

The Rt Hon Greg Clark MP

Secretary of State for Business, Energy and Industrial
Strategy

Department for Business, Energy and Industrial
Strategy,

1 Victoria Street,

London SW1H 0ET

From: The Rt Hon Lord Tyrie
Chairman

Direct line:

21 February 2019

Dear Greg,

In August, you requested that I advise you on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. This followed earlier conversations, with both you and the Prime Minister, indicating an interest in such a piece of work.

The attached provides preliminary advice. Work is continuing at the CMA on a number of these proposals.

The UK is widely held to be an excellent place to do business,¹ one in which innovative, dynamic firms can thrive. The impartiality of its legal framework and high standards of business conduct are also well recognised. A robust competition framework, one well-adapted to rapidly-changing markets, has been and will remain an essential support to that environment. By preventing, among other things, anti-competitive behaviour, whether from cartels or abuse of a dominant position, the competition framework plays a crucial role in enabling businesses to enter markets and challenge incumbents. Markets, mergers and consumer protection legislation all contribute to the same end.

¹ The UK is ninth out of 190 countries in the World Bank's Ease of Doing Business rankings.

As you suggested in the summer, there is certainly scope for strengthening and updating that framework, particularly in the light of economic and technological developments in recent years. We must ensure that it continues to pay for businesses to do the right thing, and not to engage in anti-competitive or unfair trading practices. Doing so can only bolster the UK's domestic productivity, and its international competitiveness.

The central challenge is that, despite relatively recent legislative changes, the UK has an analogue system of competition and consumer law in a digital age. Similar observations have been made about comparable regimes elsewhere in the world.² The ability of the CMA to act quickly to prevent harm to consumers in fast-moving markets is impeded by a complex web of interacting pieces of legislation that have accumulated on the statute book over many decades. It is impenetrable to non-specialists. It also lacks a clear and unifying purpose.

Much of the legislation is interpreted by a specialist tribunal. It is held to provide high-quality judgments. Nonetheless, I am told that aspects of the tribunal's procedure have departed from the relatively quick and simple process originally intended; in some cases, this can allow businesses to "game the system", resulting in unduly long and costly proceedings. In these proceedings (and in its own administrative proceedings) the CMA's counterparties comprise large teams of private-sector lawyers, deploying Byzantine procedural and technical complexity on behalf of their clients. The result is often years of protracted legal dispute, of intellectual interest and commercial benefit to firms and the competition "establishment", but far removed from the concerns of ordinary consumers.

² See, for example, *The Economist*, 15 November 2018, special report on antitrust.

The legal framework is not broken, and the CMA is effective – and domestically and internationally respected – for its deployment.³ But carrying on roughly as we are is not a prudent option. This is primarily for two related reasons:⁴

- First, the growth of new and rapidly-emerging forms of consumer detriment, caused in part by the increasing digitalisation of the economy, requires more rapid intervention, and probably new types of intervention. Competition authorities and policymakers in many jurisdictions are coming to the same conclusion. They are considering how best to secure the many benefits for competition and consumer welfare of the growth of the digital economy, while addressing the consumer detriment that has accompanied it.⁵

The UK has greatly influenced the development of competition law and policy internationally, and the spread of independent, pro-market competition regimes. It now has the opportunity to help shape the response to the challenges that many jurisdictions now face. The Chancellor has appointed an independent expert panel, chaired by Professor Jason Furman, to consider the challenges posed by digitalisation for competition policy, to which the CMA has contributed.⁶

³ Recent successful outcomes include the securing of a binding court order against the ticket resale site viagogo over concerns that it was breaking consumer protection law; and changes in the care homes sector, including residents receiving £2 million in compensation from a leading care home provider for having paid upfront compulsory fees.

⁴ Brexit, too, poses challenges for the CMA, not least from a greater workload of large, complex cases previously reserved to the European Commission, and the assumption of responsibility for monitoring and enforcing State aid rules. But whatever the UK's future relationship with the EU, far-reaching reform is likely to be needed, to ensure that the CMA can meet the reasonable expectations of Parliament and the wider public in the years to come.

⁵ See, for example, the US Federal Trade Commission's public hearings on Competition and Consumer Protection in the 21st Century, which have considered (among other things) Collusive, Exclusionary, and Predatory Conduct by Digital and Technology-Based Platform Businesses; and Privacy, Big Data and Competition. See also the German competition authority's (the Bundeskartellamt's) position paper explaining its decision to investigate whether Facebook is abusing its market power by imposing unfair conditions on its users ("Background information on the Facebook proceeding", 19 December 2017), and its Decision, published on 15 February, that imposed restrictions on Facebook's processing of user data. The European Commission has recently appointed a panel of experts to consider the "future challenges of digitisation for competition policy", which is due to report by 31 March 2019.

⁶ A number of measures that specifically address the challenges posed by digitalisation are proposed in the Annex to this letter (see, for instance, proposals to extend the CMA's information-gathering powers in Section 6). Further ideas that have been discussed as part of the global debate on competition

- Second, there are increasing signs that the public doubt whether markets work for their benefit. Perhaps they are not mistaken: the growth in market power – reflected in rising concentration and profitability across a number of sectors – may well enable large firms to collect excess rents.⁷ And technology may have helped business to take better advantage of that market power, by enabling them more effectively to target and segment consumers according to their willingness to pay. The Government’s, and Parliament’s, growing concern is therefore well-founded.

Two broad routes to reform are available: either attempt a fundamental rewrite of the statute book, or try to amend and improve what we have. The first has many attractions (scope for simplification, clarity, transparency and effectiveness). But it would probably take at least two years to be able to attempt a fundamental rewrite. Doing so while the extent of UK alignment with existing EU law post-Brexit remains unknown (and would probably remain unknown during any transition period), would be a near-impossible task. Furthermore, the disturbance of existing bodies of jurisprudence that would come with a new corpus of law could introduce enormous uncertainty, both for businesses and consumers, at a time when there is more than enough.⁸

Given the above, and particularly your request that I attempt to offer a preliminary view as soon as possible, what follows is an attempt at the second route.

policy and digitisation – some of which have been discussed as part of the CMA’s engagement with the Furman Review – include:

- broadening or supplementing the prohibitions on anti-competitive agreements, so that it explicitly extends to spontaneous collusion, e.g. by price-matching algorithms or artificial intelligence, even in the absence of a conscious “meeting of [human] minds”;
- whether explicit prohibitions on unilateral conduct that exploits economic dependence or inequality of bargaining power, even in the absence of an established dominant market position, are needed; and
- whether, as part of the merger control regime, the CMA should be able to look at a series of acquisitions by a business over a given period in the round, rather than individually.

The work required to assess the merits of these proposals is at an early stage.

⁷ In the UK, economy-wide profit margins have risen from around 1.2 in 1980 to close to 1.7 today.

⁸ UK businesses also have a legitimate interest in international regulatory alignment.

This route also has drawbacks. It would still require primary legislation. It would not be wholly immune from complexities and uncertainties arising from the Brexit negotiations. It may be seen as not trenchant enough (and could possibly turn out not to be). It could well stir opposition from many parts of the competition “establishment”. The proposals will be held by some to be too wide-ranging and radical. Some will also argue that giving the CMA wider discretion to address consumer detriment would increase business uncertainty, and lower investment and output.

These points need to be considered carefully. But for legislators to rely on the sustainability of the existing, unamended, law – in short, to do nothing – is not a prudent option, given the manifest need to address the perception and reality of the growth in consumer detriment. The purpose of the proposals set out in this letter is the reinvigoration of an institutional settlement that has served the economy well: the delegation of competition policy and enforcement from Ministers to independent and impartial authorities. Failure to take action to bolster the effectiveness of the institutional settlement, and preserve public and political confidence in it, could ultimately contribute to its demise. In any case, it is highly probable that addressing the shortcomings of the current legal framework will increase overall economic performance: the counterpart to consumer detriment is often excess rents.

Therefore, what follows is probably the most practical early route to ensuring that the CMA can better meet the expectations of Parliament and the wider public, and address the Government’s very reasonable concerns about the growth of consumer detriment.

Reflecting those expectations, the intention of the proposals is to focus the work of the CMA more directly on protecting the interests of the consumer. They include changes that:

- impose more stringent duties and responsibilities on the CMA, including an overriding statutory duty to treat consumer interests as paramount, and a new statutory requirement on the CMA to conduct its investigations swiftly, while respecting parties’ rights of defence;

- strengthen or augment the tools available to the CMA in order to carry out these duties more effectively; and
- require the CMA to relinquish or share some of its existing powers and functions – for example, in the field of regulatory appeals and of criminal cartel enforcement – so that it can focus more effectively on its core responsibilities.

The proposals are the product of careful consideration by senior CMA staff, and discussion at Executive and Board level. The Annex to this letter, divided into eight sections, sets them out.

In summary, the proposals consist of a new statutory duty on the CMA, and the courts, to treat the interests of consumers, and their protection from detriment, as paramount (Section 1). This new duty would be backed by new functions and powers, including powers to investigate, and to intervene quickly, to stop market-wide consumer detriment (Section 2). Consumer law enforcement would be strengthened, the intention being to make it responsive enough to address detriment in fast-moving markets, and robust enough to deter wrongdoing (Section 3).

