leading international peers.

Enhanced judicial review.

- 2.20 If a full merits review is not adopted, the current judicial review standard must, at a minimum, be strengthened. Recent case law, such as the Court of Appeal's judgment in *Cérélia/Jus-Rol*, has already acknowledged that the specialist nature of the CAT enables a more intensive and less deferential review than might be applied by a non-specialist court. Leveraging this experience, an "enhanced" judicial review should be entrenched in statute that goes beyond the traditional grounds of illegality and irrationality and requires the CAT to conduct a deeper and more exacting scrutiny of the evidence underpinning the CMA's evaluative judgments and the proportionality of its conclusions.
- 2.21 The standard of review at EU level provides a helpful benchmark as to how administrative merger decisions should be judicially supervised; see for example paragraph 39 of the ECJ's judgment in *Tetra Laval* (case C-12/03P): "*Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts,*

inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”

- 2.22 Section 120(4) EA 2002 provides that “*in determining such an application [to the CAT for review of a mergers or markets decision] the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.*” It is suggested that, based on the approach taken in section 202 of the DCCMA, Section 120(4) could appropriately be amended as follows: “*Any person aggrieved by a [appropriately defined] mergers or market investigation decision may appeal against that decision to the Competition Appeal Tribunal on the grounds that the decision was based on an error of fact; the decision was wrong in law; the nature of any remedy or order is unreasonable; or the decision was unreasonable or wrong for any other reason. On an appeal under this section the Competition Appeal Tribunal may quash, confirm or vary the relevant decision or remit it to the CMA.*”
- 2.23 This would correspond to the consumer protection appeal standards set out in section 202 of the DMCCA 2025, which applies this heightened standard to directions (which are in effect equivalent to remedies in mergers and markets cases, albeit they are less onerous as they do not extend to divestment orders). Notably, as it extends to directions, this higher standard is not reserved for the review of penalty decisions in the consumer protection context (see section 202(3) DMCCA 2025). Such an amendment, if accompanied by clear guidance indicating that it is intended to allow the CAT a broader remit to review mergers and markets decisions than afforded under traditional judicial review, would materially improve confidence in the proposed new regime by ensuring meaningful scrutiny of the evidence and provide a more robust check against factual errors and political interference in the absence of an independent panel, bringing the UK into line with peer regimes like the EU.

b. Sub-Committee Requirements.

- 2.24 Structural safeguards must also be embedded in the membership requirements of the new sub-committees to preserve independence and reduce the risk of confirmation bias in final decisions.
- 2.24.1 **Establish a statutory sub-committee size of five members taking substantive Phase 2 or market review decisions, with at least three independent experts, one executive Board member and one non-executive Board member.** Any sub-committee size smaller than five carries the strong risk that the executive Board and non-executive Board appointees – who are likely to vote together in practice – could

either pass, or at least veto, all substantive decisions of the sub-committee (even with implementation of the two thirds qualified majority rule). Establishing a floor of five members, of which only one may be an executive Board member, and one may be a non-executive Board member (so that three would be independent experts), would ensure that independent expertise is always meaningfully represented and Board members do not have ultimately have sole influence over substantive decision-making of the sub-committee.⁵

2.24.2 Bar sub-committee members from being involved in Phase 1 decisions for the same cases. Although the Consultation indicates that Phase 2 decisions would be made of sub-committees comprised of “different, senior staff”, this should be a mandatory requirement, rather than typical practice, to reduce the risk of confirmation bias.

2.24.3 Provide expert pool members with statutory protections against removal except in limited, specified circumstances, mirroring the protections currently afforded to Panel members. Current panel members can only be removed by the Panel Chair “in very limited circumstances”. Similar protections should apply to expert pool members to ensure they can exercise independent judgment without concern for their continued appointment.

c. Access to File.

2.25 Finally, parties must be granted meaningful access to the CMA’s case file following its decision in Phase 1 – including non-confidential versions of the key documents on which the CMA is relying. Access to file is fundamental to ensuring procedural fairness – especially in a system which no longer has an independent panel providing a “fresh pair of eyes” on the matters addressed by the Phase 1 decision. It would allow parties to properly understand the CMA’s concerns, test the reliability and relevance of evidence relied upon and proactively address factual, methodological or analytical errors before a final decision is taken.

