

Government Consults on ‘Ambitious’ Reform to UK Competition Policy

9 August 2021

On 20 July 2021, the UK Government launched its consultation on wide-ranging reforms to “bring [the UK’s] competition and consumer policies into the 21st century”¹ (the “**Consultation**”). While recognising that the UK’s competition regime “starts from a strong foundation” and “is internationally well-regarded”, the Government considers that transformational reform is necessary to reflect dramatic changes to markets and the ways in which businesses and consumers interact, as well as to ensure consumers’ rights are “robustly enforced.”²

The Government is proposing a number of specific reforms to the UK’s competition law and procedure in order to achieve the following six objectives: (1) to allow Government to play a more active role in shaping UK competition policy; (2) to facilitate more effective market inquiries; (3) to “rebalance” merger control to capture more potentially harmful mergers and reduce costs in other cases; (4) to improve efficiency of CMA Panel decision making; (5) to strengthen enforcement against anti-competitive conduct; and (6) to increase the CMA’s investigative and enforcement powers.

This alert memo sets out the background to, and main reasons for, the Government’s proposals and provides observations on their possible implications, before summarising the proposed changes.

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¹ Foreword by The Rt Hon Kwasi Kwarteng MP, Secretary of State for Business, Energy and Industrial Strategy, p.8.

² *Ibid.*



I. BACKGROUND TO THE GOVERNMENT'S PROPOSED REFORMS

The Consultation follows a line of reports and studies that have recommended modernising and reforming the UK competition regime, including:

- **National Audit Office Report (February 2016).** The report was critical of the CMA's lack of enforcement activity in relation to antitrust cases, noting that “[a]wareness of competition law and the competition authorities is low, and there is limited evidence on the full impacts of competition work.” The report concluded that “the regime has further to go to ensure that value for money is achieved.”³
- **Letter from Lord Tyrie, then Chair of the CMA (February 2019).** Lord Tyrie described the UK as having “an analogue system of competition and consumer law in a digital age.” He identified two alternative routes for reform: either a fundamental rewriting of the statute book; or amendments to the current rules. Given the disturbance and uncertainty associated with the former, Lord Tyrie suggested eight proposals to amend the existing regime, including to broaden the CMA's information-gathering powers, to empower the CMA to intervene quickly to prevent consumer harm, and to reduce judicial scrutiny of the CMA's antitrust decisions.⁴
- **Report of the Digital Competition Expert Panel, chaired by Jason Furman (March 2019).** The Government-commissioned report on “unlocking digital competition” identified features of digital markets that impose challenges for competition enforcement and that require new tools to prevent consumer harm. The report proposed, among other things, the creation of a

Digital Markets Unit within the CMA to monitor competition in digital markets, the introduction of a code of conduct for firms with “Strategic Market Status” and changes to the merger regime.⁵

- **Advice from the Digital Markets Taskforce (December 2020).** Following the Furman report, the CMA published advice to Government on the design and implementation of a new regulatory regime for digital markets. The CMA recommended, among other things, an *ex ante* regime with three pillars: (1) an enforceable Code of Conduct for firms with Strategic Market Status; (2) pro-competitive CMA interventions to address sources of market power; and (3) a specific merger-control regime for firms with Strategic Market Status.⁶
- **Report by John Penrose MP (February 2021).** This report identified a number of shortcomings in the UK's competition and consumer regimes and made a series of recommendations to promote creative and light-touch regulation, including (1) strengthening the CMA's powers to enforce consumer protection law; (2) implementing measures to expedite and simplify competition proceedings; (3) cutting burdensome regulation; (4) supporting the CMA's proposal to create a Digital Markets Unit; and (5) allowing greater scope to intervene in mergers that threaten to move operations offshore.⁷

The Government's proposals aim to deal with the procedural and substantive issues identified in these reports and deliver on the objectives of the suggested reforms. The Government is separately consulting on new tools to deal specifically with competition in digital markets⁸ and has asked the CMA to advise it on how competition and consumer law tools can be

³ See National Audit Office, [The UK competition regime](#), 5 February 2016.

⁴ See [Cleary Gottlieb UK Competition Newsletter, February 2019](#) (page 8).

⁵ See Cleary Gottlieb Alert Memorandum, [Unlocking Digital Competition: UK Expert Panel Publishes Report on Competition in Digital Markets, 11 April 2019](#).

⁶ See [Cleary Gottlieb UK Competition Newsletter, December 2020](#).

⁷ See Cleary Gottlieb Alert Memorandum, [Putting Customers in Charge: Penrose Report on the State of UK Competition, 15 March 2021](#).