Measures are proposed to improve individual responsibility for competition and consumer law compliance (Section 4). The CMA's investigative capabilities would be bolstered through proposals to protect and compensate whistleblowers (Section 5), and to broaden the CMA's information-gathering powers (Section 6). There are also proposals to simplify and expedite court scrutiny of the CMA's decisions (Section 7). Changes to the mergers regime will be required to cope with the increase in the CMA's case load after Brexit, including compulsory notification above a threshold (merger notification is currently voluntary, in contrast to most other jurisdictions) (Section 8). Taken together, the reforms may have implications for both the CMA's institutional and its decision-making framework. Detailed work has yet to be undertaken on these.

Consumer empowerment – finding means by which consumers can more easily obtain redress when they suffer the consequences of illegal, anti-competitive or unfair trading practices – could play an important role in restoring public confidence in markets. The

CMA will consider whether, in addition to recent reforms,⁹ further steps could be taken to facilitate or encourage consumers to obtain redress directly.

The proposals contained in this letter are intended to enable the CMA to intervene earlier and more robustly to tackle consumer detriment, and to penalise and deter wrongdoing when it occurs. Taken together, they would mark a decisive shift in favour of the consumer and of businesses that behave fairly and competitively, and against those businesses that, among other things, take advantage of consumer vulnerability.

The success of the proposals 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.

In practical terms, for the CMA, the proposals would be likely to lead to more, and more successful, action to protect consumers. Reform of the “markets regime” would increase the scope for the investigation and remedy of market-wide detriment. This would increase the value to the CMA of using the markets regime, rather than relying mainly on enforcement against individual firms, to address detriment. Nevertheless, enforcement of competition and consumer protection laws – backed by stronger deterrents – would continue to play an important and mutually supportive role; it is likely that these reforms would enable cases to be concluded faster than they are now, creating scope for an increase in the case load and the CMA’s ability to address consumer detriment.

In both markets and enforcement work, the proposals would enable the CMA to make greater use of interim measures to address consumer detriment and anti-competitive behaviour pending a final decision on whether the law has been broken. Such measures, or something similar, will be essential if the CMA is to respond to the

⁹ Including the provisions of the Consumer Rights Act 2015 on private actions under competition law which, among other things, introduced a so-called “opt-out” collective actions regime (whereby claimants may automatically be included in the action unless they opt out, in a manner decided by the Competition Appeal Tribunal on a case by case basis).

challenges thrown up by rapidly changing markets, and to do so sufficiently quickly to prevent irreversible harm to consumer trust.

The CMA would probably also become a good deal more visible: in protecting consumer interests; as a contributor to public discourse on the role of markets; as an adviser to Government on how best to promote competition and the consumer interest;¹⁰ through its communication with businesses, not only about their strict legal obligations, but also about what constitutes acceptable standards. This external communication and engagement – much of it new to the CMA – is an important part of building trust in the institutional framework not just of competition law and policy, but also of the economy as a whole.

If you agree with the approach, a number of the proposals will require a good deal of further work.¹¹ Some are at an early stage of development, but can nonetheless form a basis for discussion. And wider consultation will, in any case, be required: the package as a whole – and indeed any fundamental reform of the regime – should, in my view, be submitted to open and rigorous external scrutiny. I would appreciate an early discussion on how this may be accomplished.

Andrew Tyrie

Andrew.Tyrie@cma.gov.uk

¹⁰ Under section 7 of the Enterprise Act 2002, the CMA has responsibility for making proposals, or giving information and advice, “on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).”

¹¹ The CMA’s capacity to give priority to this work would be impeded by a ‘no deal’ Brexit.

ANNEX: REFORM PROPOSALS

1. An overriding “consumer interest” duty on both the CMA and the courts

A new statutory duty, binding on the courts (including the Competition Appeal Tribunal), as well as on the CMA, is required to ensure that the economic interests of consumers, and their protection from detriment, are paramount.¹²

The CMA’s current statutory duty is to “promote competition, both within and outside the United Kingdom, for the benefit of consumers”.¹³ It does not have a primary duty directly to protect consumers. The current duty can leave the CMA constrained from acting to protect consumers’ interests unless doing so through purely competition-based remedies.

This constraint matters because interventions based on competition alone are not always sufficient to protect the interests of consumers, or to do so in a timely manner. This was already the case prior to digitalisation. It is more so now. Digitalisation has dramatically improved consumer welfare, and has given small firms access to vastly larger markets. But it has also created new forms of consumer detriment (for instance, through harvesting of personal data, or from personalised pricing that takes advantage of vulnerabilities). And it has created new forms of vulnerability, among those without internet access, or without the skills, confidence or time to trade effectively online. Such evidence as there is suggests that the scale of consumer detriment is rising.¹⁴

¹² The concept of “economic interests” was contained in the Fair Trading Act 1973 and the Enterprise Act 2002, in the descriptions of the general functions of the Director General of Fair Trading, and the Office of Fair Trading, respectively. It would probably be necessary to qualify the duty to ensure that the CMA was not drawn into territory better occupied by other specialist authorities (including, for example, product or food standards and safety, or environmental effects on consumers).

¹³ Ofwat has a consumer objective (among others) to “protect the interests of consumers, wherever appropriate by promoting effective competition”; the FCA has an operational objective (among others) of “securing an appropriate degree of protection for consumers”; Ofcom has a duty (among others) to “further the interests of consumers in relevant markets, where appropriate by promoting competition”..

¹⁴ See, for instance, Oxford Economics/Citizens Advice, “Consumer detriment – counting the cost of consumer problems”, October 2016, Chapter 8.

It is notable that the CMA's public (but non-statutory) strategic aim is to "make markets work well in the interests of consumers, business and the economy".¹⁵ Arguably, this already goes beyond the current statutory duty, and is a better reflection of what the public expects of the CMA. This should be put on a statutory footing. It should also be made clear that the consumer interest is paramount.

An overriding statutory duty to promote the consumer interest would give clear legislative authority to the CMA to address consumer detriment, including new and emerging forms of detriment, and including the protection of vulnerable consumers. And it would ensure that concerns about consumer detriment, and how best to remedy it, are uppermost in the CMA's mind when deciding whether, when and how to intervene in markets.

This duty would underpin other proposals (see box) that better enable action to protect against detriment to be taken on an interim basis, pending completion of formal investigations, whether under the competition law prohibitions, consumer protection law or the "markets regime".¹⁶ This would include reforms to the requirements on access to file in competition cases, consistent with the corresponding evidence provision requirements in civil litigation.

In its investigations, the CMA undertakes extensive evidence gathering and analysis before issuing final decisions. But, as a consequence, these investigations can be slow and can leave consumer detriment unchecked for long periods, certainly longer than consumers appear to expect. This is a particular concern in digital markets, given the pace of developments.

¹⁵ "Vision, Values and Strategy for the CMA", January 2014, page 1. The Government has ensured that both its existing and its proposed new strategic steer for the CMA are in line with this aim.

¹⁶ Interim measures are particularly important in fast-moving markets. There is a risk that, by the time appeal routes are exhausted, the harm will have become entrenched or the market will have "tipped", rendering the competition authority's decision, even if upheld, ineffective.

A consumer interest duty would not only influence how the CMA conducts and prioritises its work. It would also influence the work of the courts charged with applying competition and consumer protection laws, and with reviewing the CMA's decisions. The duty would ensure that the interests of consumers – and what they stand to gain and lose – would be at the forefront of the courts' consideration, decisions and interpretation of the law. The conduct of the CMA would be subject to appropriate judicial scrutiny with that aim in mind. It would therefore embed a consistent purpose at all stages of the UK competition regime.

The new statutory consumer interest duty should not constrain the CMA from intervening to promote and protect the competitive process.¹⁷

Some illustrations of the likely implications of the duty on the CMA and the court, and how it interacts with other reform proposals, are set out in the box below.

¹⁷ In particular, the duty should not constrain the CMA from enforcing so-called “object infringements” of competition law, which it can currently enforce without a requirement to inquire as the effects of the infringement in the relevant market. Nor should the duty, or proposals in Section 2 to broaden the scope of market investigations, constrain the CMA from investigating and ordering remedies directly to address competition problems.

