

Submissions of Hausfeld & Co. LLP following
**The Department for Business, Energy & Industrial Strategy's
consultation Reforming Competition and Consumer Policy:
Driving growth and delivering competitive markets that work for
consumers**

A. Introduction

1. In July 2021, the Department for Business, Energy & Industrial Strategy (“**BEIS**”) published the consultation *Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers* (“**RCCP Consultation**”), which proposes a number of potentially significant changes to competition and consumer law and policy, including new powers for the Competition and Markets Authority (“**CMA**”) to directly enforce consumer protection rules in a similar manner to competition law (the “**Proposals**”).
2. The below submissions are made by Hausfeld & Co. LLP (“**Hausfeld**”) in response to the RCCP Consultation. Hausfeld is a leading, disputes-only law firm with twelve offices across Europe and the US, including in Brussels, Paris, Amsterdam and Berlin. Hausfeld has significant experience in collective redress and competition litigation before the Competition Appeal Tribunal (“**CAT**”), the High Court and in jurisdictions outside of England & Wales. More information is available [here](#).
3. Hausfeld has acted in follow-on cartel damages claims on behalf of individual claimants and groups of claimants,¹ in group claims in the High Court pursuant to Group Litigation Orders (“**GLOs**”) and in some of the first collective opt-out claims issued under the new opt-out collective regime introduced by the Consumer Rights Act 2015.² We are currently involved in several landmark collective actions on behalf of consumers both before the High Court and before the CAT, including against Apple and Google for excessive app store fees, against YouTube for the unlawful use of children’s data, against Daimler in relation to the emissions scandal and against Qualcomm for abuses of dominance in relation to smartphone chipsets and standard essential patents, among others.³
4. We have considered the questions set out in the RCCP Consultation in light of our experience and have responded below to those that directly concern our practice and our clients, as well as providing some general observations on the Proposals as a whole.⁴
5. We would be happy to discuss any of the points made in this response further if BEIS would find it helpful to do so.

B. General observations

6. Overall, we consider the Proposals in the RCCP Consultation to represent, broadly-speaking, a welcome development for the competition and consumer law enforcement landscape and for consumers.

¹ Including (without limitation) in *Trucks* (cases 1292/5/7/18; 1293/5/7/18; 1294/5/7/18; 1355/5/7/20; 1356/5/7/20; 1358/5/7/20; 1371/5/7/20; and 1372/5/7/20), *Car Glass* (cases 1244/5/7/15 and 1256/5/7/16), *Bearings* (case 1248/5/7/16), *Maritime Car Carriers* (cases 1346/5/7/20 and 1347/5/7/20), and *Power Cables* (cases 1352-1353/5/7/20 - Greater Gabbard and others v Prysmian Cavi e Sistemi and others; and SSE and others v Prysmian Cables & Systems and others)

² Including for example in *Train Boundary Fares* (cases 1304/7/7/19 and 1305/7/7/19), *Forex* (case 1336/7/7/19) and *Qualcomm* (case 1382/7/7/21).

³ *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* (case 1403/7/7/21); *Elizabeth Helen Coll v Alphabet Inc. and Others* (case 1408/7/7/21); *McCann v Google* (case QB-2020-000393); *Qualcomm* (case 1382/7/7/21).

⁴ Hausfeld has responded to previous consultations for which it has related experience or expertise, including the recent BEIS *call for evidence for the post-implementation review of the CAT Rules 2015*. We note that some of the content of the RCCP Consultation is closely related to that on the CAT Rules.