⁸ See [A new pro-competition regime for digital markets](#), July 2021

used to achieve the Government’s sustainability objectives.⁹

In addition to the suggested competition law reforms, the Government is also proposing a number of changes to the UK consumer law regime, to reflect the “*essential part*” consumer rights have to play in “*ensuring that competition and markets work for everyone.*”¹⁰ The Government identifies two main developments that it believes require an update of consumer rights:

- **Rise of online shopping.** The Government is concerned that the growth of online shopping, accelerated during the COVID-19 pandemic, has led to a number of issues, including websites increasingly collecting and using consumer data to exploit consumers’ behavioural biases. The Government is proposing measures to prevent consumers being coerced into purchases by introducing “fairness by design” principles. It is also proposing to strengthen the law to better prevent fake reviews online as well as to increase payment protections and safeguard customers’ money.
- **Increase in subscription contracts.** The Government estimates that consumer spending on subscription services is between £28 billion to £34 billion per year. It is concerned that businesses are setting “subscription traps” by making it too hard for consumers to cancel. To address this, the Government is suggesting clarifying the law on pre-contract information so that consumers know what they are signing up for, and also proposes measures to ensure that consumers are given a choice on auto-renewals, are alerted to ongoing subscriptions, and are given easier ways to exit them.

These consumer law reforms may also have significant implications for businesses, empowering the CMA to take direct action against firms that breach consumer law (rather than having to apply to

court), with powers for the first time allowing the CMA to impose significant fines of up to 10% of global turnover for breaches of consumer law.

II. GOVERNMENT’S REASONS FOR REFORM

The Consultation identifies five main reasons for modernising the UK competition regime:

1. **Evidence of reduced competition.** The Government refers to international and domestic evidence showing “*that the overall levels of competition have declined*” in the past two decades.¹¹ In particular, the CMA’s report on the [State of Competition in the UK](#) found that market concentration increased across the economy following the 2008 financial crisis. The Government also considers the COVID-19 pandemic “*likely to have compounded*” this issue.¹²
2. **Evidence and perception of consumer detriment.** The Government identifies certain “*markets with stubbornly high levels of consumer harm, where problems are not being resolved, and consumer satisfaction is low.*”¹³ It states that people must be able to see that “*competitive markets make their lives better*” if “*public confidence in the market system*” is to be restored.
3. **Broader post-Brexit jurisdiction.** With “*full autonomy*” to promote competition in the UK, the Government considers that the UK should use its “*newfound freedom to decide what markets or conduct to investigate, and what the best outcomes are for UK markets specifically.*”¹⁴ The broader remit, though, will result in “*more strategically significant*” and “*complex*” investigations, which will require “*the right*

⁹ [Letter from Rt Hon Kwasi Kwarteng MP, Secretary of State for Business, Energy and Industrial Strategy, of 19 July 2021.](#)

¹⁰ Paragraph 0.22.

¹¹ Paragraph 0.3.

¹² *Ibid.*

¹³ Paragraph 0.4. These include markets in the “*transport, telecoms, utilities, and property services*” sectors.

¹⁴ Paragraph 0.5 (emphasis added).

*resources, powers, and procedures to deal with these cases effectively and efficiently.*¹⁵

4. **Perception that competition law is slow to respond to consumer and business needs.** The Government highlights reports that the UK “*regime can be slow and lacking the powers necessary to prevent harms in the UK’s 21st century economy.*”¹⁶
5. **Effective competition law can better promote environmental ambitions.** While competition law cannot deliver the changes needed to address the challenges posed by climate change, the Government believes that there is more competition policy can do to help deliver the UK’s net zero commitment and support a green industrial revolution.

III. OBSERVATIONS

The Government has identified a number of shortcomings in the UK competition regime, including the burdensome and lengthy nature of market inquiries, merger control investigations and Competition Act cases. While there is scope to refine the existing rules to increase efficiencies and enable quicker intervention to prevent consumer harm, there is a risk that in pursuing those aims some of the protections that currently exist to improve decision-making and guarantee procedural fairness could be lost.

The Government’s proposals to “rebalance” the merger control regime (*see* Section IV.C below) are unsurprising, given the increased pressures on the CMA following Brexit. The proposed increase in the turnover threshold and the addition of a *de minimis* safe harbour for small mergers are intended to allow the CMA to focus resources on transactions that are more likely to impact competition and help businesses to assess whether there is a risk of investigation. At the same time, the CMA would retain the flexibility to investigate transaction under the share of supply test other than in *de minimis* cases.

Given that the CMA has stretched the interpretation of the share of supply test considerably in recent years to catch mergers they wish to review (*e.g.*, through

wide descriptions enabling a vertical merger to be caught, through using non-traditional metrics for the calculation of market shares such as staff numbers or patent numbers), a further extension of the share of supply test is unwarranted unless it is accompanied by a clear reset in the way the CMA must interpret the test in practice, so that it adopts a more predictable approach. Otherwise, the already considerable uncertainty that exists over the application of the share of supply test will be magnified. The case has not yet been made for a further broadening of the share of supply test.

The proposed reforms to the CMA Panel (*see* Section IV.D below) have also been debated for some time. A reduction in the number of Panel members and employing Panel members on a full-time basis would mark a significant departure from a system that has operated in more or less the same form for around 50 years. The changes could see benefits in greater consistency, transparency and predictability of decision-making. They could also facilitate better engagement between the CMA and the parties under investigation, as well as with other competition agencies. The inevitable consequence, however, would be a further weakening in the “fresh pair of eyes” approach to Phase 2 mergers and market investigations and to Competition Act cases. This will reduce the perceived legitimacy and fairness of the CMA’s processes.