2.26 As set out in Annex 1, access to file is also a standard feature of leading international regimes and a basic expectation of due process. For example, the European Commission’s merger control process includes access to file and an oral hearing framework overseen by an independent Hearing Officer, reinforcing procedural fairness and confidence in outcomes. Ensuring equivalent transparency in the UK (e.g. via a Hearing Officer sat outside of the CMA) would help to preserve the credibility of the regime, improve decision

⁵ If the Government considers it critical to maintain flexibility for smaller sub-committee sizes, at the very least it should be enshrined in statute that independent experts should account for the majority of all members on any sub-committee for substantive mergers and markets decisions.

quality and support investor confidence – especially where investigative and final decision-making responsibility is consolidated within the CMA's executive structure.

Conclusion.

- 2.27 In conclusion, abolishing the CMA's panel system – which has been a hallmark feature of the UK competition regime for over 80 years – raises real concerns around the independence and integrity of CMA decision-making, and in turn, the attractiveness of the UK as an investment destination. If the Government proceeds with this proposal, additional safeguards must be introduced to guard against these concerns. Changing the appeal standard to a full merits review is the most direct way to achieve this. In the absence of such a change, it is absolutely vital that the Government at least implements safeguards around sub-committee membership, access to file and an independent Hearing Officer, together with an enhanced standard of judicial review to counter balance a shift in decision-making power from the independent panel to the CMA executive.

3. MARKETS WORK AND MARKET REMEDIES

i. Enhancing the CMA's markets work.

Q4. Do you agree the existing market study and market investigation model should be replaced with a new single-phase market review tool? [Yes]

- 3.1 The end-to-end process of combined market studies and investigations can take over three years in some cases, creating prolonged uncertainty for in-scope businesses and delaying benefits to consumers. Anything that reduces duplication and delay in this way is to be welcomed. We, therefore, support the proposal to replace the existing two-stage model with a single-phase market review tool. These reforms also align closely with the objectives of the CMA's 4Ps framework, in particular pace and proportionality.
- 3.2 We particularly welcome the commitment that the single-phase tool will allow for earlier identification of the types of potential remedies being considered, thereby providing greater transparency and predictability. Where the CMA is considering more intrusive remedies, such as price controls or divestures, it plans to consult on an updated provisional adverse effect decision and provisional decision on remedies within six months of forming its initial provisional view. It is reasonable to interpret this as implying that more intrusive remedies that have not been signalled within this period will not subsequently be imposed.
- 3.3 However, we consider it would be useful if the guidance confirmed that, provided intrusive remedies are not consulted on in that window, then those remedies are permanently off the

table. In this context, from a legal certainty perspective it is important to identify clearly what is considered an “intrusive” remedy – for example, structural divestments, price regulation, access remedies – and what is not – for example, transparency remedies. While recognising that some flexibility will be necessary for the CMA to adapt with policy changes over time and the circumstances of specific cases, meaning it may be appropriate for the CMA to address this topic in its published guidance rather than it being fixed in legislation, we would nevertheless support some form of statutory distinction being made, or at least there being a legal obligation for the CMA to issue guidance on such a distinction.

- 3.4 We also note that the CMA should give a steer on the level of intervention – either by publishing a final report with recommendations or consulting on a provisional adverse effect decision (including possible remedies) – within six to twelve months of the launch of a review. It is important to recognise that this will require the CMA to have developed a sufficient evidence base within that period, and the process will be intensive for both the CMA and affected parties in the early stages of a review. It is clear that the CMA must be adequately resourced to discharge these obligations and make considered decisions within the relevant timeframes; without proper resourcing, the efficiency gains of the new model risk being undermined.

Q5. Do you agree the statutory time-limit for market reviews should be 24 months, with a possibility to extend by a maximum of six months? [Yes]

- 3.5 We agree with the proposal to introduce a statutory time-limit of 24 months for single-phase market reviews, with the ability to extend by up to a maximum of six months only in certain limited circumstances.

Q6. Do you agree there should be a single legal test for single-phase market reviews? [Yes]

Q7. If so, should this be the adverse effect on consumers test? [No]

- 3.6 The current markets model applies different thresholds and legal tests for market studies and market investigations.⁶ This two-test architecture made conceptual sense within the two-phase model: it was reasonable for the market study preliminary stage to be focused on whether consumers were being harmed, while the market investigation stage directed attention squarely to the competition question at the heart of the CMA’s function. Moving to a single process logically requires a single test, and we support that conclusion.

⁶ In a market study, the CMA must assess whether there are reasonable grounds to suspect there is an adverse effect on consumers, while in a market investigation it assesses whether there is an adverse effect on competition.