7. The Proposals indicate ambition and intent on the part of the Government to improve the enforcement of competition and consumer law and outcomes for consumers. Further, the Proposals recognise not only the CMA's increased role and responsibilities as a global competition and consumer protection authority in the wake of both Brexit and the COVID-19 pandemic, but also that the CMA, in common with other regulators, needs to step up to address the concerns that are being echoed globally about the ability of competition and consumer law enforcement to adequately protect consumers in an age of increasing digitalisation. The effectiveness of the competition law regime to deal appropriately with mergers of companies with valuable data holdings, for example, or its ability to allow for quick intervention to deal with abuses in fast-moving markets, have been highlighted. Big Tech in particular poses significant challenges to enforcement due to regulators having to play 'catch up' with the pace of technological development and the fact that regulatory fines can effectively be a 'cost of doing business' for a trillion-dollar company. As such, we welcome BEIS' work in this area and its parallel consultation on the CMA's new Digital Market Unit and a new pro-competition regime for digital markets (to which we are responding separately).
8. The COVID-19 pandemic has of course accelerated the growth of online and digital markets even further and has highlighted weaknesses in UK consumer protections that have allowed unscrupulous businesses to exploit consumers. The CMA has already been doing much good work in this sphere, such as taking decisive action in relation to cancellations and refunds in the package holidays and holiday lets sectors. It – together with the other sector regulators – should now be given enhanced powers and tools to protect consumers as effectively as possible from these threats and to ensure the maintenance (and, where required, restoration) of public confidence in key markets.
9. In this context, BEIS' consideration of the strengthening of the private enforcement of competition and consumer law, as a complement to public enforcement, is very much welcomed. Notwithstanding any reforms to the scope and processes of public enforcement, public bodies have finite resources and will need to prioritise their interventions – and private enforcement plugs the gap.
10. In particular, opt-out collective redress is an important part of the existing competition law private enforcement toolkit which allows access to justice for those who would otherwise not be able to exercise their rights. Where the same conduct leads to thousands or millions of consumers being ripped off or otherwise becoming the victims of unlawful behaviour, collective redress allows those wronged to club together to seek compensation where claims on an individual basis would be unfeasible. The availability of this procedural mechanism also operates as a deterrent against anticompetitive conduct and, as such, claims can seek to end conduct as well as address its effects.
11. There is currently a substantial gulf in terms of the private enforcement of competition law and that of consumer law. As we detail further below, this gap can be narrowed by extending the opt-out redress regime to breaches of consumer law – such a reform would be likely to bring significant benefits to consumers, to the economy and to the country as a whole.

Consultation questions

Market inquiries

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

12. At present, the CMA can impose binding remedies only after conducting a market investigation. Since a market investigation typically follows a market study, it can take the CMA more than three years to impose remedies.⁵ We agree with the suggestion that this timeframe leads to harms being tackled too late, especially in cases where the existence of an adverse effect on competition and the need for structural remedies become apparent early on during the market study process. Quicker interventions are likely to be especially useful in fast-moving markets - such as digital markets - where there is a risk that, by the time a market inquiry is completed (or the appeal process exhausted), the harm in question may have already become entrenched or the market will have ‘tipped’, rendering the CMA’s interventions ineffective.

13. However, we acknowledge that given the market inquiries process can result (and has historically resulted) in far-reaching changes to market sectors,⁶ the process must be sufficiently thorough and robust so as to lead to high-quality decisions which can provide long-term benefits to both businesses and consumers. Solving complex, structural issues in a market may not be straightforward and will require an in-depth understanding of the industry, as well as coordination with various other regulatory bodies and governmental organisations.

14. As such, we consider that the process as a whole should be streamlined, but in a way that does not curtail the ability of the CMA to undertake a proper assessment of the market in question and to ultimately make the right intervention. If option 1 were adopted (i.e., empowering the CMA to impose binding remedies at the end of a market study, but retaining the two-stage process), then that may also mean: (i) providing for increased powers and tools for in-depth assessment during the statutory 12 months of the market study; and/or (ii) reserving significant structural interventions (such as the divestment of assets) for use at the end of market investigations only, to ensure the fairness and robustness of the process. A two-tier process may risk duplication and incremental costs and as such, the alternative option of a two-year, single stage process with a single set of criteria and powers for the CMA – provided the right procedural safeguards are in place – is likely to be a more flexible and less costly compromise.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

15. We consider that there is merit in granting the CMA the same powers to impose interim measures at any point in the market inquiry process as it does in Competition Act 1998 (“CA98”) investigations. As stated in our response to question 5 above, earlier

⁵ Given that the statutory deadline to complete a market study is 12 months and for market investigations 18 to 24 months, with additional time to implement remedies.

⁶ Examples are the airports’ divestiture of assets or wholesale regulatory changes such as the U.K.’s Open Banking regime.

interventions are particularly important in digital markets; Lord Tyrie has previously commented on how the increasing digitalisation of the economy has resulted in new and rapidly-emerging forms of consumer detriment, which require more rapid intervention.⁷ At EU level, Commissioner Vestager has also hinted at an intention to make more frequent use of interim measures given their particular importance in fast-moving markets, following the imposition of interim measures on Broadcom in 2019.⁸

16. The power to order legally binding requirements to remedy consumer detriment pending full investigation – at both a firm and a market-wide level – would also provide a stronger incentive for these firms to listen, engage and take steps to address the CMA’s concerns in advance of formal work.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