The Government may also face challenges recruiting the same range and calibre of Panel members if the role becomes a full-time or regular part-time position. To benefit from the additional time commitment of Panel members, the CMA should ensure that it has sufficient Panel members available so that they have time to read into investigations and cases and are not over-stretched.

The Government’s proposals for strengthening (1) the UK’s market inquiry regime (*see* Section IV.B), (2) the enforcement of Competition Act cases (*see* Section IV.E), and (3) the CMA’s investigative and enforcement powers (*see* Section IV.F) are the most far-reaching and will require careful scrutiny. There is a risk that, in seeking to allow the CMA to act more quickly and decisively (with fewer checks and

¹⁵ *Ibid.*

¹⁶ Paragraph 0.13.

balances), the reforms could result in hasty interventions, impair rights of defence and increase the already-heavy regulatory burden on business.

To give three examples:

- Interim measures are at present used sparingly and are subject to strict procedural safeguards because they are imposed before a comprehensive investigation or any finding of unlawful conduct, and can have substantial implications for businesses. On that basis, it is arguably fair and proportionate that the CMA should have to provide evidence in support of a decision. This logic applies *a fortiori* in circumstances where, as the Government proposes, (1) an appeal of an interim measures decision in Competition Act cases would no longer be subject to full merits review by the CAT, and (2) interim measures could be imposed during a market inquiry, where there is no allegation of unlawful conduct.
- In Competition Act cases, the Government’s proposed change to give the CMA autonomy to determine the internal decision-making process for final decisions could result in the CMA deciding to appoint the same decision-makers for the entire case, for efficiency reasons. This would remove the benefit of having a “fresh pair of eyes” after a Statement of Objections, increasing the risk of confirmation bias and possibly reducing the perceived legitimacy and fairness of the CMA’s processes. In light of the significant fines that can be imposed and the potential for follow-on damages claims, it appears ever more important that full merits appeal is retained to address these concerns.
- The Government’s proposals to give the CMA new powers to monitor and review remedies imposed in market inquiries is logical from a policy perspective, but it is critical that the CMA collect reliable evidence to confirm that the original adverse effect on competition still exists before expanding or supplementing remedies; it must be absolutely clear that the original remedies have not addressed the concerns effectively. The CMA should also be alive to circumstances where remedies are no longer necessary or appropriate and should be removed.

As for the Government’s proposal to become actively involved in competition policy and the CMA’s selection of discretionary cases (such as market investigations and the enforcement of consumer or competition law) (*see* Section IV.A), there is a danger that this could signal a move away from an economic effects based approach to competition law to one based more on political considerations, with decisions becoming susceptible to political interference and lobbying. As Lord Tyrie states in his letter of February 2019: “[t]he success of the proposals [for reform] will rest in large part on the CMA being able to carry the confidence of the public and the business community, particularly in its use of new powers of intervention. This in turn depends on the CMA acting – and being seen to act – with the political independence expected of it by Parliament.”

While many of the details of the Consultation will need careful consideration – and many of the proposals may ultimately fall away – it seems clear that the UK competition and consumer law regimes are about to undergo yet another radical reform. This is no doubt partly a consequence of Brexit and the Government’s determination to set its own competition policy. It is also an attempt to make the CMA’s work appear more relevant and connected to consumers. The challenge is to achieve these benefits without sacrificing the fundamental principles of independent decision making, rights of defence, and robust judicial scrutiny.

IV. THE SIX PROPOSED AREAS OF REFORM TO THE UK COMPETITION REGIME

Taking account of these motivations and previous recommendations for reform, the Government is proposing a “five-step plan” to modernise the UK regime for the 21st century. An important sixth proposal is for Government to play a more active role in steering UK competition policy. The following sections describe each of the Government’s six proposed steps and the specific reforms designed to achieve them.

A. More active role for Government in competition policy

- Government should give more detailed and regular advice to the CMA on strategic priorities
- Empower the CMA to obtain evidence specifically to advise Government on the state of competition in the UK

While “evidence-based decision making” by “impartial, independent regulators” remains “crucial to effective competition policy”, the Government considers that it should play a “more active role in setting the strategic direction for the UK’s competition policy.”¹⁷ The Government wants to task the CMA with regularly reporting on the state of competition in the UK in order to provide the evidence necessary to “inform government’s overall competition policy and help shape any future action.”¹⁸ The Government proposes to give the CMA new information gathering powers so that it is better able to perform this reporting function.¹⁹

As to the Government’s strategic involvement, the Government is considering “more detailed and regular” guidance to the CMA, rather than the high-level ‘strategic steer’ setting out expectations and priorities for competition policy that the Government currently provides once in each Parliament. The Government would provide greater clarity to the CMA on focus sectors of the economy and more granularity on metrics against which the state of competition should be measured. While the strategic steer would remain “non-binding”, the CMA would have to report to Government on its compliance and provide reasons for any departures.²⁰

¹⁷ Paragraph 1.32

¹⁸ Paragraph 1.36.