Likely implications for the CMA and the courts of the “consumer interest” duty, in combination with other reform proposals

- The CMA needs to be able to act swiftly, on an interim basis, to prevent consumer detriment in competition enforcement cases, pending final determination of its investigations. With a consumer interest duty in mind, the CMA would be likely to intervene more frequently and directly on an interim basis to protect the consumer interest. And if such interventions were challenged, the reviewing court would be subject to the same duty, implying a need to give particular weight to the protection of the consumer interest on an interim basis. For the same reason, the application of the duty might be expected to raise the bar for companies seeking to set aside the CMA’s infringement decision (where it contained directions to cease infringing conduct) on an interim basis. There would probably need to be strong reasons why the courts would allow the continuance of practices which have been found to be illegal by the CMA, pending the outcome of an appeal.
- As well as supporting its existing powers to act on an interim basis, the duty would also reinforce specific proposals in Sections 2 and 3 of this Annex for new legal provisions to widen the CMA’s use of interim measures. These proposals would – for the first time – allow the use of interim measures in the “markets regime” to address adverse effects on consumers (pending the completion of a full market investigation), and also, in consumer protection law enforcement, to put a stop to trading practices and contract terms that may be unlawful (pending a final CMA decision).
- The duty would support other proposals in Section 2 to make the markets regime more effective. In particular, it would reinforce changes that broaden the scope of market investigation references to address adverse effects on consumers, by putting beyond doubt the CMA’s mandate to impose remedies to tackle consumer harm. And it would require the court to take account of the consumer interest when reviewing the legality of such remedies.
- Under the new duty, there may be greater scope for the CMA to proceed more quickly with its investigations (for example, to avoid prolonging consumer detriment), and the court may be more inclined to support the CMA in this objective. Proposals in Section 6, intended to strengthen the CMA’s investigative powers and to ensure that firms comply with reasonable deadlines to produce information, could further expedite the investigative process, and enable swifter action to address consumer detriment.
- The duty and the proposals in Section 7 would enable the court to narrow the points of challenge on which it needs to hear oral argument or evidence, and lead it to afford a “margin of appreciation” to the CMA’s findings of fact and analysis following a detailed investigation, provided that it had been properly conducted.

2. A more effective and flexible regime for market studies and market investigations

Under its existing powers, the CMA is able to examine, and then take steps to resolve, market-wide problems. This so-called “markets regime” is divided into two phases.

Phase 1 “market studies” can be used to look into matters that “adversely affect the interests of consumers”, which the CMA can address with non-binding recommendations. Statute requires that market studies be completed within a year. A market study may lead to a more detailed Phase 2 “market investigation”,¹⁸ the focus of which is to identify “adverse effects on competition”. Again, statute requires that market investigations must be completed within 18 months,¹⁹ after which the CMA may order legally enforceable remedies that address the adverse effects on competition.²⁰

On the face of it, the markets regime is a powerful tool. It can, in principle, be used to put a stop to consumer detriment, without having to resort to protracted enforcement action, and without involving penalties which encourage legal challenge. Few jurisdictions have such a regime. It is, apparently, being examined with interest by agencies in other countries. The US Federal Trade Commission, in its recent hearings on the US competition framework, has acknowledged its benefits.²¹

In practice, however, the markets regime has some significant defects.

¹⁸ A market study is not a prerequisite to a market investigation: provided the statutory reference thresholds are satisfied and the CMA has consulted in accordance with s169 of the Enterprise Act 2002, an investigation can be launched immediately.

¹⁹ The CMA may extend this period by up to a further six months if it considers that there are special reasons why the investigation cannot be completed, and the report published, within 18 months.

²⁰ Market investigations are led by independent “panels”, comprising individuals from a variety of backgrounds (law, economics, public sector, business); the panels are supported by CMA staff but the independent panel members are the sole decision-makers - not the CMA Board, or CMA staff.

²¹ See, for instance, Transcript of FTC Hearing #2 on Competition and Consumer Protection in the 21st Century, pages 47-9 and page 120.

First, there is a difference in scope between market studies and market investigations. Market studies can look into anything that may adversely affect either competition or the interests of consumers. But when it comes to market investigations, the CMA must identify and address adverse effects on competition before action can be taken.

This distinction matters because, on completion of a market study, the CMA is restricted to making non-binding recommendations. It is only after a market investigation that the CMA can order legally binding remedies. And because of the difference in scope, these remedies can only be used to address detriment that results, or may be expected to result, from adverse effects on competition. If the scope of Phase 2 market investigations were more closely aligned with that of Phase 1 market studies,²² the CMA could order legally enforceable remedies to address consumer detriment, without having to demonstrate an adverse effect on competition. This would give it greater scope to take direct action to address, for instance, unfair trading practices across a sector, or the exploitation of a particular consumer vulnerability wherever it arose.²³

²² For instance, by changing the reference test in section 131 of the Enterprise Act 2002 (which relates to “reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition”) to include matters which fall within the scope of the CMA’s market study function (in the language of section 130A of the Enterprise Act 2002, this is to “consider the extent to which a matter in relation to the acquisition or supply of goods and services... in the United Kingdom has or may have effects adverse to the interests of consumers”).)

²³ The CMA is also closely considering global developments, including how the competition regimes in other countries are adapting to the challenges of digitalisation. By way of example, the Chapter II prohibition of the Competition Act 1998 sets out that a firm may be in breach of the law if it both (a) has a dominant position and (b) abuses that dominant position. The law in some other countries, such as Germany, goes beyond this to encompass the concept of one business exploiting the “economic dependence” of another. Recent proposed reforms in Germany include extending its doctrine of economic dependence to encompass all firms and not just SMEs, since in digital markets relevant dependencies may arise for large firms as well as small ones. The aim of these kinds of proposals is to capture asymmetry of power in business-to-business relationships which may not be caught by the current definition of dominance.

In developing the current package of proposed reforms to the UK regime, the CMA has given careful consideration to changing the substance of competition law prohibitions, for example by introducing an explicit prohibition on unilateral conduct that exploits economic dependence or inequality of bargaining power, even in the absence of an established dominant market position; or by broadening or supplementing the prohibitions on anti-competitive agreements, so that it explicitly extends to spontaneous collusion, e.g. by price-matching algorithms or artificial intelligence, even in the absence of a conscious “meeting of [human] minds”. It is expected that many of the concerns about the nature and scale of consumer detriment can be addressed through markets tools, particularly if adapted by the proposals in this section, and in combination with the proposed new statutory duty. This should be kept

Second, the time required for the CMA to reach a point where it can order legally-binding remedies (i.e. only at the completion of a Phase 2 market investigation) is ill-suited to the modern economy, where new markets are constantly emerging, business models are changing rapidly, and consumer detriment can arise quickly. From the point at which a market study is initiated, it can be over three years before remedies are ordered under a subsequent market investigation, and longer still before they are implemented. This is not always unreasonable: understanding the underlying causes of problems in markets, and devising appropriate remedies, takes time. However, meeting growing demands for swifter intervention in the face of consumer harm may require the CMA to be given the ability to impose legally enforceable requirements on firms on an interim basis, pending the completion of its market investigations. Further consideration is being given to assess the merits of introducing such “interim measures” in the markets regime, which will need to take careful account of the consequences for businesses of swift interim action based on provisional analysis.

Third, the existing regime allows the CMA to accept binding undertakings from firms about their practice and conduct (for example, at the end of a “Phase 1” market study), in lieu of a full “Phase 2” market investigation. But the CMA’s ability to enforce these undertakings is weak. This element of the markets regime would be made more effective, first, by allowing the CMA to accept undertakings at any time (for instance before or during a market study); and second, by enabling the CMA to fine firms that breach such undertakings.²⁴

under close review (and it is possible that further changes to the substantive competition provisions may be required).

²⁴ The CMA can also accept binding undertakings and commitments in other contexts: as part of competition and consumer enforcement investigations, and from firms that are merging. Likewise, there are no fines available for breaches of such undertakings. The CMA can “enforce” undertakings by way of a follow-up order or by relying on that promise in court (for example, through civil proceedings for an injunction or for interdict). But this does not provide meaningful deterrence, in the sense that the business, having been forced to fulfil an undertaking by a court order, is currently no worse off for having initially failed to comply with the undertaking. Fines for breaches of undertakings and commitments across the competition, consumer, markets and mergers regimes would greatly facilitate early resolution of the CMA’s investigations.

By way of comparison, the European Commission already fines for non-compliance with its competition commitments. In 2013, it imposed a €561 million fine on Microsoft for failing to comply with its

Fourth, once it has completed an investigation, the remedies that the CMA orders are binding: they are a source of law intended to set the parameters within which firms can act. But the powers currently in the markets regime to sanction firms that fail to comply with the remedies ordered are extremely limited.²⁵ A straightforward solution would be to enable the CMA to fine firms that failed to comply with the rules that it set. This would put the CMA closer in line with a number of other regulators.²⁶

There may be further reforms that can be made to make the implementation of remedies following a market investigation, and the review of those remedies, more effective and flexible. Work is under way to explore these issues.²⁷

The implementation of the four recommendations above, taken together, would undoubtedly improve the effectiveness of the markets regime a good deal, providing the CMA with a more powerful set of tools to stop exploitative practices. For instance, if, during a market study, the CMA identified a practice that might be harmful to consumers, it could order it to stop, pending an investigation, under threat of a fine for those who might flout its order.

commitments (in that case, to offer users a browser choice screen, enabling them easily to choose their preferred web browser).

²⁵ For instance, if an energy company failed to comply with the pre-payment meter price cap that the CMA introduced following its market investigation, the CMA would have no direct means to penalise it for doing so.