- 3.7 However, we do not agree that the single test should be an adverse effect on consumers test. The key thrust of the CMA's markets work is to identify and remedy competition problems in markets; that is the area of the CMA's core expertise and experience. The adverse effect on competition test has an established body of case law, has been extensively considered and applied by the courts, and provides a well-understood and legally certain framework within which parties and their advisers can assess the likely scope and outcome of a review. Predictability – another of the CMA's 4Ps – is best served by a test with that legal pedigree. As such, we do not agree that the CMA should have the power to implement wide ranging remedies on the basis of merely identifying consumer detriment, which has been identified / evidenced in past market investigations by high level observations on profitability in a market which is not necessarily due to a failure of competition in the relevant market.
- 3.8 The Consultation suggests that the CMA's ability to remedy harm could be restricted under a single adverse effect on competition test, particularly in cases where the causal link between consumer harm and harm to competition is open to dispute. We note that the Consultation draws on no specific examples – whether particular types of conduct or categories of market – where reliance on an adverse effect on competition test would leave material harm unremedied. In the absence of such examples, we are not persuaded that there would be an enforcement gap with an adverse effect on competition test or that the uncertainty introduced by an adverse effect on consumers test is justified. As a general matter, any remedies imposed to address the adverse effect on competition remain grounded by proportionality principles relative to the consumer detriment identified.⁷
- 3.9 A further reason for caution against applying an adverse effect on consumers test is that the CMA has recently acquired broad powers to undertake consumer protection enforcement that do not depend on a finding of adverse effect on competition, and those powers remain available to address consumer harms that fall outside the scope of markets work, thereby addressing any perceived enforcement gap. The argument that these new consumer law enforcement powers do not allow market-wide action does not in our view justify a single consumer test for market reviews. The CMA's new consumer powers – and its current approach to enforcement involving guidance and widespread public consultation – was designed to allow individual decisions to demonstrate where conduct infringed consumer law and hence act as precedents for market operators to follow. Moreover, the CMA has very significant fining powers in relation to consumer law infringements, which will ensure a strong general deterrence effect. Against that background, and given the substantive body of case law supporting the adverse effect on competition test, we consider it would not be appropriate to move to an adverse effect on consumers test.

⁷ CC3 (revised): Guidelines for market investigations: their role, procedures, assessment and remedies, para 354.

ii. CMA Market Remedies.

Q8. Do you agree the CMA should consider sunset clauses when designing remedies? [Yes]

Q9. Do you agree the CMA should review market remedies at least once every 10 years? [Yes]

Q10. Should the CMA be able to delay reviews beyond 10 years in exceptional circumstances? [Yes]

- 3.10 We support placing the obligation to consider sunset clauses when designing remedies on a statutory footing. The Government recognises that sunset clauses may not be appropriate for all remedies and that the CMA is best placed to determine whether they should be imposed; where it judges they are not appropriate, it will be required to set out its reasoning. This approach is proportionate and we support it. Remedies should not continue unless there is a positive justification for their continuation.
- 3.11 We also support the proposal that all market remedies must be reviewed at least once every 10 years – the appropriateness of a regular review cycle has been evidenced recently through the CMA's strategic review of a significant proportion of its market remedies, which resulted in the removal of a number that were no longer appropriate. It is important to ensure that any remedy continues to be proportionate and effective, and does not impose excessive costs or stifle innovation for those enterprises subject to them.
- 3.12 We recognise that remedy reviews themselves carry a cost and resource burden for both the CMA and affected businesses. The extent of that burden will vary depending on the complexity and scope of the remedy in question. The CMA should ensure such reviews remain proportionate rather than extend into a new substantive review of the market. In particular the CMA should avoid an effective re-run of the original market investigation. However, to the extent that reviews lead to the removal of ongoing compliance obligations, the net effect for industry should in most cases be beneficial.

iii. Concurrency.