¹⁹ The consultation seeks views on (1) the metrics that should be used to monitor the state of competition in the UK, and (2) whether the CMA should be given new evidence-gathering powers.

²⁰ Paragraph 1.44. The Government seeks view on whether it should provide the CMA with more detailed and regular steers.

²¹ Paragraph 1.45. Under the Competition Act 1998, the CMA can investigate cases of suspected

B. More effective market inquiries

- Enable faster prevention of harm either by (1) empowering the CMA to impose remedies after a market study or (2) introducing a single-stage market inquiry tool
- Empower the CMA to impose interim measures earlier in market investigations
- Allow the CMA to accept commitments earlier in market inquiries
- Improve the CMA’s monitoring of market inquiry remedies and empower it to revise them if necessary to deliver on the remedies’ objectives

The Government considers market studies and investigations to be “the CMA’s most powerful tools for promoting competition in UK markets” because, unlike Competition Act cases, they are not limited to investigating potentially unlawful conduct.²¹ The Government believes that market inquiries have benefitted UK consumers but are “overly cumbersome and significantly underused.”²² Accordingly, it is proposing the following four reforms:

1. **Structural changes to allow faster investigations and remedies.** At present, the CMA can impose binding remedies only after conducting a market investigation. Since a market investigation typically follows a market study, it can take the CMA more than three years to impose remedies.²³ The Government is consulting on two alternative proposals for empowering “the CMA to tackle harms sooner.”²⁴ First, it could empower the CMA Board to impose remedies at the end of a market study, which would maintain a fresh pair of eyes after the case team’s market study but dispense with the need to appoint a CMA

collusion or anticompetitive agreements (*i.e.*, the Chapter 1 prohibition) and suspected abuses of a dominant position (*i.e.*, the Chapter 2 prohibition).

²² Paragraph 1.47. CMA market investigation saved consumers on average £840 million annually in the CMA’s financial years 2017/18 to 2019/20.

²³ The statutory deadline to complete a market study is 12 months and for market investigations 18 to 24 months, with additional time to implement remedies.

²⁴ Paragraph 1.56.

Inquiry Group to carry out a market investigations.²⁵ Alternatively, it could introduce a two-year,²⁶ single-stage market inquiry tool, which the CMA could launch on the basis of its own prioritisation, with independent decision makers from the CMA Panel appointed if the case team considers that remedies should be imposed.²⁷

2. **Possibility of interim measures earlier in market investigations.** Unlike Competition Act cases, the CMA cannot impose interim measures during a market investigation, even if urgently required to prevent significant damage and/or protect the public interest. Interim measures can be imposed only after issuing a final report, to prevent frustration of remedies. The Government is seeking views on granting the same powers to impose interim measures in market investigations as exist in Competition Act cases.²⁸
3. **Ability to resolve cases sooner through binding commitments.** Under this proposal, the CMA would be able to accept commitments at any stage of a market study or investigation, allowing it to avoid a full investigation (or narrow the scope of an investigation).²⁹ The Government nevertheless recognises the need to balance any broader power to accept early remedies with the risks that commitments may be less effective than remedies that follow a full investigation and that the consideration of commitments during an investigation may disrupt the CMA's timetable.

4. **Introduce a more versatile and effective remedies design process.** The Government is concerned that the CMA is not currently able to revisit and adjust remedies after the event, even if they are failing to deliver on their objectives.³⁰ It is proposing two possible reforms to address this. First, the CMA could be given the power to compel businesses to participate in remedy implementation trials to help ensure remedies are less likely to fail.³¹ Second, the CMA could be given new powers to monitor and review remedies, with a power to expand or supplement remedies if they are failing to deliver comprehensively and effectively on their objectives.³²

C. A rebalanced merger control regime

- *Raise the jurisdictional turnover threshold to £100 million*
- *Exclude mergers between companies with less than £10 million turnover from CMA review*
- *Introduce a new jurisdictional threshold designed to capture acquisitions of potential competitors and mergers raising conglomerate and/or vertical issues*
- *Make merger control more efficient by (a) allowing the CMA to agree earlier commitments at Phase 2, (b) restricting Phase 2 investigations to the issues identified at Phase 1, (c) improve the Phase 2 "fast track" process, and (d) limit the CMA's use of extensions at Phase 2*

²⁵ The legal standard for imposing remedies for market studies would be the same as for market investigations, but more remedial options would be available for the latter, including the power to impose structural remedies.

²⁶ The two-year inquiry could be extended by six months in complex cases.

²⁷ The decision makers for the market inquiry tool would have the same set of powers and remedies as currently exist for market investigations.

²⁸ Paragraph 170. The Government identifies the possible risks of distorting regulatory incentives and other unintended consequences and is consulting on additional safeguards that would be

required if the CMA is given these expanded powers.

²⁹ Paragraph 1.73.

³⁰ Paragraph 1.78. At present, the CMA can only revisit the scope and design of remedies by conducting a new market investigation.

³¹ Paragraph 1.81.

³² Paragraph 1.86. While the Government considers that the proposal could reduce red tape by removing the need for a new market investigation, it is consulting on safeguards to ensure that remedies are not subject to perpetual review (e.g., by including a period within which the CMA cannot revisit remedies).