The CMA can obtain a court order to enforce its remedies, breach of which would be contempt of court. But apart from any reputational impact, a business is no worse off from ignoring the CMA's requirements and waiting for the court order.

²⁶ For example, the Financial Conduct Authority, Ofcom, Ofgem and the Civil Aviation Authority have such powers.

²⁷ For example, there could be merit in providing the CMA with greater flexibility to order additional remedies within a reasonable timeframe following the conclusion of a market investigation, without going through what could turn out to be another three-year cycle. There may also be merit in simplifying the scope of the existing powers by which the CMA may propose remedies (set out in Schedule 8 of the Enterprise Act 2002).

The reformed regime could also enable the CMA more effectively to influence the conduct of those businesses whose practices raise concerns, without the need for formal work in the form of market studies or market investigations. This is because the power to order legally-binding requirements to remedy consumer detriment, and the power to do so by way of interim measures pending full investigation – at both a firm and a market-wide level – would provide a stronger incentive for these firms to listen, engage and take steps to address the CMA’s concerns in advance of formal work, than currently. Weighing on the minds of management in deciding whether to cooperate with the CMA would be the alternative: direct intervention, in the form of legally-binding requirements.

This informal communication with these businesses, through which the CMA could signal expected standards of conduct, would certainly be a major improvement. At the moment, communication with these businesses takes place principally through lawyers. Understandably, the legal advice will often be framed with an eye on how they might deter or delay the CMA from scrutinising their client. An acid test of whether reforms of the markets regime were sufficiently robust would be whether direct and meaningful engagement with these businesses, and their management, began earlier.

Many of these exchanges would occur in private. Early public communication of problems in markets, and sources of consumer detriment, could also encourage improvements to behaviour. For instance, an announcement that the CMA was concerned about certain practices or markets, and minded to investigate, might in itself be sufficient to secure engagement with firms and improve standards.

Such engagement, prior to the start of “formal” markets work, would also be assisted by wider information-gathering powers set out in Section 6. Legal protections may also be required to ensure that the CMA is adequately protected from defamation liability,²⁸ and that its communications with firms do not prevent or prejudice enforcement proceedings, or any subsequent action under the markets regime.²⁹

A more radical reform would be to remove the distinction between market studies and investigations, leaving a single regime for examining market-wide competition and consumer concerns. This could make the markets regime simpler and more effective; but the implications for decision-making would need to be carefully considered. Work is under way to examine the merits of this.

A still more fundamental reform that has been put to us could be to consolidate rule-making powers over the regulated sectors in a single, existing, authority, or by the creation of a new oversight body for the economic regulators, with powers of direction to ensure consistency of approach to consumer protection. Whether or not this has merit needs a good deal of careful consideration, and the engagement of a large number of external parties. Such work is not primarily the responsibility of the CMA. It would best be undertaken by a free-standing review of the regulatory regime as a whole.³⁰

²⁸ This could be achieved by changes to the law to give the CMA privilege, or qualified privilege (e.g. where there is no malice or bad faith) against defamation proceedings. There is precedent for this in respect of the CMA’s published reports and decisions, in the Enterprise Act 2002 s108.

²⁹ Further work is under way to assess what protections may be required to enable the CMA to communicate more routinely with businesses, including whether the FCA’s exemption from liability for damages, and the requirement it places on regulated firms to be open and co-operative, provide relevant points of comparison.

³⁰ The National Infrastructure Commission has recently been asked by HM Treasury to look at regulatory consistency as part of its review of infrastructure regulation.

3. Consumer protection law enforcement

The CMA has powers to enforce certain consumer protection legislation, particularly in relation to unfair trading and unfair contract terms.³¹ It currently carries out this enforcement function by taking individual businesses to court, and seeking orders to cease infringing conduct.³²

In principle, the CMA can take such action against any business in the UK that it suspects of breaking consumer law. In 2012 (shortly before the CMA was formed), the Government reviewed the landscape for consumer law enforcement, including the division of responsibilities between different enforcement bodies. It decided that the CMA should use consumer enforcement primarily to address market-wide conditions and practices which make it harder for consumers to exercise choice (as well as having a lead role on unfair terms legislation and international liaison). Other cases were to be handled by Trading Standards (see box, below).

³¹ A full description of the CMA's consumer enforcement powers can be found in Annex A to the CMA's *Consumer protection: enforcement guidance, August 2016*.

³² This "backward-looking" enforcement work, which is intended to address failures by firms to comply with existing law, can be contrasted with the "forward-looking" markets regime, where the CMA can set parameters within which firms must operate in the future. Consumer law enforcement cases are often launched in the light of practices uncovered in work under the markets regime. For instance, enforcement action against hotel booking websites was initiated after a market study on digital comparison tools; and enforcement action on care homes took place in conjunction with a market study in the same sector.

This means that, in practice, the CMA uses consumer law enforcement against individual businesses largely to improve market-wide conduct. The effectiveness of such a consumer protection regime relies heavily on the credible deterrence that can come through the enforcement of the law. Currently, deterrence is weak in the UK, both in comparison with the competition enforcement regime, and by international standards.³³ The CMA's consumer law powers are unfit for its current purpose, and far short of what would be required to enable the CMA effectively to fulfil a consumer interest duty.³⁴

Three major weaknesses stand out.

First, where the CMA concludes that consumer law has been breached, it has no powers to order the cessation of illegal practices. Instead, it must pursue businesses through the courts in order to obtain a binding remedy. This differs from the enforcement of competition law, where the CMA decides itself whether the law has been broken, and gives directions and imposes fines on offending firms.

Second, even when the CMA wins in court, no civil fines are available (again by contrast with competition law enforcement).

Third, the CMA can secure undertakings from a firm, as an alternative to taking it to court. But the CMA cannot fine the firm if it fails to comply with the undertaking.³⁵

From a commercial perspective, for the minority of firms that are prepared to risk breaking the law, there may often be no business case for compliance. Deterrence, in short, is very limited.

³³ For example, in August 2018, the Australian Competition and Consumer Commission was given stronger fining powers for breaches of Australian consumer law. Fines were increased from a maximum of Aus \$1.1m to Aus \$10m, or three times the benefit obtained by the company, or 10 per cent of annual turnover. These changes aligned the maximum penalties under consumer law with those available under Australian competition law.

³⁴ The CMA's work on the loyalty penalty also identified gaps in the consumer protection regime, and made recommendations to address these (see "Tackling the loyalty penalty", 19 December 2018, pages 138 to 141).

³⁵ See also footnote 24 in Section 2 of this Annex, which discusses the same limitations of undertakings and commitments in other contexts.

The Government has already proposed to introduce legislation to give the courts the power to impose civil fines up to 10 per cent of global turnover for breaches of consumer law.³⁶ But more far-reaching changes may be required to address these shortcomings.

First, the CMA could itself be empowered³⁷ to decide whether consumer protection law has been broken; declare the fact publicly; direct businesses to bring infringements to an end; and impose fines. Fines could also apply to firms that have breached undertakings provided to the CMA. The CMA's decisions would then be subject to appeal, just as they are in competition cases.

Second, in urgent cases, the CMA should also be able to order the cessation of practices that it suspects may be harming consumers on an interim basis, pending a final decision on whether the law has been broken. Powers to impose such interim measures to address suspected breaches of consumer protection law would reflect the CMA's existing powers in respect of competition law breaches, and proposals in Section 2 for similar measures in the markets regime.

Third, the deterrent effect of the enforcement regime would also be enhanced by reforms to improve personal responsibility for breaches of consumer protection law, including director disqualification. These reforms are discussed in the next Section.

Fourth, there is a strong case for entrenching a division of responsibilities for consumer law enforcement between the CMA and Trading Standards (described in the box below) in law.³⁸

³⁶ BEIS, *Modernising Consumer Markets – Consumer Green Paper*, April 2018, page 57

³⁷ As it already is for competition law infringements.

³⁸ The boundaries established by the Government in 2012 could also be re-examined; however, a recasting of the institutional landscape for consumer law, for a second time in six years, could be a destabilising upheaval for all the agencies concerned, distracting them from their main job of tackling consumer law breaches. At the very least, cross-agency consultation should be conducted prior to any change in this field.

The CMA's responsibilities for consumer protection law enforcement

Most of the CMA's powers to enforce consumer protection legislation are shared with other authorities, including Trading Standards.^a Following a review in 2012, the Government stated that the CMA's enforcement role should be limited to particular areas, rather than seeking to duplicate the work of Trading Standards.^b In particular, the CMA was asked by the Government to:

- “[use its] consumer enforcement powers as remedies... in markets where competition is not working appropriately due to practices and market conditions which make it difficult for consumers to exercise choice”;
- be “the lead enforcement authority for unfair contract terms legislation and source of business guidance in this one area”; and
- retain its “role on international consumer law and policy liaison”.