17. Addressing harmful conduct via commitments can represent a successful and efficient outcome for the CMA. However, the acceptance of commitments also means that: (i) no fine will be imposed on the undertaking(s) involved for what may have been unlawful conduct; and (ii) there will be no infringement finding, which is unhelpful for victims of the conduct that has occurred in the meantime. Accepting commitments at an early stage of the market inquiry process may also mean halting investigations before the CMA has had an opportunity to assess the full extent of the conduct/harm, and the process of considering commitments might itself take away valuable time for the investigation. The upshot of all of this is little deterrence from harmful conduct overall.
18. As such, whilst it should be possible for the CMA to accept commitments at every stage in the inquiry process if it considers appropriate to do so, there should be safeguards to ensure this does not lead to outcomes for consumers and markets which only partially address harms (or to the entities giving the commitments escaping any consequences of potentially unlawful conduct). These safeguards could include:
- a. Stricter criteria for allowing commitments to be considered at an early stage, e.g., a greater evidentiary burden on the undertakings concerned to show that the commitments have a high likelihood of remedying the conduct/harm in question, and corresponding greater information gathering tools for the CMA (supported by the ability to impose civil fines by reference to the company’s turnover, as the Government proposes at paragraph 1.220 of the RCCP Consultation).
 - b. A dedicated period for the consideration of commitments (outside of the proposed two-year single stage process for the market inquiry, above).
 - c. Extended powers for the CMA to review and/or request that the undertakings concerned vary the commitments it has accepted to ensure they continue to be effective. A timetable for periodic review could be set/agreed at the outset (depending on the conduct involved) as a condition of acceptance of the commitments, so as to also increase certainty for businesses.
 - d. The ability to issue civil fines for failure to comply with commitments (as the Government proposes at paragraph 1.230 of the RCCP Consultation). This would

⁷ See: <https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy>

⁸ See: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_6115

also be in line with the procedure at EU level, whereby the European Commission can impose substantial fines for failure to comply with commitments.⁹

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

19. We consider that a necessary precondition of allowing the CMA to impose interim measures and to accept commitments earlier on in the market enquiry process (and before the investigation is complete) is an increased flexibility to review/vary interim measures and commitments should they reveal to be ineffective further down the line. The Government's proposals for extended powers to the CMA in this regard are appropriate. As set out above, limits to the CMA's review powers could be defined as part of the relevant commitments agreed with the undertaking (or as part of the remedies imposed).

Stronger and faster enforcement against illegal anticompetitive conduct

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

20. We welcome the proposal to expand the Chapter I and Chapter II prohibitions to more broadly reflect the extra-territorial approach of the EU and US competition enforcement regimes. Following Brexit, and in keeping with the ambition for the UK's competition regime to be 'best in class', UK consumers and markets must be equally protected from harmful conduct happening outside the UK but which may nonetheless have effects within the UK.

21. As is acknowledged, this is particularly important in a world where globalisation and digitalisation are increasing the ability of agreements or conduct implemented outside the UK, or abuses of dominance in a market outside the UK, to cause harm in UK markets. It is not difficult to think of examples of agreements or conduct which, whilst not implemented nor intended to be implemented in the UK, affects domestic markets and/or consumers. A straightforward example of conduct that is likely to be caught by the new jurisdictional test is a price-fixing cartel implemented across continental Europe but not in the UK - that cartel is highly likely to affect prices of goods in the UK whilst not being implemented here. Similarly, the new jurisdictional test is likely to cover Chapter II conduct by a Big Tech company in digital markets, where the relevant geographic market may be outside the UK (e.g., in the US) but still have a substantial impact in the UK as a result of the inherently cross-border and ubiquitous nature of digital markets.

22. Clearly an expansion of the jurisdictional requirements is likely to result in an increase in the instances of potentially unlawful conduct which the CMA can investigate and the number of investigations which the CMA may undertake. It is therefore vital that the CMA is sufficiently resourced to tackle the additional workload that would come with this change. Further, effective coordination with international competition authorities and regulators will

⁹ Fines of up to 10% of the undertaking's annual turnover without having to prove any violation of the competition rules, plus periodic penalty payments of up to 5% of the average daily turnover until the undertaking complies with its commitments.

be important to address harms that extend cross-border; in this regard, the Government's aim to equip the CMA with stronger powers and tools to facilitate such cooperation (paragraphs 1.232 – 1.246 of the RCCP Consultation) is welcome.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