The Government maintains that a “*voluntary and non-suspensory process continues to strike an appropriate balance between consumer protection and regulatory burden.*”³³ Nevertheless, the Government believes that there is scope to update the UK’s jurisdictional thresholds and merger control processes “to enable the CMA to better scrutinise potentially harmful mergers while reducing costs to businesses in other cases.”³⁴ It suggests the following four reforms:

1. **Raise the turnover threshold to £100 million.** The Government suggests that an increase in the UK turnover test from £70 million to £100 million is necessary to adjust for inflation, to focus on mergers that are more likely to lead to harm, and reduce costs to business.³⁵
2. **Create a safe harbour for small mergers.** The Government proposes that mergers will be excluded from the CMA’s jurisdiction when each of their worldwide turnovers is less than £10 million, even if the merger would otherwise qualify for review under the share of supply test. The aim would be to provide greater clarity and comfort to small businesses, thereby promoting innovation and growth, without unduly compromising the CMA’s jurisdiction to review potentially problematic mergers.
3. **New jurisdictional threshold to deal with threats to competition in fast-moving markets.** The share of supply test currently requires merging parties to have overlapping shares of supply and is therefore (mainly) focused on mergers between direct competitors.³⁶ The Government is concerned that the test cannot “*reliably*” allow the CMA to review mergers that remove potential competition (so-called “killer acquisitions”) or mergers between companies producing

different but related products or products at different levels of the supply chain (*i.e.*, conglomerate and vertical mergers).³⁷ Accordingly, it proposes that the CMA should be empowered to review mergers in which any merging party has (a) a share of supply of at least 25%, and (b) a UK turnover of more than £100 million. This would allow the CMA to call in vertical mergers involving large established competitors that might increase concentration, as well as acquisitions by large companies of small start-ups or potential entrants which have no qualifying UK share of supply.

4. **Introduce more efficient merger control procedures.** The Government recognises the importance of merger investigations being carried out quickly and efficiently, in order to reduce the burdens on businesses, particularly for mergers with a benign effect on competition. It notes that a more efficient merger control regime would also help the CMA manage its increased workload post-Brexit. To that end, the Government sets out four main proposals:
 - a. *Allowing the CMA to agree binding commitments earlier in Phase 2.* The Government considers that allowing parties to offer undertakings at Phase 2 before the CMA gives its provisional findings could help speed up merger investigations. This change could be particularly beneficial for cases in which parties were “timed-out” of agreeing undertakings at Phase 1.
 - b. *Restrict Phase 2 investigations to the issues identified at Phase 1.* Instead of Phase 2 Inquiry Groups having a statutory duty to investigate all issues relating to the merger afresh, the

³³ Paragraph 1.93.

³⁴ Paragraph 1.90.

³⁵ Other than in certain sensitive sectors where lower thresholds apply, the turnover test applies where the target’s UK turnover in the last business year was more than £70 million.

³⁶ The Government acknowledges concerns raised by business about the inherent flexibility of the share of supply test and is consulting on reforms

to increase predictability. *See, e.g.*, “Waiting for Brexit: Five Ways the CMA Could Improve UK Merger Control” in the European Competition Law Review (ECLR) by N. Levy, P. Gilbert and L. Sheridan, 4 September 2020.

³⁷ Paragraphs 1.104-1.104. Concerns have increasingly been raised about the effects of these mergers in fast-moving parts of the economy, such as digital markets and pharmaceuticals.

Government is considering narrowing the scope of Phase 2 investigations to the specific issues and concerns identified at Phase 1. This would aim to improve the use of the CMA's resources and reduce the length and scope of Phase 2 investigations.

- c. *Replace the "fast track" option.* The Government considers that the current Phase 2 fast-track option (under which parties can agree not to contest a Phase 2 reference with the aim of shortening the overall timetable) is underused. One possible reason is that parties are currently required to concede that there is a realistic prospect that the merger substantially lessens competition for a fast-track reference to be made. Instead, the Government proposes that parties should be able to request a reference to Phase 2 without making substantive concessions and, provided the CMA was persuaded that the relevant jurisdictional tests were met, the case would proceed to Phase 2 automatically.
- d. *Limits on the CMA's use of extensions at Phase 2.* The Government notes that the CMA has found a "*special reason*" to extend its Phase 2 investigation in 50% of cases. It wants to ensure that the power to extend is used as efficiently as possible and is considering additional conditions for granting an extension, such as the offering of undertakings or the parties consenting to the extension. It also notes that when an extension is made, it is always made for the maximum eight weeks permitted, although this is because the current regime allows the period to be extended only once.