Q11. Should sector regulators be able to oversee market remedies imposed or accepted by the CMA? [Yes]

Q12. Do you support the proposed consultative approach, where the CMA must consider undertaking a single-phase review following a request from sector regulators? [Yes]

- 3.13 We are supportive of the proposals for sectoral regulators to oversee market remedies imposed or accepted. Allowing the sectoral regulator with relevant expertise to oversee remedies in its own sector should, in practice, result in fewer regulatory touchpoints for businesses and constitute a more efficient use of regulatory resources overall. To the extent that there might be concerns that a sectoral regulator may not be able to oversee remedies for their full duration (e.g. if the sectoral regulator's resource or remit were to change – noting, for instance, that a new regulator will replace Ofwat), the regime could build in flexibility to allow oversight of remedies to be passed back to the CMA if required or appropriate.
- 3.14 We also support moving to a consultative approach whereby the CMA must consider undertaking a single-phase review following a request from sectoral regulators.
- 3.15 It is appropriate for the CMA, as the cross-economy regulator, to have control over its resource allocation and to be able to assess whether a particular market review should be prioritised in light of its own prioritisation principles and the Government's Strategic Steer. The sectoral regulator's recommendation should carry weight, but this will ultimately depend on the evidentiary basis: where a recommendation is not accompanied by an evidence base of the depth typically assembled in a market study, the recommendation will inevitably carry less weight than a reference supported by a fully developed evidentiary record – and the CMA will be best placed to assess this. The CMA will need to be transparent in its assessment of such requests and the reasons for any decision not to proceed. We note the Government's commitment to work with sectoral regulators, to assess the merits of these proposals to ensure they uphold the benefits of the concurrency framework and to retain the important leverage the regime gives them. We welcome this and would encourage that commitment to be reflected in the final legislative design.

4. **MERGERS**

i. Increasing predictability in merger control.

- 4.1 In our view, the difficulty of establishing in advance, or indeed during an investigation, whether the CMA has jurisdiction to review a transaction is the main challenge faced by merging parties when engaging with the UK merger control regime. As noted in the Consultation, this difficulty arises primarily from the “flexibility” of the share of supply and material influence tests. While the Consultation indicates that such flexibility is “historically considered a strength of the UK regime”, this is not a view shared by merging parties and their advisers who have encountered the CMA's extensive and unpredictable application of these tests in practice. Both tests are inherently uncertain and subjective.

Furthermore, the fact that the CMA can subject parties to a lengthy and time-consuming Phase 1 investigation without establishing jurisdiction - and indeed can dedicate significant energy and resources during an investigation to the question of whether or not jurisdiction is present - further reduces predictability and legal certainty.

The “share of supply” test.

Q14. Should share of supply be revised to a closed list of criteria, for both the share of supply and hybrid jurisdictional tests? Please explain why. [Yes]

Q15. Do you support the proposed criteria for inclusion? Please explain why. [No]

Q16. Are there any additional criteria that should be included? Please explain why. [Yes]

Q17. Would the proposed reform for the share of supply test improve predictability for businesses? Please explain why. [No]

- 4.2 As noted in the Consultation, the CMA has extremely broad discretion under current legislation to determine the basis on which it will calculate parties' shares of supply. As long as it can define a “good” or “service” (however strained or convoluted the definition), and provided the parties together supply or consume 25% of that good or service (in the UK or a “substantial part of it”), then it can assert jurisdiction. Under the new hybrid threshold, the situation is even more uncertain, given that it is sufficient for the CMA to describe a product or service for which only one party has a share of supply or acquisition of 33%.
- 4.3 The fluidity of the share of supply test in its current form means that, in practice, lawyers generally adopt the view that it is practically impossible to anticipate every way in which the CMA may seek to assert jurisdiction on share of supply grounds, if it wishes to do so. Given this, the safer course is often simply to advise clients that the CMA will find a way to assert jurisdiction over a transaction on this basis, if it has concerns. This was indeed the express view of former senior CMA executives. This undermines the whole point of a jurisdictional test. The fact that the CMA may conclude that the share of supply test is not met only at the end of a full Phase 1 investigation, having sent multiple information requests to the parties in the meantime to see if it can find a way to do so, contributes to this unfortunate situation.
- 4.4 Given this state of affairs, we welcome the Government's stated objective of increasing predictability by reforming the share of supply test. Unfortunately, the proposed reform – namely, providing a closed list of criteria that can be considered by the CMA when

establishing parties' shares of supply (or consumption), and removing the CMA's discretion to consider "some other criterion, of whatever nature" – does not go far enough.