Immunity from liability for damages

23. In broad terms, we welcome the prospect of more and better tools for the CMA in effective public enforcement. Public and private enforcement of competition law share the common goal of enforcing competition law and deterring future infringements. In many respects, they are complementary and reinforce one another.
24. Against this backdrop, we are concerned that the proposal to offer those with public immunity further immunity from private damages actions will violate the basic right to seek damages for harm stemming from a breach of competition law. The basic principle that a victim of a cartel may recover their losses from the cartellists (including leniency applicants) is established under retained EU law (see *Crehan* and *Manfredi*). It is also notable that the English Courts established almost 40 years ago (before the same recognition was realised by the EU courts) that damages are available for harm caused by infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union.¹⁰ The prospect of immunity from private enforcement violates this basic principle and would, if implemented, represent a significant step backwards in private enforcement.
25. Were this proposal to be implemented, it would send entirely the wrong message to potential cartellists. That is to say, you can participate in an anticompetitive agreement and, on the condition that you ensure that you blow the whistle on those arrangements first, you will be completely immune from any consequences, you will not receive any regulatory fine, nor will you have to repay to those you have harmed any form of compensation (to the contrary, you are free to keep the profits stemming from the cartel). We do not consider this to be an appropriate (or fair) approach to dealing with the effects of anticompetitive conduct.
26. We take from the consultation that the proposal would be intended to deliver a greater number of immunity applicants. However, it is important to bear in mind the impact of the Damages Directive which was implemented in the UK in March 2017.¹¹ The Damages Directive introduced mechanisms in order to safeguard the exposure of leniency applications to private damages. For example, an immunity recipient is only jointly and severally liable for harm caused to its direct and indirect purchases, and to other injured parties but only where full compensation cannot be obtained from the other undertakings (Art. 11(4)). There are also safeguards in place for undertakings which are considered to be small and medium-sized enterprises (Art. 11(2)-(3)). This safe harbour provision has some similarities to s.213 of the Antitrust Criminal Penalty Enforcement and Reform Act 2004 in the US, which provides that a whistle-blower was subject to single, not treble,

¹⁰ *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130.

¹¹ The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385).

damages between 22 June 2004 and 21 June 2020 (although a sunset clause meant that the de-trebling provision lapsed on 22 June 2020). Furthermore, under the Damages Directive, national courts are prevented from ordering disclosure of corporate statements and settlement submissions (Art. 6(6)). These two provisions under the Damages Directive - adopted after a lengthy legislative process - strike a balance between incentivising leniency applications on the one hand and enabling private damages claims to be brought effectively on the other. We are yet to see whether the provisions of Arts 6(6) and 11(4) of the Damages Directive have indeed struck the right balance, but it is far too early to conclude that they have not. Amending those provisions only four years after their adoption in the UK – and before they have been tested in the context of live damages claims – would therefore, in our view, be premature.

27. Whilst it is true that, if this proposal were to be introduced, the other cartelists would be jointly and severally liable to a claimant for the full amount of loss, shielding the immunity applicant from liability for damages may impact upon a claimant's decision to bring a claim for damages altogether. This is because a claimant must consider the overall liquidity of the cartelists in deciding whether to proceed with a damages action given the need to enforce a favourable judgment following the conclusion of the litigation, and (if so) against which cartel entities. Furthermore, the other cartelists would not be incentivised to settle any potential claim before proceedings are issued if they needed to cover the immunity applicant's losses. This may result in a cartel victim having to make a difficult decision over which cartelists to sue based on its commercial relationships with them, and in some instances may result in deterring the cartel victim from pursuing damages altogether. In cases where cartel participants are domiciled in various jurisdictions, the inability to bring a claim against an immunity applicant domiciled in the UK may create additional hurdles in regard to seizing the jurisdiction of the English courts, if all of the other cartelists are domiciled in other jurisdictions, which could result in the claimant incurring more cost in bringing the claim, or bringing a claim in a jurisdiction without the benefits that English litigation has (such as disclosure), or not bringing the claim at all.
28. Further, we note that immunity from civil damages in the UK is a limited benefit overall if the immunity applicant finds it is also exposed to civil claims in other jurisdictions. This is especially so if the Chapter I jurisdictional requirements are expanded as proposed so that they cover conduct with substantial effects in the UK but not necessarily implemented here (see our response to Q14 above).

Whistle-blowers

29. We consider that there is merit in strengthening the protections for whistle-blowers as the Government provisionally suggests at paragraphs 1.163 and 1.164 of the RCCP consultation.
30. In this regard, the Government may also want to consider approaches adopted elsewhere, for example EU Directive on the protection of whistle-blowers¹² which extends whistle-blower protection to include not only current or former employees of the relevant company

¹² Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

but all people who could make useful disclosures.¹³ We think that this is a fertile area for bolstering public enforcement, which would also not interfere with the private right to damages of cartel victims.

Q20. Will government’s proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government’s proposals provide the right balance of incentives between early resolution and deterrence?