D. Streamlined CMA Panel

- *Smaller pool of dedicated Panel members*
- *Reduced role for Panel members to increase the CMA's administrative flexibility*

The role of the CMA's Panel members is to act as independent decision-makers in Phase 2 investigations, merger inquiries and regulatory references and appeals. They can also be appointed to antitrust case decision groups. The Panel currently consists of 33 mostly part-time members. The Government considers that the following two reforms "*should produce a system that is faster and more consistent*":³⁸

1. **Smaller, dedicated pool of Panel members to speed up cases.** The Government proposes a smaller pool of Panel members whose primary employment would be with the CMA. Members would be required to work on a greater number of cases, and so would have greater familiarity with the CMA's processes, which would lead to faster, more consistent and predictable decision-making.³⁹ By offering Panel members a set income, the CMA could also attract a more diverse talent pool.
2. **Reduced role for Panel members to increase the CMA's administrative flexibility.** The Government proposes that Panel members' role should be restricted to "*making final decisions on theories of harm and remedies*", which would retain the "fresh pair of eyes" but give the CMA more control over administrative procedure (e.g., timetabling).⁴⁰

³⁸ Paragraph 1.131.

³⁹ Footnote 77.

⁴⁰ Paragraph 1.131.

E. Stronger enforcement under the Competition Act

- *Align the rules on the territorial application of the Chapter 1 and Chapter 2 prohibitions with EU law*
- *Reduce thresholds for small business immunity to £10 million turnover for both Chapter 1 and Chapter 2 prohibitions*
- *Increase protections for whistle-blowers*
- *Facilitate the use of interim measures*
- *Increase information-gathering powers*
- *Empower the CMA to conclude cases earlier through settlement*
- *Remove formalities in relation to final decision makers*
- *Review the procedure and standard of judicial review*

The Government wants to ensure that the enforcement process is as effective as possible, given evidence that competition in UK markets may be decreasing and the apparent lack of awareness of competition rules among some UK businesses.⁴¹ The Government is also concerned that timeframes for Competition Act cases are too long (often taking over three years) and the CMA’s workload will only increase post-Brexit.⁴² It is proposing the following reforms:

1. **Expand the territorial scope of Chapter 1 and Chapter 2 prohibitions.** The Government is proposing to expand the territorial scope of the Competition Act prohibitions to align the rules with those that apply to Articles 101 and 102 TFEU. Accordingly, whereas the Chapter 1 prohibition currently applies to arrangements implemented, or intended to be implemented, in the UK, it would be extended to cover arrangements which have, or are likely to

have, “*direct, substantial, and foreseeable effects within the UK.*”⁴³ Likewise, the Chapter 2 prohibition currently applies to anti-competitive conduct by firms with a dominant position in the UK, or any part of it. It would be extended to apply to conduct irrespective of the location of the dominant position, provided the conduct (a) takes place in the UK or (b) has, or is likely to have, “*direct, substantial, and foreseeable effects within the UK.*”⁴⁴

1. **Reduce thresholds for small business immunity.** At present, a business that infringes the Chapter 1 prohibition (except for price-fixing agreements) benefits from immunity from financial penalties if the parties to the agreement have a combined turnover of £20 million or less. Similarly, a business that infringes the Chapter 2 prohibition has immunity if its turnover is £50 million or less.⁴⁵ If the CMA has concerns about the conduct of small businesses, it may notify them that it has withdrawn this immunity. The Government is seeking views on the merits of lowering the threshold for both prohibitions to companies with an annual turnover of less than £10 million.⁴⁶
2. **Increase protections for whistle-blowers.** While the Government considers the CMA’s leniency regime has been a valuable tool in tackling cartels, it believes that changes could be made to encourage businesses and individuals to blow the whistle. It proposes the following two reforms:
 - a. *Immunity from private damages.* The Government wants to explore whether private damages actions may be disincentivising leniency applications.⁴⁷ Immunity applicants are protected from disclosure of their leniency statements and from joint and several liability, but they remain liable

⁴¹ Paragraph 1.134.

⁴² Paragraph 1.137.

⁴³ Paragraph 1.149(a).

⁴⁴ Paragraph 1.149(b).

⁴⁵ See sections 39 and 40 of the Competition Act.

⁴⁶ Paragraph 1.155. For the Chapter 1 prohibition, the Government is consulting on whether the immunity should apply to any business with turnover less than £10 million that is party to an agreement, or only to agreements where all parties have an annual turnover of less than £10 million.

⁴⁷ Paragraph 1.160

to their direct and indirect purchasers and can be an easy target for follow-on damages claims.⁴⁸ As a result, the Government is seeking views on the merits of providing full-immunity against damages claims. Such a proposal would arguably allow a business to benefit from its unlawful conduct. The Government recognises this concern but argues that the disadvantage should be weighed against the prospect of more effective cartel enforcement. As to the purchasers that might have suffered harm, they could still claim damages from other cartelists.⁴⁹

- b. *Protections for individual whistle-blowers.* The Government notes that individuals may be reluctant to come forward to report anticompetitive conduct because of the serious personal or professional consequences they could face if their identity is revealed. Accordingly, it is proposing an absolute prohibition on the disclosure of a whistle-blower's identity, unless the CMA relies on the whistle-blower's evidence as part of its infringement decision.⁵⁰ Provided the evidence can be corroborated by other sources, the CMA could offer assurances that identities would not be disclosed.

3. **Facilitate the CMA's use of interim measures.** The Government is concerned that interim measures in Competition Act cases are ineffective (the CMA having only imposed them in one case).⁵¹ At present,

⁴⁸ Part 4, paragraph 15 of Schedule 8A of the Competition Act 1998.