- 4.5 Simply put, although removal of the "some other criterion" wording would provide some benefit by removing the CMA's ability to invent entirely new metrics, the explicit statutory criteria that would remain, namely "value, cost, price, quantity, capacity and number of workers employed", remain vague, subjective and very broad. As a result, the proposed change would not, in our view, place "clear, statutory boundaries around the application" of this test, as the Consultation purportedly seeks to do.
- 4.6 Notably, the proposed revision would not have prevented the CMA from adopting the rather convoluted assessments seen in some recent cases. For example:
- (i) in *Roche/Spark* (ME/6831/19, decision of 10 February 2020), the CMA assessed the merger on the basis of the parties' shares of "the supply of novel non-GT and GT Hem A treatments in the UK ... based on the number of UK-based, full time equivalent, employees engaged in activities relating to novel non-GT and GT Hem A treatments" (i.e. the "number of workers employed"). The jurisdictional assessment supporting this conclusion took up 12 pages of a 66-page decision and was no doubt the product of many requests for information to the parties.
 - (ii) In *Sabre/Farelogix* (ME/6806/19, decision of 27 September 2019), the CMA asserted jurisdiction *inter alia* on the basis of the parties' "supply of services to British Airways that facilitate the indirect distribution of airline content", with the share apparently being assessed by reference to the number of bookings (i.e. "quantity"). The jurisdictional assessment took up 12 pages of a 94-page decision and will again have been the product of many requests for information to the parties.
 - (iii) In *Google/Looker* (ME/6839/19, decision of 13 February 2020), the CMA asserted jurisdiction on the basis of the parties' "supply of tools for analysing web analytics data" (notwithstanding the fact that the parties' tools addressed different user needs), with the share being assessed by reference to the number of UK users (i.e. "quantity").
- 4.7 The remaining statutory list following the proposed reforms would retain criteria that are extremely uncertain. For example, it is far from clear how parties could reliably estimate their shares of "cost" or "price", or even anticipate how the CMA would assess this. Against this background, we suggest that the share of supply test does not align with the CMA's renewed focus on predictability and proportionality.

- 4.8 If the Government concludes that it nevertheless wishes to retain a share of supply based test, we consider that it should be based on the share of supply of goods or services of a particular description offered for sale in the UK by reference to value or volume. As relevant context to this suggestion, it is important to bear in mind that the recently adopted “hybrid test” has substantially increased the jurisdictional reach of the CMA such that any acquisition by a company with a material presence in the UK is now reviewable.
- 4.9 In any circumstances, the reference to the number of workers employed should be removed. We would also recommend the removal of the share of consumption test. While this is rarely applied in practice, its existence introduces additional uncertainty to jurisdictional assessments, and adds to the sentiment that there is always a way to find jurisdiction.

The “material influence” test.

Q17. Should the material influence and de facto control tests be revised to a closed list of statutory factors? [Yes] Please explain why.

Q18. Do you support the factors proposed for inclusion? [No] Please explain why.

Q19. Are there any additional factors that should be included? [Yes] Please explain why.

Q20. Would the proposed reform for the material influence test improve predictability for businesses? [No] Please explain why.

- 4.10 The existing material influence test has two central problems: (i) “material influence” is an intrinsically vague concept; and (ii) the threshold for materiality is unclear and potentially subjective. As a result, its application is inherently uncertain.
- 4.11 Whereas the concept of control (which, in European law, includes *decisive* influence) presupposes the actual ability to require a company to act in a certain way or prevent it from doing so, the test of material influence is far more nebulous and inherently difficult to determine. As the CAT noted in its 2013 judgment in *Eurotunnel v. Competition Commission*, “*the concept of material influence over policy is not one that can comprehensively be defined in advance and which is highly fact sensitive*”. The definition relied on by the CMA for material influence – namely, the ability materially to influence the commercial policy of the target enterprise – is circular and is, therefore, of limited practical value. Similarly, the CAT’s guidance in *Eurotunnel* that “*policy influence arises where one entity can influence the choice being made by another*”, whilst logically coherent in the context of that case, adds little to the statutory language.