31. We understand the motivation to ensure that, particularly post-Brexit and in the context of the further issues relevant to the CMA’s workload noted above, enforcement is as efficient as possible.
32. However, we are concerned that the proposed ERA process would: (i) effectively mean a ‘slap on the wrist’ for what might be global, billion-dollar companies indulging in potentially unlawful and harmful conduct; and (ii) mean that those affected by that conduct, be they customers or competitors, would find it more difficult to seek redress by way of a private damages action. It is important that any settlement-type process associated with Chapter II conduct acts as a deterrent to engaging in such conduct, and amounts to more than the ‘cost of doing business’ for the companies involved – which, by definition, will often have very deep pockets.
33. We therefore consider that any ERA process should also entail a finding of an infringement, so as to mean there is better accountability for unlawful conduct where it has occurred and to assist those who may have suffered losses to pursue private actions. This would be closer to the current settlement procedure applicable to Chapter I conduct, which entails a discount to the level of the fine alongside a finding of an infringement, and where the risk of an administrative appeal is reduced as a result. Without a finding of an infringement, the deterrent effect is very significantly weakened, as is the relationship of public and private enforcement.
34. We also note that the proposed ERA process should be applicable to “complex Chapter II cases”. It might be that conduct by the likes of Google, Facebook, Amazon and Apple is effectively always classified as ‘complex’ simply by the nature of those companies’ global operations and the fact of their operations in various markets. If this interpretation is correct, potentially unlawful conduct which may be very damaging to UK markets and UK consumers would be highly likely to be dealt with (potentially repeatedly) with this mechanism. Such an approach would demonstrate little deterrent and reduced fines may simply be viewed as the ‘cost of doing business’ to such companies.

¹³ Including non-executive directors, self-employed, contractors, volunteers, prospective employees, trainees and shareholders. Supporting colleagues and / or relatives of the whistle-blower must also be protected from retaliation (see Article 4).

Q21. Will government’s proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

35. The Consumer Rights Act 2015 gave the CMA the power to approve voluntary redress schemes. Whilst the voluntary redress scheme is (we understand) yet to be used,¹⁴ we are concerned that the reason for the lack of uptake to date is potentially misplaced. There are many other elements of the redress scheme which may make it unattractive – such as its lack of flexibility. We would note that other enforcers of consumer law have more flexible powers when adopting such a scheme. The lack of uptake to date may also be a result of the collective actions regime having been stalled owing to the appeal proceedings in the *Merricks* litigation – and which received a judgment from the Supreme Court in December 2020. We do not therefore consider that the Government’s proposal will, by itself, be sufficient to encourage the use of voluntary redress schemes, and as set out below there is a risk that the proposal will act contrary to consumers’ interests in seeking redress through private actions.

36. If a redress scheme has been proposed to but rejected by the CMA, then the documents going to the rejected proposal are likely to be relevant to private actions. When considering the application requirements as set out in 2.9 of the CMA’s “*Guide on the approval of voluntary redress schemes for infringements of competition law*”, the business applying for a scheme will need to provide (*inter alia*) details about the conduct and aspects about the infringement decision or investigation to which the scheme is being offered, details about who will be entitled to compensation and details about the scope and level of compensation. Such categories of information are plainly relevant to a claimant under the ordinary rules of disclosure in English law, and therefore are in the interests of efficient and cost-effective litigation. Furthermore, such categories of information may assist the parties to have an earlier settlement dialogue, which in turn will free up court resources.

Q22. Will government’s proposed reforms help to speed up the CMA’s access to file process and by extension the conclusion of the CMA’s investigations?

37. We would agree that the proposed reforms may help to expedite the public enforcement of competition law. However, we would also note that such provisions may also facilitate more efficient conduct of private actions which are follow-on in respect of a CMA decision. This is particularly the case where a claimant wishes to obtain access to the CMA’s administrative file, and where issues regarding confidentiality have the potential to cause significant delay in granting access.

38. We likewise consider that adopting the reforms may set a helpful precedent for the use of confidentiality rings in private actions and which are already commonplace.

39. As regards the first point at paragraph 1.189 of the RCCP Consultation, we do not think that it should be a default position that non-legal persons are denied access to confidentiality rings. If information is unable to be shared with all relevant persons, then external legal representatives may be unable to take proper instructions to act. We note

¹⁴ We note that the CMA has indicated that as part of settlements concluded in connection with some of its pharma investigations, the settling parties have announced they are also making payments to the NHS – these have not been described as being made under the Consumer Rights Act 2015’s voluntary redress mechanism, but this suggests they are used on occasion.

that the Court of Appeal has previously expressed a preference for including non-legal persons into a confidentiality ring – with the burden sitting with the disclosing party to justify their exclusion:

“[...] it is exceptional to limit access to documents in the case to external eyes only, so that no representative from the party which is subject to the restriction can see and understand those documents. An external eyes tier does not require justification for the restriction by reference to individual documents. It enables one party to decide to exclude all representatives of the opposite party from access to any document that it chooses, and places the onus on the party seeking access to apply to court to obtain it. That approach, in my judgment, is wrong in principle.”¹⁵