Where an issue falls outside the CMA's remit it is passed to the relevant local Trading Standards Service or appropriate team of specialists in National Trading Standards or Trading Standards Scotland (e.g. the e-Crime team) for consideration. For issues which may have an impact on consumers across a significant part of the UK, and where coordinated enforcement action is most likely to be needed, the CMA will raise an issue for discussion at the national level. The CMA attends both the National Tasking Group (England and Wales) and the Tasking and Coordination Group (Scotland), where national issues are discussed. These are sub-groups of National Trading Standards and Trading Standards Scotland respectively. For Northern Ireland, the CMA can pass issues to the Northern Ireland Trading Standards Service.

^a *Other authorities with powers to enforce certain consumer protection legislation include the Civil Aviation Authority, the Financial Conduct Authority, Ofcom and the Information Commissioner.*

^b *BEIS, “Empowering and Protecting Consumers: Government response to the consultation on institutional reform”, April 2012, paragraph 6.42.*

4. Individual responsibility

Personal sanctions for competition law infringements

Almost all successful competition law enforcement results in fines being imposed on firms. The current regime allows for civil (rather than criminal) fines of up to 10 per cent of worldwide turnover to be imposed on infringing businesses. But the burden of these fines does not necessarily affect individuals directly responsible for misconduct. Other competition authorities, such as those in the Netherlands and Germany, impose civil fines on individuals for serious competition law infringements, such as price-fixing, bid-rigging, market-sharing, resale price maintenance, and serious abuses of dominance.³⁹ In the UK, the Financial Conduct Authority (FCA) may impose fines on regulated individuals for breaches of its rules.⁴⁰

Individual responsibility does apply to a degree in competition law enforcement (see box). But it is arguable that personal responsibility for competition law compliance could be further bolstered, and the deterrent of enforcement enhanced, if the CMA were also able to impose individual fines directly on individuals for serious competition law infringements. This would, however, be a significant change in competition law enforcement. A good deal of further work would be required to assess the merits of such a change. This work would need, among other things, to examine the impact on deterrence, and whether a system could be devised to identify who was responsible for infringements without lengthy legal argument.

³⁹ In Germany, for instance, individuals' fines are set having regard to income and the level of participation in the infringement, with a maximum of €1,000,000. In the years 2008-2016 the Bundeskartellamt fined 333 individuals a total amount €24.4 million (an average of €73,000 per individual).

⁴⁰ For instance, under section 66 of the Financial Services and Markets Act 2000, the financial regulators can issue unlimited financial penalties and publicly censure approved persons for breaches of regulatory requirements. Successive financial regulators struggled to take action against individuals, particularly at senior levels, because individual responsibilities were poorly defined and/or because it was difficult to provide an evidential trail linking a senior figure to a regulatory breach. The Senior Managers and Certification Regime – a recommendation of the Parliamentary Commission on Banking Standards – introduced for banks in 2016, and currently being extended across the financial services industry, is designed to address some of these problems, and make it simpler for the financial regulators to hold individuals responsible.

There could also be merit in bolstering the consumer protection law regime by introducing mechanisms to reinforce personal responsibility. For instance, the CMA could be given the ability to seek disqualification of directors – just as it can do under the competition regime – to protect the public from company directors whose involvement in consumer law infringements makes them unfit to be involved in the management of a company. The scope of such disqualification powers would need to be carefully considered; disqualification should probably apply only for most serious breaches. Work is under way to develop this proposal, and examine its merits.

Board-level responsibility

Business standards – what firms and their employees choose to value or disregard – are set from the top. This has been a lesson from the banking crisis. Measures to establish a clear line of responsibility to the boards of public companies for competition and consumer law compliance could be considered. These could include:

- A requirement on companies to appoint a board director with responsibility for assessing and reporting on risks to competition and consumer law compliance.
- A requirement on auditors to make a report to the company if, during the course of their usual work, they identify practices that may raise competition or consumer law compliance risks. There would be a corresponding duty on company directors to attest in annual reports (or otherwise record and report) that these risks have been noted and addressed. Such changes could be considered as part of Donald Brydon’s review of UK Audit Standards. Mr Brydon may also wish to consider the merits of a further requirement on auditors to report to the CMA and to the Financial Reporting Council any suspected infringements of competition or consumer law that they identify during their work (see Section 5).

The detailed work required to establish the merits of either of these proposals has not yet been undertaken. In any case, changes of this type would require extensive consultation.

Individual responsibility in competition and consumer protection law enforcement

Individual criminal responsibility exists in competition law, but it is limited to hard-core cartel activity (a subset of competition law infringements). In practice, it has been difficult and costly to apply, and invoked relatively rarely. Because hard-core cartel prosecutions are only a small part of its overall enforcement work, the CMA does not maintain the scale of specialist expertise normally possessed by agencies with powers of prosecution. Primary responsibility for cartel prosecutions may sit more naturally with an agency that routinely brings criminal prosecutions, such as the Serious Fraud Office, and the case for this merits reconsideration.

Directors of companies that have breached competition law may be subject to disqualification from directorships of any UK company for a period of up to 15 years. This power was introduced in 2002, but was unused for many years. More recently, the CMA has started to use these powers, with three director disqualifications since December 2016, and possibly more in the pipeline. But the process is wholly reliant on the courts. Moreover, not all individuals responsible for competition law breaches will be company directors.

In consumer protection law, limited individual responsibility arises in the following ways:

- The new remedy of “enhanced consumer measures”, introduced by the Consumer Rights Act 2015, can apply to individuals as well as to companies. These measures – which are intended to secure changes in behaviour going beyond simply stopping the infringing conduct – can, for instance, require directors to take certain steps, such as to implement a compliance programme.
- Breach of the *Consumer Protection from Unfair Trading Regulations* can be a criminal offence. By contrast, breach of unfair contract terms legislation cannot be.
- In the case of sole traders, enforcement against the business is, of its nature, enforcement against the individual.

5. Whistleblowing and other sources of information

Whistleblowers

Information from whistleblowers is essential to the CMA's work. It is the starting point for a great deal of enforcement against cartels, and an important source of intelligence on markets which develop consumer detriment. In addition, the knowledge that people might "blow the whistle" is itself a deterrent to wrongdoing by companies.

The current whistleblowing regime for competition policy is inadequate in a number of respects. First, compensation may be nugatory in relation to the career risk involved for a high proportion of potential whistleblowers.⁴¹ Second, the CMA makes great efforts to safeguard confidentiality. But when whistleblowers become witnesses, the courts decide whether their confidentiality is protected. Uncertainty about the protection of confidentiality and limited financial compensation risks severely curtailing effective whistleblowing.

Whistleblowers need a straightforward means of reporting wrongdoing, and a strong motive to do so, in the form of both better incentives and protections. The compensation cap needs to be raised considerably. Reducing the risks to whistleblowers, through appropriate financial compensation, and by providing stronger protections of confidentiality, could greatly increase the quality and quantity of intelligence that the CMA receives. It could sharply improve firm behaviour. And it could send a message to the public that the Government and its regulators take issues identified by whistleblowers seriously, and value the contribution they make to integrity and standards in commercial life.

⁴¹ The CMA's informant rewards policy limits compensation to £100,000.

Financial compensation

The CMA compensates whistleblowers for information about cartel activity out of its budget.⁴² The £100,000 limit that it has set on such payments is far too low. It is unlikely even to cover the loss that a typical whistleblower would incur from losing his or her job. It is very unlikely to compensate either for the resulting damage to the whistleblower's career prospects, or for the distress suffered. Neither does it reflect the wider economic and social benefits that attach to successful enforcement of the law.

The maximum compensation should be set at a much higher level. It should be commensurate with the financial impact, the loss of career prospects, and the distress that whistleblowers may encounter. But the current budgetary constraint on the CMA is a major impediment to doing so.

HM Treasury receives all fines imposed by the CMA. Since the CMA's operational launch on 1 April 2014, these have amounted to £67.7 million.⁴³ The practice of returning fines to the Consolidated Fund should continue. But a framework needs to be developed with the Treasury to enable the CMA better to compensate whistleblowers, without budgetary consequences. If the higher compensation available under such a framework encouraged more whistleblowers to come forward, the CMA might return more fines revenue to the Consolidated Fund than currently.⁴⁴

⁴² The CMA's total Resource DEL budget (before depreciation) for 2019/20 will be £68.74 million.

⁴³ The figure rises to £157 million if the fines decided in respect of the *Phenytoin* case are counted towards the total. However, the decision in this case is subject to appeal. Proposals in this Annex, if implemented, would probably increase the fines revenue returned to the Consolidated Fund substantially, in a number of ways:

- Sections 2 and 3 propose new fines for breaches of undertakings, commitments and orders.
- Section 3 proposes new fines for consumer law infringements.
- Section 4 proposes new personal fines for competition law infringements.
- Section 6 proposes higher fines for failure to comply with information requests, and new fines for failure to comply with information notices, and for providing false or misleading information.
- Section 7 proposes to bring competition law fines in the UK more closely into line with those in other jurisdictions: this would be likely to result in higher fines than currently.

