

21 January 2022

VIA ELECTRONIC MAIL  
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## Competition and Markets Authority

The Cabot  
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Dear Competition and Markets Authority,

### Competition and Markets Authority Annual Plan 2022/23 Consultation

We are grateful for the opportunity to provide our views and comments on the Competition and Markets Authority's ("CMA") draft Annual Plan for 2021/22 (the "draft Annual Plan").

#### About Hausfeld

Hausfeld & Co. LLP is the leading competition litigation firm in Europe for claimants. Hausfeld is a global disputes-only law firm with 12 offices worldwide including Amsterdam, Berlin, Brussels, Düsseldorf, London, Paris and Stockholm in Europe, and 5 offices in the US. Since the launch of Hausfeld's European presence over a decade ago, Hausfeld has pioneered redress for breaches of competition law in Europe and has managed some of the region's most high-profile and complex disputes. Hausfeld has significant experience in collective redress and competition litigation before the UK Competition Appeal Tribunal (the "CAT"), the High Court and in jurisdictions outside of England & Wales. More information is available [here](#).

#### Consultation responses

**1. Do you agree with the overall direction and themes of focus for the CMA set out in the 2022/23 draft Annual Plan?**

1.1. As was the case in 2021, the CMA is continuing to face clear challenges in the year ahead in dealing with both the implications of Brexit and the Covid-19 pandemic. These challenges only increase the importance of the CMA's crucial role in promoting fair competition in all sectors of the economy and protecting consumers. The CMA's draft Annual Plan takes account of this changed landscape in which the CMA finds itself operating and acknowledges further challenges too, including the accelerating digitalisation of the economy, which we note is an area where pro-competitive reform is anticipated.

1.2. With this in mind, we broadly agree with the overall direction and suggested focus for the CMA as set out in the draft Annual Plan. We note below some further observations as to the Annual Plan's main themes.

**2. Are there any changes that you think we should make to our main themes for 2022/23?**

Protecting consumers through competition enforcement

2.1. We note that the CMA continues to focus its efforts on protecting consumers and small and medium-sized enterprises ("SMEs") through fostering competition in UK markets and issuing fines where it uncovers incidents of anti-competitive behaviour. The CMA's focus on enforcement is welcome, particularly given the challenges which consumers and SMEs face in the wider economy.

- 2.2. It is, in our view, vital that the CMA is awarded sufficient resources, and allocates the same, to support this emphasis on public enforcement.<sup>1</sup> Brexit will continue to increase the number of antitrust investigations (alongside merger reviews) which the CMA undertakes, and it is important for consumers and businesses that these investigations are adequately resourced, as well as conducted as thoroughly and swiftly as possible so as to protect consumers and markets from the consequences of ongoing anticompetitive conduct. We appreciate in this context the importance of the CMA's ability to properly prioritise its investigations and interventions to maximise their effect.
- 2.3. The CMA's public enforcement work is complemented by a well-functioning private enforcement regime, with the latter acting as a further deterrent to future competition law breaches by would-be wrongdoers. In short, private enforcement actions can assist in plugging the gap left by the regulatory bodies' necessarily finite resources. In recent years, the ability of private enforcement to grow its role in this area has been augmented by the regime for opt-out collective actions introduced by the Consumer Rights Act 2015, and we note that a significant number of new, opt-out collective actions were filed in the CAT during 2021.<sup>2</sup> It is notable that the vast majority of the potential collective actions filed before the CAT are either in respect of standalone abuses of competition law or rely upon the decisions adopted by the European Commission, as opposed to decisions of the CMA or domestic sector regulators. It is in this context that it would be helpful to understand more as to how the CMA sees its role within this wider enforcement landscape and, in particular, the relationship between the CMA's work and opt-out collective actions (which are often the means by which consumers stand to receive redress).
- 2.4. We note that the Department for Business, Energy & Industrial Strategy recently consulted upon the potential to reform consumer redress ("**BEIS Consultation**") and we would strongly support an alignment of the procedural mechanisms available to consumers for breaches of consumer law as currently exist for breaches of competition law.<sup>3</sup>
- 2.5. Finally, we suggest that the CMA could helpfully use the Annual Plan to clarify whether it intends to revisit its approach to confidential treatment of information gathered in the course of its investigations in the coming year, and similarly whether it plans to hold a consultation. As the CMA will be aware, the issue of confidentiality recently came to the fore in the context of an application in BGL's appeal of the CMA's decision.<sup>4</sup> In its judgment, the CAT expressed concerns that the CMA's confidentiality regime appears excessively wide which is at odds with the principle of open justice, indicating that "*a significant reassessment of the confidentiality regime needs to be undertaken by the CMA*" to ensure that it is appropriately calibrated to what is going to take place in court (i.e., a public hearing of various aspects of the decision and its factual background).<sup>5</sup> The issue of confidentiality is likely to have wider implications for private enforcement actions where such claims rely upon decisions of the CMA.