40. As regards the second point at paragraph 1.189 of the RCCP Consultation, parties may – between them – agree upon the parameters of disclosure of documents, but documents relating to a regulatory decision and/or the authority’s administrative file is sometimes viewed as an opportunity for defendants and third parties to impose significant delay and costs to proceedings. The proposals therefore will help to save cost and ensure efficiency of investigations.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

41. Whilst we consider that addressees of decisions by the CMA and other regulators should benefit from a robust framework for challenging those decisions, we also consider that the potentially complex and protracted appeal process before the CAT (with extensive use of oral witness evidence and cross-examination, the possibility of admission of fresh evidence, and a ‘full merits’ review standard) is not necessarily conducive to effective and efficient enforcement of competition law. The deterrent effect of the regulators’ enforcement activity could be argued to be diminished as a result, and there are strong incentives for businesses to litigate if they lose a case, which can in turn lead to risk aversion in the competition authorities (as the RCCP Consultation acknowledges). A lengthy appeal process also allows the detriment caused by anti-competitive behaviour to persist for long periods, leaving consumers and other victims of the conduct in question poorly served by public enforcement.

42. A good compromise between the procedural rights of businesses and efficient enforcement may be a new standard of review setting out specified grounds of permissible appeal, as envisaged by Lord Tyrie in his proposals. The CAT could, for example, limit its review to whether the CMA’s decision was based on material errors of law or fact, or a breach of essential procedural requirements.

43. As Lord Tyrie observes, the practice at EU level supports the adoption of this approach. The EU General Court considers competition appeals on specified grounds: namely, 1) lack of competence, 2) infringement of an essential procedural requirement, 3)

¹⁵ TQ Delta LLC v Zyxel Communications UK Ltd [2018] EWHC 1515 (Ch), at paragraph 21.

infringement of the EU Treaties or any rule of law relating to their application and 4) misuse of powers, whilst maintaining unlimited jurisdiction in relation to fines.

44. The grounds of permissible appeal may be narrowed even further in the context of reviewing penalties imposed by the CMA for a business' failure to comply with its investigative and enforcement powers (on the assumption that less in-depth scrutiny would be sufficient in those circumstances).

[We do not respond to Q26. As noted above, Hausfeld has participated in the consultation in relation to the statutory review of the 2015 amendments to the CAT rules and expressed views on the necessary reforms in that context.]

Paragraph 1.250 of RCCP Consultation – proposal to extend the CAT's jurisdiction to grant declaratory relief

45. We agree that this proposal is a sensible extension of the CAT's existing jurisdiction, which (in the context of private damages actions) has expanded from hearing only follow-on claims to also hearing stand-alone claims, and collective actions. The CAT's lack of jurisdiction to grant declaratory relief appears to be an anomaly and out of line with its otherwise comprehensive jurisdiction to hear and grant relief in respect of private damages actions.
46. The proposal is also welcome in light of more complex factual scenarios and potentially infringing conduct arising, where clarification on how the law applies to the facts may be beneficial. The proposal may furthermore increase certainty to both businesses responsible for the conduct in question as well as prospective claimants.

Consumer law enforcement

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

47. Yes, we strongly support this proposal. The fact that, currently, in contrast with the position vis-à-vis competition law, the CMA must go to court to enforce consumer protection law is both costly and time consuming, with the ultimate effect that, in our view, consumer law is likely to be under-enforced and the deterrent effect of enforcement in this area lessened. By way of example, the behaviour of secondary ticketing companies has shown how the current system can be abused, with Viagogo in particular failing to comply with court orders secured by the CMA until the CMA threatened further legal proceedings.¹⁶
48. Even when the CMA is successful in court, no civil fines are available (again by contrast with competition law enforcement). Similarly, where the CMA decides to accept undertakings from a firm instead of taking the matter to court, it cannot then fine the firm if it fails to comply with the undertakings.
49. The Government's proposal to empower the CMA to decide whether consumer protection law has been broken, direct businesses to bring infringements to an end, and impose fines would, in our view, greatly enhance the deterrent effect of the regime and is necessary in circumstances where the types and scale of consumer detriment are on the rise.¹⁷ In our view, there appears to be little reason why the consumer regime is not currently aligned

¹⁶ <https://www.gov.uk/government/news/viagogo-fixes-concerns-in-face-of-further-cma-legal-action>

¹⁷ See, for instance, Oxford Economics/Citizens Advice, "Consumer detriment – counting the cost of consumer problems", October 2016, Chapter 8.

with the competition law regime and, as per the above, there are good reasons to align the two by introducing the administrative model into consumer law enforcement.