- 4.12 In addition, the CMA may consider not just direct influence but also indirect influence, such as the ability to influence other shareholders to themselves exert influence on the target enterprise. This further increases uncertainty.
- 4.13 There is no conceptually stable threshold beyond which mere influence (as may be held by any significant shareholder or commercial partner) becomes material. A company may take account of the views of a range of stakeholders before deciding on its commercial strategy. In particular, it is common for start-ups and scale-ups to consult with their main shareholders, who will expect such consultation in return for the commitment of their capital. The key point, however, is that an independent company will ultimately decide for itself how to proceed following such consultations.
- 4.14 Although the CMA has provided helpful additional examples of factors liable to confer material influence in its updated guidance, this guidance cannot overcome the central difficulties arising from the concept itself. It remains the case that material influence is inherently difficult to determine and may be found with very low shareholdings, or even no shareholding at all, so as to catch a wide range of transactions between independent companies. This results in the outer jurisdictional boundaries of UK merger control being very wide indeed, extending well beyond what most companies would consider a “merger” in any meaningful sense, as well as being highly subjective and uncertain.
- 4.15 The Government’s proposed reform of setting out the factors that can be considered by the CMA will have limited impact, in the absence of a more thorough recasting of the material influence test, or even its removal altogether. This is because the central challenge for parties of assessing the presence or absence of material influence would remain, given the nebulous nature of the concept.
- 4.16 In addition, the listed factors would not materially constrain the scope of the test. In particular, the ability to access confidential strategic information and “commercial, financial, or consultancy arrangements” remain very broad factors and would potentially bring many arm’s-length commercial relationships within the scope of merger control, given that no shareholding would be required.
- 4.17 In fact, setting out these factors as a statutory list could actually make the situation worse than it is under the current law. Although the CMA guidance does refer to these factors, in practice the CMA will undertake a holistic assessment, by analysing a combination of the listed factors to determine whether the threshold of material influence is met in the round. It is generally understood that there is more weighting given to the factors which relate to corporate governance (i.e. a commercial agreement or confidential information could not alone give rise to material influence).

- 4.18 This nuance would be lost if the same list is enshrined in statute as a list of alternatives, separated by an “or”. Because all the factors would be presented as having equal weight on a standalone basis, this would actually increase uncertainty, compared with the status quo. In principle, the CMA would be able to rely on the statute to argue that access to commercial strategic information or commercial, financial or consultancy arrangements alone is sufficient to constitute material influence. Such an approach would be contrary to CMA practice, as well as the jurisprudence of the CAT, which noted in *Eurotunnel* that it did “*not consider: (i) economic dependence between one party and another; (ii) the fact that one party may have contracted exclusively with another; nor (iii) the fact that there may be close relations between one party and another to be – whether in themselves or collectively – sufficient per se to establish a material influence over policy*”.
- 4.19 The position is different with the share of supply, whereby the CMA is considering alternative approaches to assessing this metric. Here the test is cumulative and the CMA needs to weigh all these factors in the round – not pick one as sufficient to get across the line.
- 4.20 We would favour a removal of material influence altogether as a jurisdictional test, in favour of a reliance on control (including the concept of decisive influence, as applied under EU law). This would align the UK regime with international best practice. As a fall-back, we would favour the introduction of a clear safe harbour, whereby material influence cannot be present with shareholdings of less than 15%, except in circumstances where an agreement gives a counterparty clear de facto control based on objective criteria, for example a minimum threshold of board appointments or other key governance rights which are tantamount to decisive influence (e.g. veto rights over budget, business plan or hiring/firing of senior management).
- 4.21 It is unclear why the Government considers it necessary for there to be a statutory definition of factors that can be taken into account when establishing de facto control, as there is significantly less uncertainty over the meaning of that concept. We would, therefore, suggest dropping that aspect of the reforms.

ii. Providing more time to agree remedies at Phase 1.

Q21. Should the timeframe for submitting and considering Phase 1 remedies be extended from up to 10 to up to 20 working days? [Yes] Please explain why.

- 4.22 We are supportive of the proposal to extend the timeline for submission and consideration of Phase 1 remedies from up to 10 to 20 working days (although the proposal for parties to be able to submit remedy proposals within 10 working days (extended from five) should apply in all cases and not be subject to CMA discretion). This will no doubt expand the number of cases which can adequately be dealt with at Phase 1 and not require a

burdensome in-depth investigation. However, at the same time, the CMA must also be prepared to engage with Phase 1 remedies at pace and even entertain discussions earlier in the Phase 1 process to ensure these can be agreed within a still tight 20-working day framework.

5. FURTHER CROSS-CUTTING CHANGES

i. Stronger investigative powers for algorithms.

Q22. Should the CMA be granted enhanced powers to investigate algorithms in its competition and consumer protection functions? [No] Please explain your reasoning.