⁴⁹ The Government's proposal might have the unintended consequence of decreasing the incentives for parties to apply for leniency where there has already been an immunity applicant.

⁵⁰ Paragraph 1.164. If the CMA relies on the evidence, the Government indicates that the courts would "*still need to have regard to the importance of protecting the whistle-blower's identity to the fullest extent possible without undermining the defendant's procedural rights*".

before imposing interim measures, the CMA must provide the business concerned with a chance to review and comment on the proposed decision and a reasonable opportunity to inspect all of the CMA's evidence. The Government has suggested two options to reduce the burden on the CMA while "*providing sufficient protection*"⁵² for businesses under investigation: (1) requiring the CMA only to provide reasons for its decision rather than access to the underlying evidence, and/or (2) lowering the standard of review of interim measures on appeal from full merits to judicial review.

4. **Increase the CMA's information gathering powers.** While the Government proposes general reforms to the CMA's information-gathering powers (*see* the following section), it is also considering a number of options for Competition Act cases specifically, including: (a) the power to require individuals to attend interviews even if they are not connected to the business under investigation (*e.g.*, customers or suppliers); (b) civil and criminal sanctions for failure to preserve evidence that a person knows is relevant but the CMA has not yet requested (akin to the position under the cartel offence); (c) extending the CMA's "seize-and-sift" powers to include inspections of domestic premises;⁵³ (d) protecting documents prepared to seek voluntary redress from disclosure in civil litigation; and (e) more efficient use of confidentiality rings (with civil sanctions to enforce them).

5. **Empower the CMA to conclude investigations more quickly through**

⁵¹ The Furman Report suggested that the "CMA's processes should be streamlined" in order to "facilitate greater and quicker use of interim measures to protect rivals against significant harm" (*see* Recommended Action 12).

⁵² Paragraph 1.169.

⁵³ Paragraph 1.174. These powers, as specified in section 28(2) of the Competition Act 1998, allow the CMA to remove material from the premises where it would not be practical to decide on-site whether it should be seized. The CMA then sorts through the evidence, returning non-relevant evidence to its owner.

settlement. The Government believes it is important for the CMA to “*quickly and efficiently identify and fix anticompetitive conduct.*”⁵⁴ It believes that voluntary resolution measures can help resolve investigations sooner and free up resources for new cases. It is therefore proposing the following measures.

- a. *Increase efficiency of the settlement process.* The Government is considering whether admissions of facts or liability made in a settlement with the CMA should be binding on that party. The CMA could then rely on the admissions without having to corroborate it with evidence. As a result, the CMA could, by default, issue short form settlement decisions, rather than the long and detailed decisions that are currently required.
- b. *New settlement tool for abuse of dominance.* The Government proposes a procedure that would allow businesses to enter into an “Early Resolution Agreement”, which, unlike settlement cases, would not require an admission of dominance or infringement and would therefore not be binding as to matters of fact or liability in follow-on damages claims.⁵⁵ Before entering such an Agreement, the CMA would have to be satisfied that it had reasonable grounds to believe that an infringement had been committed. The Government is also considering whether the Competition Appeal Tribunal (“CAT”) should have to approve an Early Resolution Agreement.

6. **Remove formalities in relation to final decision makers.** After a statement of objections has been issued in a Competition

⁵⁴ Paragraph 1.175.

⁵⁵ Paragraph 1.180. Early Resolution Agreements could set out the basis for the CMA’s concerns and may require the business under investigation to: (1) not contest the CMA’s proceedings; (2) accept certain factual matters relevant to the conduct under investigation; (3) give commitments as to future conduct; and (4) agree

Act case, the CMA is required to appoint new decision makers to reach a final decision. The CMA appoints a Case Decision Group of (typically three) individuals that have had no involvement in the investigation. While these decision-making structures are designed to mitigate concerns of bias and reduce the risk of errors, the Government considers that they create delays while decision makers acquaint themselves with a new case. Accordingly, the Government proposes that the CMA “*should have autonomy to determine the most effective internal decision-making process*” for Competition Act cases.⁵⁶

7. **Review of procedure and standard of review for Competition Act appeals.**

Unlike appeals of merger control, market study and market investigation decisions, which are subject only to judicial review, the CAT determines appeals of Competition Act decisions on the merits. When the Chapter 1 and Chapter 2 prohibitions were introduced, this was justified by the fact that they operate as quasi-criminal offences and can result in significant penalties. There have, however, been several calls to reconsider this position because a full merits appeal is longer and more burdensome.⁵⁷ Given that other stakeholders, including the CAT and businesses, consider the current approach to be established, beneficial in providing meaningful rights of defence, and well understood, the Government does not propose a specific reform but seeks views on what the appropriate level of judicial scrutiny should be.

to make a settlement payment in return for closure of the investigation.

⁵⁶ Paragraph 1.195.

⁵⁷ See, e.g., [Letter from Lord Tyrie](#), p.11, [Furman Report](#), Recommended Action 13, [Penrose Report](#), paragraph 6.18.