#### CMA fining powers for consumer law breaches

- 2.6. We note the CMA's reference to the introduction of fining powers for breaches of consumer law and administrative decision-making powers (paragraph 2.25 of the draft Annual Plan). We would

<sup>1</sup> The overview of CMA's recent and ongoing activity at paragraphs 1.10 – 1.14 of the draft Annual Plan indicates that the proportion of resources allocated by CMA in 2020/2021 to enforcement activities remained comparable to that in 2019/2020 (37.9% as compared to 38.1%).

<sup>2</sup> The following proposed collective proceedings were filed in the CAT in the course of 2021: Case 1425/7/7/21 *Justin Gutmann v Govia Thameslink Railway Limited & Others*; Case 1408/7/7/21 *Elizabeth Helen Coll v Alphabet Inc. and Others*; Case 1404/7/7/21 *David Courtney Boyle & Edward John Vermeer v Govia Thameslink Railway Limited & Others*; Case 1403/7/7/21 *Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd*; Case 1382/7/7/21 *Consumers' Association v Qualcomm Incorporated*; and Case 1381/7/7/21 *Justin Le Patourel v BT Group PLC*. We also note that a further collective claim was filed by Home Insurance Consumer Action Limited against BGL (Holdings) Limited and three others in November 2021, although these proposed proceedings do not yet appear on the CAT's website.

<sup>3</sup> Our response to the BEIS Consultation is available [here](#).

<sup>4</sup> Case 1380/1/12/21 *BGL (Holdings) Limited & Others v Competition and Markets Authority*.

<sup>5</sup> *Ibid*, [2021] CAT 33 (4 November 2021), at paragraph 8.

strongly support the enhancement of the CMA's remit regarding consumer protection powers in this manner and, in broad terms, a mirroring of the regime for consumer law enforcement with that of competition law. We have provided fuller feedback to that effect in paragraphs 47 – 72 of our response to the BEIS Consultation.<sup>6</sup>

#### Cooperation with the EC and concurrent regulators in the UK

- 2.7. We are pleased to see that the CMA plans to continue engaging and cooperating closely with other competition and consumer authorities and regulators with concurrent powers in the European Union and globally (paragraphs 2.60 – 2.62 of the draft Annual Plan). We also welcome the CMA's recommendation of domestic block exemption legislation which will be helpful in clarifying the regulatory landscape in the UK, both from the perspective of businesses and consumers.
- 2.8. It is important that cooperation between the CMA and other competition authorities takes place at the early stages of investigations worldwide (especially in the European Union) to ensure that CMA decisions can be delivered in parallel to those in respect of similar conduct outside of the UK. This is especially the case in the circumstances where the UK Government is considering reforms to expand the scope of Chapter I and Chapter II prohibitions to conduct intended to be implemented in the UK and having direct, substantial and foreseeable effects within the UK. It would be helpful for the CMA to indicate in the Annual Plan whether it has implemented a process for early-stage communication and engagement with its global counterparts regarding any practices which may affect the UK market.

#### Digital Markets Unit ("DMU")

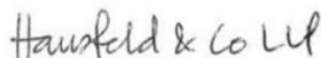
- 2.9. We welcome the establishment of the shadow DMU within the CMA pending the creation of an independent DMU on a statutory footing. The CMA notes in the draft Annual Plan that Parliament will introduce the necessary legislation when time allows.
- 2.10. 'Big Tech' in particular poses significant challenges to enforcement due to the scale of concentrations in digital markets and regulators having to play 'catch-up' with the pace of technological development. We therefore support the establishment of a full-fledged DMU in a timely fashion, which should be one of the CMA's priorities.

#### Supporting the transition to low carbon growth

- 2.11. The focus on the commitment of net zero emissions by 2050 and promoting carbon-efficient growth is paramount following COP26, and we agree that the CMA has an important role to play in this respect and consider that the CMA should remain vigilant as to any collusion (or other anticompetitive practices) that is taking place under the guise of environmental standards.

We hope that our responses are of assistance to the CMA in considering any amendments to be made to the draft Annual Plan. If it would be of assistance to CMA to discuss any of the points identified, we would be very happy to do so.

Yours faithfully,



**Hausfeld & Co. LLP**

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<sup>6</sup> *Supra* footnote 3.