- 5.1 We understand why the Government might want to look again at the CMA's information gathering powers to ensure that they are appropriate for the different ways in which information is now generated, held and used in businesses. However, the proposal as currently formulated represents a major departure from, and potentially significant increase to, the current obligations on businesses that are subject to CMA processes, namely the production of existing documents and information that is held within the business. These existing obligations are already burdensome.
- 5.2 The proposed extension of powers would mean that businesses could be required to invest time and resources in generating new information, which will inevitably disrupt ongoing commercial operations. There could also be material operational complexity associated with producing the types of simulated outputs, A/B tests or demonstrations that we understand are envisaged by these powers. This is particularly inappropriate in the context of processes such as market investigations where there is no allegation of fault on the part of an individual business (and where the corresponding burdens may also not be evenly spread between market participants).
- 5.3 It is also not wholly clear from the summary in para 95 whether the intention is that such powers are limited specifically to the operation of algorithms as compared to broader business activities and, if so, how such a distinction would be made in practice.
- 5.4 Whilst we understand that the intention is alignment with powers available to the CMA under its digital markets function, we consider that:
- 5.4.1 These powers are as yet relatively untested in the context of the digital markets function, and we note that Parliament chose not to extend these powers to the consumer functions of the CMA at the time of the DMCCA.

- 5.4.2 The CMA's powers in relation to digital markets relate to an *ex ante* regulatory role and operate in the context of specific businesses that have been (or may be) identified as holding strategic market status. It is not self-evident that these powers are appropriate as general competition powers that apply to the economy as a whole.
- 5.5 We suggest that this proposal is paused for now and revisited in light of greater practical experience in operating the digital markets regime, at which point it may be possible to address some of the concerns around proportionality and burdens on businesses by more targeted adjustments to the CMA's information gathering powers.
- ii. The Secretary of State's role in CMA guidance.**
- Q23. Should the Secretary of State have a formal role in a wider range of key guidance documents? [Not sure] Which ones, and please explain why.**
- 5.6 We do not have concerns with the Secretary of State having a formal right to be consulted in relation to certain key guidance documents, provided that this can be done in parallel with the broader consultation of stakeholders that the CMA will carry out. This will ensure the introduction of the Secretary of State into the consultation process will not lead to delays in finalising revisions to relevant documents or introduce a second, more political, stage in the approval process.
- 5.7 However, we are less convinced that it is appropriate for the Secretary of State to approve all key guidance documents, given: (i) the technical nature of many of these documents, relating to fields where ministers and their officials are likely to lack relevant experience; (ii) the implications of such rights for the perception of the CMA's independence; and (iii) the potential delays to timetables that this may cause. These factors all seem likely to diminish the CMA's ability to act with pace and proportionality when formulating and updating guidance. Despite these drawbacks, the justification and countervailing advantages for introducing such a step are not specified.
- 5.8 We recognise that the Secretary of State already has a consultation role in relation to certain specific documents and can understand why this might be appropriate for documents concerned with how enforcement powers will be exercised (e.g. guidance on penalties) or where there may be an impact on the UK's international relationships (e.g. international co-operation). It may be that there are other specific documents, particularly those that are focussed on higher level principles rather than technical guidance, that could be added to the category where ministerial approval is required (the 2025 Mergers Charter perhaps being an example). We suggest, however, that this should be addressed on a case-by-case basis rather than there being a general provision affecting all guidance documents.

iii. Excluding the Christmas period from statutory time limits.

Q24. Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits? [Yes] Please explain why.

Q25. If so, what length should the pause be?

- 5.9 We agree that a longer Christmas period should be excluded from merger and markets statutory time-limits. However, if the intention is that this reform is to also benefit businesses and the individuals that work within them then this would need to be accompanied by some form of additional protocol setting out:
- 5.9.1 restrictions on how close to the start of the Christmas period new materials and RFI requests will be sent to parties; and
 - 5.9.2 how deadlines are set where the time for responding falls over the Christmas period.
- 5.10 We recognise that there will be exceptional cases from time to time and so some level of flexibility is required but the main sources of pressure and disruption for businesses where timelines run over the Christmas period arise as a result of RFIs or similar (i) arriving prior, but very close, to Christmas Eve by which time relevant subject matter experts may already be away and there is limited opportunity to make arrangements for cover or changes to plans; and (ii) where the deadlines are set in a way that assumes the parties will continue to progress matters over the Christmas period (either because the deadline falls very shortly after new year and/or because the amount of work required by the RFI means that it cannot be achieved in the specified timetable without being progressed over the Christmas period. Simply allowing additional days to be counted as bank holidays for the purpose of setting the overall deadlines for the process, without anything further, would not materially change this position.
- 5.11 We would propose a pause of either five working days, or a fixed period from December 24 to the first working day (as defined in s129 of the Enterprise Act) of the new year when the statutory timeline will be suspended.