F. Stronger investigative and enforcement powers

- *Increase penalties for failure to comply with information requests up to 1% of annual turnover with additional daily penalties up to 5% of daily turnover*
- *Require individuals or company directors to make a personal declaration in respect of the information supplied and impose penalties and/or director disqualification for false declarations*
- *Impose penalties for misleading information provided on a voluntary basis*
- *Introduce penalties for breaches of CMA orders, directions or undertakings, capped at 5% of annual turnover with an additional daily penalty of up to 5% of daily turnover*
- *Introduce tools to promote international cooperation*

Citing the CMA's central role in the "economic recovery from the pandemic" and the increasing volume and complexity of the CMA's caseload post-Brexit, the Government proposes a range of "cross-cutting" reforms to the CMA's investigative and enforcement powers to give it the "tools necessary to promote competition effectively in the modern economy" and conduct investigations "more swiftly and effectively".⁵⁸ The following five reforms are suggested.

1. **Tougher penalties for companies that slow down or obstruct cases.** The Government notes that the CMA's penalties are "significantly weaker than those of other competition authorities in Europe" and proposes that penalties are brought in line with international norms.⁵⁹ At present, the CMA can impose a fixed penalty of £30,000 and/or a daily rate of £15,000 if a business fails to comply with the CMA's information-

gathering powers. Even though there is very little evidence that companies are failing to comply with CMA investigations, the Government believes the level of fines currently available provides insufficient incentives to ensure compliance.⁶⁰ The Government proposes that the CMA should be able to impose fixed penalties of up to 1% of a business's annual turnover and an additional daily penalty of up to 5% of daily turnover while non-compliance continues.⁶¹

2. **Personal accountability for the provision of evidence.** The Government proposes to require an individual or company director responding to an information request to make a personal declaration certifying that the information "is, to the best of their knowledge, full, complete and correct," and that they have "carried out all reasonable checks to verify this."⁶² The Government is separately considering whether a false declaration by a director should attract the same civil penalties as supplying false and misleading information to the CMA (*i.e.* up to £30,000 fixed and £15,000 daily fines), or should, for "flagrant breaches", be grounds for director disqualification.⁶³
3. **A wider prohibition against providing false or misleading information to the CMA.** The CMA can ask businesses to provide information on a voluntary basis, as well as pursuant to its formal investigation-gathering powers. Currently, only the latter carries the threat of penalties for providing false or misleading information. The Government is proposing to extend these penalties to cases where false and misleading information is provided voluntarily.⁶⁴
4. **Stronger penalties for companies that fail to comply with remedies imposed or accepted by the CMA.** The CMA has

⁵⁸ Paragraph 1.214.

⁵⁹ Paragraph 1.218.

⁶⁰ Paragraph 1.219. The Government cites an example of the [Phenytoin sodium capsules: suspected unfair pricing case](#) from 2016 where Pfizer, a business generating £1.15 billion in turnover, was fined £10,000.

⁶¹ Paragraph 1.220. Penalties for individuals would remain capped at £30,000 along with the possibility of a daily penalty of up to £15,000.

⁶² Paragraph 1.224.

⁶³ Paragraph 1.225.

⁶⁴ Paragraph 1.227.

detected 185 breaches of remedies put in place after market investigations since 2018.⁶⁵ Currently, the CMA's recourse against these breaches is to obtain a Court enforcement order, which the Government notes is "*a lengthy process*" that "*places significant costs on the CMA*".⁶⁶ The Government proposes to give the CMA a new power to impose penalties on businesses that fail to comply with directions or orders imposed by the CMA or with commitments or undertakings given to the CMA.⁶⁷ The recommended penalty is capped at 5% of annual turnover, with an additional daily penalty of up to 5% of daily turnover.

5. **Stronger powers and tools to assist international cooperation.** The Penrose Report concluded that the Multilateral Mutual Assistance and Cooperation Agreement framework,⁶⁸ to which the CMA is a party, could provide a model for the CMA's future cooperation arrangements with competition authorities in other countries. Acting on this recommendation, the Government is proposing to bring forward legislation to update the Enterprise Act 2002 to provide for clearer and more flexible rules to facilitate information sharing between the CMA and international competition authorities. It is also proposing to introduce new investigative assistance powers in civil competition and consumer enforcement investigations.⁶⁹ This would allow the CMA to use compulsory information-gathering powers to obtain information on behalf of overseas competition authorities. The Government is seeking views on the conditions that the CMA should have to satisfy to obtain information on behalf of overseas competition authorities.⁷⁰

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⁶⁵ Paragraph 1.228.

⁶⁶ Paragraph 1.229.

⁶⁷ Paragraphs 1.228-1.230.

⁶⁸ The Multilateral Mutual Assistance and Cooperation Agreement is a framework between the CMA, Australian Competition and Consumer Commission (ACCC), the Competition Bureau of Canada (CBC), the New Zealand Commerce

Commission (NZCC), the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC). See [Cleary Gottlieb UK Competition Law Newsletter, August-September 2020](#).

⁶⁹ Paragraph 1.241.

⁷⁰ Paragraph 1.243.