⁴⁴ For original information leading to successful enforcement action, the US Securities and Exchange Commission pays whistleblowers between 10 per cent and 30 per cent of any resulting fines. Since the

Confidentiality

It can prove difficult for the CMA, and for competition authorities in other jurisdictions, to build a competition enforcement case on the basis of evidence from a whistleblower who wishes to remain anonymous, often for good reasons. If the whistleblower becomes a witness, the CMA may be required by the court to reveal the whistleblower's identity to the defence. The risk of disclosure means that whistleblowers (particularly those in cartel cases) will sometimes choose not to become witnesses, with the result that it may not be possible for the CMA to pursue the case.

The protection of whistleblower anonymity in competition enforcement cases, while respecting the legitimate rights of defence of the businesses under investigation, has long proved challenging for competition regimes worldwide. There are no easy solutions, even by the deployment of legislative protection. Nonetheless, the current arrangements in the UK merit re-examination. In particular, there may be merit in changing the law to make it explicit that, when the courts decide whether a whistleblower's identity should be revealed, they must give due weight to the importance of anonymous whistleblowing to competition law enforcement in the public interest.

Reporting requirements on auditors

Auditors may identify potential lapses in consumer and competition law compliance during the course of their work. But currently there is no requirement on auditors to alert the respective authorities to suspected infringements. By contrast, in the financial services sector, auditors are legally required to communicate suspected breaches of regulatory requirements to the relevant financial regulator.⁴⁵

programme began in 2011, the information received by the SEC has led to enforcement action resulting in \$1.7bn in fines. It has paid out over \$300m to whistleblowers under the programme. There can be behavioural effects from linking payments to whistleblowers directly to the fines that result from the information they provide, and this is not the CMA's recommended approach.

⁴⁵ Section 342 of the Financial Services and Markets Act 2000 allows HM Treasury to make regulations prescribing circumstances in which an auditor must communicate matters to the Financial Conduct Authority or to the Prudential Regulation Authority that they have become aware of in the course of their work. Under the current regulations, the circumstances include those where the auditor reasonably

Alongside a reformed whistleblowing regime, a robust reporting requirement on auditors to report suspected infringements of competition law identified during the course of their usual work to the CMA and the Financial Reporting Council could supply useful information. And, just as importantly, it could provide a strong incentive on boards and senior management to maintain high standards in their firms. There may be merit in such a requirement being considered as part of Donald Brydon's Review of UK Audit Standards.

believes that there has, or may have been, a contravention of any regulatory requirements that may be deemed by the regulator to be of material significance. The requirements also apply to information received by auditors working for firms that may not be involved in contraventions, but have close links to those that do.

6. Investigatory and information-gathering powers

The CMA would greatly benefit from better investigatory and information-gathering powers, to improve the quality of the evidence on which it bases its decisions, to enable it to conclude its investigations, and to put a stop to consumer detriment, in reasonable time. There is considerable scope both to broaden the range of the CMA's powers, and to strengthen the available sanctions for non-compliance, bringing the UK into line with other jurisdictions.

Penalties for non-compliance

The CMA can require a firm to produce information for the purposes of an investigation (whether as part of its markets work, or in the context of a merger review or a competition enforcement investigation). But the CMA's powers to sanction firms that fail to comply with its requests are significantly weaker than those of other competition authorities in Europe.⁴⁶ A meaningful deterrent on large businesses is lacking.

No fines at all are levied when firms fail to comply with so-called "information notices" in consumer enforcement investigations. If firms fail to comply with an information notice, the CMA must apply to the court. Only with the benefit of a court order requiring information to be produced is there an incentive to comply: non-compliance with the order would be grounds for contempt proceedings.

A turnover-based fines regime for non-compliance with both competition and consumer protection law enforcement investigations, with a similar limit to that of other authorities, is almost certainly required. This should create a stronger incentive to comply with investigative requirements, and increase the timeliness and completeness of information provided to the CMA.

⁴⁶ They are capped at £30,000 for a fixed fine, and £15,000 for each day of non-compliance (although a combination of these may be imposed). The French Competition Authority can impose administrative fines of 1 per cent of total turnover on firms that obstruct its investigations: in December 2017, it fined Brenntag, a chemical distribution company, €30 million for failing to provide requested information and documents. The European Commission can impose a fine of 1 per cent of total turnover in the previous year under its administrative penalties powers – as well as a fine of 5 per cent of average daily turnover – for (among other things) failure to supply complete and proper information (for both antitrust and merger proceedings).

Penalties for provision of false or misleading information

Just as the commercial incentive for un-cooperative parties to comply with the CMA's investigations is weak, so too is their incentive to be honest. The CMA's ability to tackle consumer harm depends on its investigations being based on evidence that is truthful and accurate.

It is a criminal offence to provide the CMA with false or misleading information in competition, merger and markets cases. Although, in principle, this should provide a powerful deterrent, the bar to a successful prosecution is high. For the relevant offence to be made out, the false or misleading information must have been provided to the CMA knowingly or recklessly. Civil fines for the provision of false or misleading information are needed. These should apply across all of the CMA's tools (including the enforcement of consumer protection law) to provide a more cost-effective and flexible sanction, to sit alongside the threat of criminal prosecution for the most unacceptable conduct.⁴⁷

Deadlines

Firms can challenge (including by way of judicial review) the CMA's deadlines for the provision of information, on the grounds that they are unreasonable. This is an entirely proper protection of their procedural rights. However, when reviewing such decisions, it is important that the courts take account of the importance of the CMA completing its investigations as swiftly as possible (even when not subject to statutory deadlines), while of course respecting the parties' rights of defence. The CMA could also be made subject to an explicit statutory requirement to conduct its investigations swiftly, while giving due consideration to parties' rights of defence.⁴⁸

⁴⁷ The criminal sanction does not apply to false or misleading information provided in consumer protection enforcement cases. There may be a case for extending it to cover such cases. Work is under way to consider this.

⁴⁸ The CMA already has "a duty of expedition" in the context of its mergers work (Enterprise Act 2002 section 103). Such a duty could also apply in respect of its other investigations.

Extending the scope of the CMA's formal information-gathering powers

The CMA has no general powers to require information to be produced. To gather information outside the context of a “formal” investigation,⁴⁹ it must issue an informal request. Co-operation from firms with such requests is voluntary. This is often sufficient. But it is sometimes the case that businesses refuse to co-operate, or choose to provide superficial, selective or misleading responses. There is nothing to stop them doing so.

A general power to require information to be produced could assist in the identification and response to problems in fast-moving markets. In particular, a general information-gathering power could better enable the CMA to monitor⁵⁰ developments in the digital economy, including the growth in the use and sophistication of algorithms.⁵¹ A general power could also enable more comprehensive responses to “supercomplaints”.⁵² A good deal of further work would be required to consider the appropriate scope and limitations of such a power.

⁴⁹ That is, outside the context of a market study, a market investigation, a merger inquiry, or a consumer or competition enforcement case.

⁵⁰ Consistent with the CMA's general function (under section 5 of the Enterprise Act 2002) of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions.

⁵¹ In the digital economy, how firms obtain data and make decisions to act has changed and continues to change. For example, firms now deal with a wider variety of complex data types such as “clickstream data” from websites or location and “orientation data” from mobile phones. They often store data in the cloud, including on servers outside the UK. And much firm decision-making, especially regarding rapid changes in prices or regarding the personalisation of price and non-price elements such as ranking or listing, is taken by algorithms.

The way in which machine learning algorithms take decisions can be difficult to understand. And it may not be technically possible to transfer an algorithm, the historical data that inputted into it and results that were outputted to an outside agency, to allow the agency to interrogate the algorithm.

Given these factors, there can be marked and increased information asymmetries between firms and competition authorities in the digital economy. It has been suggested that addressing these asymmetries may require competition authorities to be able to require firms to help them understand complex data types, including by giving them access to data wherever it is stored, or having firms analyse algorithms on the authority's behalf. These powers may be needed even before the agency has decided whether to start a formal investigation.

⁵² The Enterprise Act 2002 makes provision for designated consumer bodies (including, for instance, Which? and The National Association of Citizens Advice Bureaux) to make so-called “supercomplaints” to the CMA about “any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers”. Within 90 days after the day on which a super-complaint is received, the CMA must say publicly how it proposes to deal with it.

With or without a general power, the CMA's existing information-gathering powers will need some reform. First, the powers need to keep pace with the way information is obtained, used (including to make decisions) and stored as a result of digitalisation.⁵³ Second, consideration should be given to whether the powers are sufficiently effective to investigate companies located outside the UK. Work is under way on both these issues.

Other tools

Further investigative and information-gathering tools may also need to be considered, and work is continuing on whether anything can be learned from the powers available to other regulators. For example, the FCA has powers under section 166 of the Financial Services and Markets Act 2000 to obtain an independent expert's view of aspects of a firm's activities that cause it concern.⁵⁴ A similar power in the competition enforcement context could reduce the disparity of technical expertise between the CMA and very large firms.

There may also be merit in introducing reporting mechanisms, so that certain businesses are required to inform the CMA of mergers and acquisitions they undertake. This could help the CMA keep abreast of merger activity, which it could then review and consider whether to 'call in'. A similar measure has recently been proposed by the Australian Competition and Consumer Commission following the interim findings of their digital platforms inquiry.⁵⁵

⁵³ See footnote 51, above.