Should you need any further information, please do not hesitate to contact Nicole Kar (nkar@paulweiss.com) or Kevin Hart (kevin.hart@clls.org) at the CLLS

ANNEX 1 – CONSULTATION QUESTIONS

MULTIPLE CHOICE RESPONSES

Chapter 1: Enhancing Accountability for CMA Decision-Making in Mergers and Markets

Q1. What impact do you think the proposed reform would have on the consistency and predictability of decision-making in merger and markets cases? Please explain your views.

Q2. Would the proposed reform for greater accountability for the CMA Board for merger and markets decision-making be something you would welcome? [Yes / **No** / Not sure] Please explain your views.

Q3. Do you support the proposed membership requirements for the mergers and markets sub-committees/committees? [Yes / **No** / Not sure] Please explain your views.

Chapter 2: Markets Work and Market Remedies

(i) Enhancing the CMA's Markets Work

Q4. Do you agree the existing market study and market investigation model should be replaced with a new single-phase market review tool? [**Yes** / No / Not sure] Please explain why.

Q5. Do you agree the statutory time-limit for market reviews should be 24 months, with a possibility to extend by a maximum of six months? [**Yes** / No / Not sure] Please explain why.

Q6. Do you agree there should be a single legal test for single-phase market reviews? [**Yes** / No / Not sure] Please explain why.

Q7. If so, should this be the adverse effect on consumers test? [Yes / **No** / Not sure] Please explain why.

(ii) CMA Market Remedies

Q8. Do you agree the CMA should consider sunset clauses when designing remedies? [**Yes** / No / Not sure] Please explain why.

Q9. Do you agree the CMA should review market remedies at least once every 10 years? [**Yes** / No / Not sure] Please explain why.



Q10. Should the CMA be able to delay reviews beyond 10 years in exceptional circumstances, providing it publishes its reasons for doing so? [**Yes** / No / Not sure] Please explain why.

(iii) Concurrency

Q11. Should sector regulators be able to oversee market remedies imposed or accepted by the CMA? [**Yes** / No / Not sure] Please explain why.

Q12. Do you support the proposed consultative approach, where the CMA must consider undertaking a single-phase review following a request from sector regulators? [**Yes** / No / Not sure] Please explain why.

Q13. We welcome any other views or evidence on improving the concurrency framework.

Chapter 3: Mergers

(i) Increasing Predictability in Merger Control

Q14. Should share of supply be revised to a closed list of criteria, for both the share of supply and hybrid jurisdictional tests? [**Yes** / No / Not sure] Please explain why.

Q15. Do you support the proposed criteria for inclusion? [Yes / **No** / Not sure] Please explain why.

Q16. Are there any additional criteria that should be included? [**Yes** / No / Not sure] Please explain why.

Q17. Would the proposed reform for the share of supply test improve predictability for businesses? [Yes / **No** / Not sure] Please explain why.

Q18. Should the material influence and de facto control tests be revised to a closed list of statutory factors? [**Yes** / No / Not sure] Please explain why.

Q19. Do you support the factors proposed for inclusion? [Yes / **No** / Not sure] Please explain why.

Q20. Are there any additional factors that should be included? [**Yes** / No / Not sure] Please explain why.

Q21. Would the proposed reform for the material influence test improve predictability for businesses? [Yes / **No** / Not sure] Please explain why.

(ii) Providing More Time to Agree Remedies at Phase 1

Q22. Should the timeframe for submitting and considering Phase 1 remedies be extended from up to 10 to up to 20 working days? [**Yes** / No / Not sure] Please explain why.

Chapter 4: Further Cross-Cutting Changes

(i) Stronger Investigative Powers for Algorithms

Q23. Should the CMA be granted enhanced powers to investigate algorithms in its competition and consumer protection functions? [Yes / **No** / Not sure] Please explain your reasoning.

(ii) The Secretary of State's Role in CMA Guidance

Q24. Should the Secretary of State have a formal role in a wider range of key guidance documents? [Yes / No / **Not sure**] Which ones, and please explain why.

(iii) Excluding the Christmas Period from Statutory Time Limits

Q25. Do you agree a longer Christmas period should be excluded from merger and markets statutory time-limits? [**Yes** / No / Not sure] Please explain why.

Q26. If so, what length should the pause be?