50. The reforms would also be in line with recent reforms to the powers of regulators elsewhere in the world, where enforcement is already stronger. For example, in 2018, the Australian Competition and Consumer Commission was given stronger fining powers for breaches of Australian consumer law. Fines were increased to up to AUD\$10m, or three times the benefit obtained by the company, or 10% of annual turnover. These changes aligned the maximum penalties under consumer law with those available under Australian competition law.

Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

51. Whilst we would welcome any further information regarding any proposed changes to scope, we can at present see no reason why the CMA's enforcement scope should be different under an administrative model from the one it currently has under the court-based model. The main benefit of the same or similar enforcement scope being retained under an administrative model is that all Part 8 legislation is included (both general and sectoral), which provides the CMA with the necessary flexibility to take independent action against breaches that may span across more than one sector. Maintaining the current enforcement scope would also avoid having to re-define the boundaries of the respective powers of the CMA and the different sectoral regulators.
52. We recognise that the CMA will still need to set enforcement priorities, and we consider that the CMA's current prioritisation principles, whereby the CMA will mainly act against breaches that point to systemic market failures, could be exported to an administrative model.

Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

53. We consider that the decision-making process and procedures in place for the administrative enforcement of competition law (subject to the proposed changes addressed in our responses to Q4 to Q22 above) should be replicated for the administrative enforcement of consumer law.

Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

54. In line with our response to the corresponding question regarding the standard for appeal of CA98 decisions (see response to Q24 and Q25 above), we see that there are good arguments for moving away from a 'full merits' standard of review given the length and complexity this has brought to the appeal process. The fact that the CMA will soon be taking on large, complex cases currently reserved to the European Commission increases the importance of addressing this issue.
55. At 3.29 of the RCCP Consultation, the CMA specifically invites views on a list of powers of scrutiny that could be granted to the appeal body in relation to administrative decisions in consumer enforcement investigations. We consider that a judicial review standard based on limited grounds of review (such as material errors of law and fact) would be advisable also in this context, for the same reasons and on the same basis as set out in

response to Q24 above. In particular, we feel the ability for the appeal body to admit fresh evidence (not previously before the CMA) on appeal should be limited to exceptional circumstances only, to encourage parties to ensure a thorough evidence collection process during the investigation stages.

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?

56. We consider that appeals of administrative CMA decisions should be heard by a specialised tribunal, similar to the process in place for the competition regime.

57. In fact, we consider that the CAT may be likely to be well-suited to hear cases on breaches of consumer protection law, and the CMA has itself acknowledged that theory and experience strongly suggest that competition and consumer issues are closely linked.¹⁸ The judges in the CAT have sufficient expertise in considering cases in the competition sphere where there are elements relevant to consumers, such as in *Justin Gutmann v London & South Eastern Railway Limited* and *Merricks v Mastercard* in which harm to consumers stemming from breaches of competition law is a core component of the cases.

58. As the Government states in the RCCP Consultation, having cross-disciplinary expertise in law, economics, business and other fields means the CAT is in a strong position to consider appeals relating to consumer law. Additionally, the judges in the CAT already have experience in relation to opt-out collective redress, which we discuss further below. Finally, extending the CAT's jurisdiction as opposed to creating a whole new body would be likely to be quicker and more cost-efficient.

Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

59. Whilst we appreciate that BEIS may wish to examine the case for extension to sector regulators on a sector-by-sector basis (or indeed a regulator-by-regulator basis) based upon an assessment of enforcement in particular areas and the impact of the same on consumers, we consider that on balance it would be preferable if sector regulators were to be allowed to enforce breaches of consumer protection law through an administrative model.

60. Such an extension would be likely to improve enforcement by spreading the enforcement burden across regulators and allow for the expertise of the sector regulators to be put to use. We note that the current powers of the regulators have not always proven effective; for example, the Civil Aviation Authority (“CAA”) has only applied for an enforcement order once since gaining the powers to do so in 2003, a statistic criticised by consumer rights organisations,¹⁹ and the Government has announced it will reform the enforcement powers that the CAA has on airlines that breach consumer rights later this year.²⁰

¹⁸See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf, paragraph 2.2

¹⁹ See: <https://www.which.co.uk/news/2020/09/no-uk-airlines-have-been-fined-for-breaking-consumer-law-in-17-years/>

²⁰See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977446/Report-of-the-Global-Travel-Taskforce-accessible.pdf paragraph 49

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

61. We consider that the proposed fines would be likely to incentivise compliance, and in turn save the CMA time, costs and resources, providing better outcomes for consumers in a more timely manner. We consider that there would be few if any drawbacks if a transparent, proportionate and consistent procedure is followed.

Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

62. As identified in the RCCP Consultation, the current undertakings regime requires improvement as undertakings cannot be directly enforced and sanctions are a weak or an unlikely prospect for infringing traders.

63. We consider that Option 2A (or Option 2 and 2A) is likely to be the most effective option, and the most likely to incentivise compliance. As regards the right level for statutory maximum penalties, the turnover-based approach suggested in relation to Q61 may be most appropriate. This would also be in line with the powers of regulators in other jurisdictions (see the Australia example above).

64. For completeness, we consider that Option 1 - whereby the enforcer would need to prove breach of consumer law in addition to proving breach of the undertakings – would fail to address the inherent issues that have been identified in the current court-based model around lengthy and costly enforcement and limited deterrence for traders.

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

65. We suggest that the settlement procedure available under CA98 could be used as a model for the formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement. In that model, the addressee benefits from a reduced fine in return for cooperation with the CMA during the investigation, including admitting to the breach of competition law. If the process includes an admission of liability, the deterrent effect is enhanced.

Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?

66. We would suggest that enforceable undertakings with fines attached would be likely to best incentive compliance. Additionally, the cancellation of any pre-existing penalty discount is also likely to incentivise compliance.

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

67. Opening further and better routes for the private enforcement of consumer law would have manifest benefits for consumers and for the economy. At present, where a breach or breaches of consumer law cause harm to a large number of consumers, those consumers can bring individual claims which are - in the overwhelming majority of instances - prohibitive from the point of view of time and costs. The alternative is that consumers

affected bring a group claim by way of a representative action under Civil Procedure Rule 19.6 or via a GLO. The former has traditionally been interpreted very restrictively by the courts and has been underused as a result. GLOs, despite being (in theory) a more flexible mechanism, are cumbersome, unwieldy and administratively burdensome, as they require claimants to actively sign up to the claim and provide all relevant information to demonstrate they have a claim, which in practice means that only a small proportion of those able to exercise their rights actually do so.

68. An example of how this is detrimental to consumers is in relation to the emissions scandal, in which the possibility of opt-out redress in the US meant US consumers have recovered compensation from companies such as VW and Daimler, while those same companies continue to fight the claims of UK consumers (brought or soon to be brought via a GLO) in the English courts, at huge cost and expense. As affected consumers are required to sign-up to these claims, only a proportion of affected UK consumers will receive compensation and, when those that are successful to do, they will have committed to pay a portion to those who facilitated the bringing of that claim (including the litigation funder, the insurer and the lawyers).²¹
69. At present, opt-out redress - which solves these issues (as detailed further below) - is available for breaches of competition law but not for breaches of consumer law. The upshot of this is an unhappy disparity between the remedies available to a consumer affected by one type of legal breach and a consumer affected by another, even though the outcome for that consumer may be exactly the same. By way of example, at present, a consumer overcharged for a product due to the existence of a cartel will have access to justice via opt-out collective redress, as a claim could be brought under competition law, but if the overcharge is due to misleading advertising as opposed to a cartel, no claim could be brought on an opt-out basis and it is therefore highly unlikely that the right to compensation would ever be exercised.
70. In our view, there is no reason to differentiate between competition and consumer law breaches. The natural corollary of bringing consumer law enforcement in line with competition law enforcement is the introduction of opt-out redress for consumer law breaches. Further, as noted above in relation to the competition regime, empowering the private sector to complement the administrative process will maximise impact and reinforce the deterrent effect on traders.

Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?

71. At present, the fact of consumer law breaches going unremedied due to the difficulties in both public and private enforcement undermines consumer confidence and trust. Introducing opt-out collective redress will highlight the seriousness with which the Government views breaches of consumer law, offer consumers the opportunity to enforce their rights and seek redress for unlawful conduct and instil an important deterrent against conduct impacting UK consumers.
72. It is important to note that the regime for opt-out redress for breaches of competition law contains various 'safeguards' against unmeritorious claims, which could be mirrored in any

²¹ By contrast, under an opt-out model, affected consumers or class members do not have to pay a portion of their damages to stakeholders in the same way.

consumer law regime. For example, treble damages are not available, litigation funders can be recompensed only from any residual damages left over after consumers have taken their share and claims are subject to a certification process which filters out 'bad' claims. There are also procedural features which incentivise consumer settlements, such as by allowing any leftover settlement proceeds to revert to a defendant, thus meaning consumers would be likely to see the impact of claims sooner and avoiding protracted litigation. There would also be efficiencies to be gained from extending the competition law regime, as we detail above, including by extending the CAT's jurisdiction.