⁵⁴ The costs of engaging the independent expert are borne by the regulated business.

⁵⁵ The report recommended that large digital platforms be required "to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition". (ACCC, Digital Platforms Inquiry – Preliminary Report, December 2018, page 64).

7. Court review of CMA decisions

Standards of review

Decisions of the CMA are subject to appeal to or review by the courts (most often the Competition Appeal Tribunal (CAT) although some decisions fall to be judicially reviewed by the High Court; ⁵⁶ judgments can also be appealed to the higher courts).

This is essential. The CMA and other regulators should be subject to a judicial process by which those it considers to have breached the law can challenge its decisions. This is in addition to the internal checks and balances in the CMA's own decision-making process, which have been strengthened since 2014 by the introduction of the "Case Decision Group" system. Under this system, those who make the final decision on a Competition Act case cannot be those who conducted the initial investigation, diminishing the risk of confirmation bias.

The current arrangements provide a robust framework for challenge. But the appeal system, particularly for competition enforcement cases, has, over time, developed in such a way as to diverge from the "tightly controlled procedural regime" envisaged when the CAT was first established. This regime was intended "to minimise the traditional difficulties presented by competition cases – those of Byzantine complexity of issues, hypertrophic growth of documentation and evidence, and inordinate duration of proceedings".⁵⁷

Two examples of this gradual divergence are striking.

⁵⁶ For example, the High Court reviews CMA decisions to close a competition investigation case on the grounds of administrative priorities, or other administrative decisions taken as part of an investigation which are not specified in statute as appealable to or judicially reviewable by the CAT.

⁵⁷ Charles Dhanowa, written evidence to the House of Lords Select Committee on Constitution Inquiry into The Regulatory State, 26 June 2003.

First, contrary to the original intention – and initial CAT practice – under which proceedings were primarily paper-based, and hearings lasted no more than one or two days (see box, below), there is now increasingly extensive use of oral witness evidence and cross-examination, with the result that hearings on a single appeal often last for four weeks or more.

Second, the appeal process is complicated and prolonged by the admission, at appeal stage, of new evidence that could have been provided to the CMA before it came to its decision. Again, this contrasts with the CAT’s original intention of avoiding “hypertrophic growth of documentation and evidence”.⁵⁸

The result is a more protracted and cumbersome appeal process than was originally intended for, and by, the CAT. Parties found by the CMA to have breached competition law can exploit this – leading to a situation where, as noted by the National Audit Office in its most recent report on the UK competition regime, many lawyers regard the UK as “the best jurisdiction in the world to defend a competition case”.⁵⁹ This entails greater cost, delay and uncertainty than necessary.⁶⁰ And it leaves consumers poorly served by a process that allows the detriment caused by anti-competitive behaviour to persist for long periods.⁶¹

⁵⁸ *Ibid.*

⁵⁹ National Audit Office report, *The UK competition regime*, February 2016, paragraph 2.15.

⁶⁰ The absorption of resources on litigation has an opportunity cost for the CMA’s work in other areas.

⁶¹ Both in the case at hand, but also more broadly because of the weaker and less immediate deterrent effect the CMA’s enforcement activity has, as a consequence of the extensive litigation it faces.

Underlying, and exacerbating, the two procedural problems identified above is the standard of review which the CAT is required to apply to decisions on Competition Act cases – that is, cases where the CMA has decided that a business has participated in an anti-competitive agreement, or abused a position of market dominance. Whereas the CMA’s decisions on mergers, and on remedies following market investigations, are subject to ordinary judicial review, the CMA’s decisions on Competition Act cases are subject to a “full merits” standard. This means that the CAT reviews all of the CMA’s findings of fact, its economic assessment and its application of the law in the relevant decision.⁶² However, it appears that the appeal stage in these cases has moved beyond a review of the CMA’s findings, and the evidence and reasoning to support those findings.⁶³

After Brexit, the CMA will be taking on large, complex cases currently reserved to the European Commission, including many in digital markets. This will increase the importance of addressing concerns about the effectiveness and efficiency in the current appeal process.

This can be achieved through two changes:

- by moving away from the current “full merits” standard, either to a judicial review standard,⁶⁴ or to a new standard of review, setting out specified grounds of permissible appeal;⁶⁵

⁶² This question was subject to consultation in 2013 (BIS, “Streamlining regulatory and competition appeals – consultation on options for reform”, June 2013)

⁶³ It appears to be a means by which opponents can re-argue the merits of the case as new: in other words, to have a “second bite at the cherry”. In addition, there is a low bar for parties to obtain an order from the CAT, setting aside the CMA’s requirements to cease infringing conduct, pending the outcome of their appeal.

⁶⁴ The inherent flexibility of the judicial review standard allows the court appropriately to discharge its obligations under the European Convention on Human Rights (ECHR), including under Article 6 (Right to a fair trial).

⁶⁵ For instance, instead of rehearing the entire case, the CAT would review whether the CMA’s decision was based on material errors of law or fact, or a breach of essential procedural requirements. The CAT would retain full jurisdiction over fines. The EU General Court considers competition appeals on specified grounds: namely, 1) lack of competence, 2) infringement of an essential procedural requirement, 3) infringement of the EU Treaties or any rule of law relating to their application and 4) misuse of powers. It also has unlimited jurisdiction in relation to fines. A move to specified grounds of appeal in the UK would be compatible with Article 6 of the ECHR.

- by amending the CAT's rules of procedure, to facilitate a faster review process. This would include addressing the specific procedural problems identified above, through greater restrictions on the admissibility of new evidence and less reliance on oral testimony.

Such changes would reduce the duration of proceedings to a level that more closely reflects the original intentions for the CAT. They would also bring it more closely into line with international practice (see box).

A number of more radical proposals, such as bringing the CAT within the umbrella of HM Courts and Tribunals Service, or having competition appeals heard by the High Court, rather than the CAT, have been suggested to us, but work is now required to establish the merits of these.

It is not just a protracted appeals process that can delay the rectification of anti-competitive behaviour. The CMA's preparation of cases can also be time-consuming. There are a number of reasons for this. First a number of investigations are highly complex. Second, the CMA takes particular care in ensuring the cases it takes forward are robust, and prepared to the highest standard, given the expected review by the courts.⁶⁶ And third, Parliament and the public expect the CMA only to take forward cases once it has a high degree of confidence that it will be successful. There is always more that the CMA can do internally to speed up case preparation and progression. With this in mind, an explicit statutory duty on the CMA is proposed in Section 6, requiring it to conduct investigations swiftly.

⁶⁶ The CMA needs to plan for each case to be litigated through the courts, even if in practice some cases settle as the parties accept a discount on the fines when they believe their likelihood of success in the courts is low (or when they want to reduce the management and legal costs of protracted litigation).

The duration of UK competition appeals

The reforms proposed in this section are intended, in part, to reduce the duration of competition appeals, and thereby bring anti-competitive behaviour to an end more quickly.

Measured by “end-to-end” appeal time (time from appeal being lodged to judgment being handed down), the UK can appear to deal with cases more promptly than other jurisdictions.^a This is at least partially because the UK is unusual in having a tribunal dedicated solely to hearing competition appeals. In many other jurisdictions, competition appeals have to wait their turn to be heard in general courts.

However, once the appeal comes before the court, the UK appears to be an outlier in terms of the length and frequency of oral proceedings. Hearings lasting three to four weeks are not uncommon (e.g *Pay for Delay* and *Phenytoin*). The forthcoming appeal by Royal Mail against a decision of Ofcom is listed to be heard for a five-week period. By contrast, hearings in competition appeals in the EU General Court often last less than a day, and those in France often take less than two days.

Perhaps more importantly, oral proceedings of this length appear to be inconsistent with the original intentions for the CAT when it was founded in 2003. Charles Dhanowa, the CAT’s first (and current) Registrar and co-architect of its procedural rules, wrote in that year that:^b

“As a result of the emphasis on written procedure, the oral hearing stage before the Tribunal has been relatively short, with complex issues being argued in hearings taking 1½ days (*GISC*), four days (*Napp*), one day (*Aberdeen Journals*) and one day (*Bettercare*).”

The CAT’s first President, Sir Christopher Bellamy, spoke in similar terms in 2003. He said that the procedure was:^c

“essentially based on that of the Court of First Instance of the European Communities, which means that it is a system that is based on the exchange of written submissions, on case management by the Tribunal, and on a short oral stage”

In an essay published the same year, he wrote that:^d

“in the majority of [CAT] cases the oral hearing lasts a day, or at the most 2 days, although two cases so far have lasted 4 days. But this may be seen against the background of the English system, where heavy cases may easily last for 4 to 6 weeks in court, perhaps longer”.

^a See, for instance, European Commission, “EU Justice Scoreboard 2018 – Quantitative data”, Fig. 18).

^b Written evidence to the House of Lords Select Committee on Constitution Inquiry into The Regulatory State, 26 June 2003

^c Proceedings of Symposium on Globalization of the Judiciary (5-6 September 2003), published in *Texas International Law Journal*, 39 (3), Spring 2004

^d *Some Reflections on Procedure in Competition Cases*, in Hoskins, M. and Robinson, W. (eds.), *A True European: Essays for Judge David Edward*, 2003, page 189,

Fines for competition law infringements

The CMA has legal powers to impose fines of up to 10 per cent of business turnover for competition law infringements.⁶⁷

In practice, however, competition law fines in the UK are well short of the statutory maximum, and are markedly lower than those imposed by the CMA's national counterparts in France, Germany, Spain and Italy (despite a similar maximum fines threshold operating in these jurisdictions).⁶⁸ This weakens deterrence. The UK is not only one of the best jurisdictions for companies to defend a competition case; it is one of the best jurisdictions to lose one.

One explanation for the lower fines imposed for competition law infringements in the UK is the approach taken by the CAT to the CMA's fining decisions. In the vast majority of cases, the CAT has lowered the CMA's (and formerly the OFT's) fines on appeal, in some cases by over 80 per cent.⁶⁹ For those that have broken competition law, appealing against the CMA's fining decision appears to be a one-way bet.

⁶⁷ In doing so, the CMA must have regard to the seriousness of the infringement and the need for specific and general deterrence. Fines imposed under the Competition Act 1998 are "civil" (or "administrative") fines, rather than criminal fines. In the legislation, they are formally described as "penalties".

⁶⁸ For instance, over the period 2012-14, the UK imposed fines totalling of £66m. Over the same period, Spain imposed fines totalling of £525m, Italy £306m, France £1,423m and Germany £1,384m (National Audit Office report, *The UK competition regime*, February 2016, Figure 14.

⁶⁹ See, for instance, *Kier Group and others v OFT* [2011], in which fines imposed by the OFT (Office of Fair Trading, the predecessor of the CMA) on six construction companies for bid-rigging were reduced by the CAT by between 80 and 94 per cent.

Fines are determined by detailed CMA guidance, approved by the Secretary of State. This has been shaped by CAT judgments.⁷⁰ The CAT, like the CMA, is required to “have regard” to the guidance when setting the amount of a fine (including when the CAT substitutes its own fine for that of the CMA). However, in practice, the CAT typically provides little or no explanation for the size of the “substituted” fine, making it difficult to determine whether the guidance itself, or the CMA’s application of it, was responsible.

Both the guidance (as approved by the Secretary of State) and the CAT’s scrutiny of the CMA’s decisions taken with reference to that guidance, need to be examined together, if an increase in fines – and the improvement in deterrence that can come with it – is to be secured. To that end, the CMA is planning to review the guidance on competition law fines, and if appropriate, make proposals for amendment to the Secretary of State. More radical changes, such as statutory tariffs, may also be considered. At the very least, the CAT should be required, by law, when it varies the CMA’s fine, not just to follow the guidance, but to explain in detail how it has done so.

Regulatory appeals

The CMA handles references and appeals of certain decisions made by the sector regulators, concerning, among other things, licensing conditions, industry code modifications, tariff methodologies and price controls.

There is a strong case for removing responsibility for review of these economic regulatory decisions from the CMA. These could be consolidated in the courts. Were the courts to take on these functions, it would simplify appeal arrangements across the regulatory landscape, and also enable the CMA to put more resources into the investigation and remedy of consumer detriment.

⁷⁰ For instance, in a series of judgments handed down in March and April 2011, the CAT substantially reduced the fines imposed by the OFT for bid rigging in the construction industry. The CAT in these cases concluded, among other things, that “the Minimum Deterrent Threshold, used by the OFT at Step 3 of the Guidance, was by its nature and application such as to give rise to penalties [i.e. fines] which were excessive and disproportionate”. The OFT updated its guidance in September 2012 partly in response to this.

8. Merger control after Brexit

Brexit could have major implications for the merger control regime in the UK. The CMA will need to review a larger number of multi-jurisdictional mergers that would previously have been considered by the European Commission.

The Competition Statutory Instrument (SI) for EU Exit⁷¹ has already provided for essential changes to domestic legislation to ensure that merger control (and other aspects of competition law) in the UK remains operable in the event of a “no deal” Brexit. But whatever the outcome, further changes to the procedural framework, the statutory timetable and the decision-making structures for merger control are likely to be needed, if the CMA is to be able to work effectively with international counterparts.

The changes required to the UK’s regime will be dependent to some degree on Brexit negotiations and any subsequent transition. This has created uncertainty although work is under way to develop a set of proposals to address these challenges. In the meantime, and in addition to the wider set of proposals being developed, the CMA is recommending the following reforms at this stage. (These are in addition to those that the Government is contemplating in the context of national security.)

Irrespective of Brexit, it is widely recognised that merger control might need to adapt to meet the challenges of the digital economy. The CMA is involved in the consideration of this question, including through its engagement with Professor Furman’s review of competition in the digital economy.

Mandatory and suspensory notification of certain mergers to the CMA

Post-Brexit, when large, multinational firms merge, they are likely to put, as a priority, engagement to secure consent for the merger with the largest jurisdictions (in particular the EU, the US and China), before engagement with the UK. This reflects the fact that the merging parties do the most business in those jurisdictions. It may also reflect their legal advisers’ judgement that the approach of the European Commission and of the US agencies will influence that taken by other authorities.

⁷¹ The Competition (Amendment etc.) (EU Exit) Regulations 2019.

Some merging parties may also have an incentive to “game” the system, by agreeing to remedies in some jurisdictions that they can seek to secure from others.

These problems are likely to be compounded by the UK’s “voluntary” and “non-suspensory” regime for merger notifications.⁷² This provides greater scope for some merging parties to fulfil their obligations in the mandatory jurisdictions, and wait and see whether the outcome can assist them in their engagement with the UK. And in any case, merging parties are generally likely to prioritise dealing with jurisdictions operating mandatory notification requirements, before turning to those with voluntary regimes.

From the perspective of UK consumers, the consequences of some merging parties engaging with the CMA late, after remedies have been negotiated and agreed with the other authorities, will almost always be negative, compared with a situation where the CMA is able to negotiate and agree remedies in conjunction with other authorities, and at an early stage. Consumers need adequate protection from this. A way for the UK to ensure that it has appropriate influence over the process would be to require mandatory notification to the CMA of mergers above a threshold set at a level to catch larger mergers that are typically reviewed by multiple international competition authorities. This means that large companies currently notifying their transactions in Brussels under a mandatory notification regime would do the same in the UK post-Exit, thereby avoiding any additional business burden. This would be accompanied by a “standstill obligation” designed to prevent parties from proceeding with the transaction prior to the CMA’s approval.⁷³

⁷² This means that merging parties can choose whether or not to tell the CMA about what they are doing, and they are permitted to complete the merger without the CMA’s prior approval. If the merger may have anti-competitive effects, there are, however, serious risks for the parties in not notifying. For instance, they could subsequently be investigated by the CMA and then ordered to sell the acquired business, after the transaction has been completed.

⁷³ Consideration should also be given to the introduction of a “short-form notification” process or other mechanisms to minimise the impact on businesses in relation to non-problematic mergers.

For those mergers below the threshold the system would remain voluntary, with parties notifying the CMA only where they consider that there is a risk to competition, and the CMA retaining the ability to review cases at its discretion.⁷⁴ This would save the businesses concerned (generally small and medium-sized enterprises), and the CMA itself, the burden of dealing with notifications of unproblematic cases, while retaining the important discretion to examine small mergers that nonetheless raise concerns (for instance, acquisition of small but growing competitors, or potential entrants, by large digital platforms, such as Google).

Cost recovery

Currently, the CMA recovers around half of the total cost of its mergers work from fees paid by merging parties. Brexit will increase the absolute cost of the work considerably.

A number of defensible approaches can be taken to the funding of merger control. One, taken by, for instance, the German authorities, is that, since merger control is a requirement imposed by the state on companies, which would otherwise be free to organise their business as they see fit, the costs should be borne by the public sector. Another is that the merging parties – those with the most direct interest in the outcome of the merger control process – should pay in full or part for the process – cost recovery.

⁷⁴ The exercise of this discretion would also need to be subject to a separate threshold (for instance relating to the share of supply and/or turnover of the merged entity), so that the CMA's ability to review mergers of multinationals was limited to cases where they had (for instance) a material UK market share and/or turnover.

Merger control fees in the UK are returned to the Consolidated Fund. There is no financial interest for the CMA in proposing one approach over another. The case for higher, or full, cost recovery, rejected in 2011,⁷⁵ may merit reconsideration, partly in the light of Brexit, and the expected rise in higher value mergers that the CMA will be required to review as a result. Any changes to the level and structure of merger fees could be designed to avoid additional costs for smaller transactions, but require a bigger contribution from the largest corporates, whose mergers often demand intensive scrutiny by the CMA, and for whom merger control fees are generally just a small fraction of the overall transaction costs.

⁷⁵ BIS, *A competition regime for growth, a consultation on options for reform*, March 2011, paragraph 11.6.