Written evidence submitted by the City of London Law Society Competition Law Committee to the Public Bill Committee (DMCCB14)

The Digital Markets, Competition and Consumers Bill

1. Introduction and summary

1.1 The City of London Law Society ("**CLLS**") welcomes the opportunity to comment on the Digital Markets, Competition and Consumers Bill (the "**Bill**").

1.2 The CLLS represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. The Competition Law Committee (the "**Committee**") comprises leading solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who act for UK and international businesses, financial institutions, and regulatory and government bodies in relation to competition law matters. Members of the Committee represent both complainants and those companies under investigation by regulators.

1.3 The individuals responsible for the preparation of this response are:

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1.4 We welcome the Bill, which has been long-awaited and, once enacted, will bring an end to the uncertainty that has existed over several years as to whether/when proposed digital, competition and consumer reforms would be introduced and the exact nature of those reforms.

1.5 We set out below our comments on the Bill, which are based on our members' significant experience and expertise in advising on competition, consumer and digital markets issues. Our comments focus on the issues we believe are most significant in terms of maximising legal certainty and reducing regulatory burden for business. These are separated into comments on the new digital markets regime (Section 2) and the competition law reforms (Section 3). Suggested drafting changes are contained in Annexes I – VI. While we broadly support the Bill, absence of comment from us on other clauses or parts does not necessarily mean that we agree with all the content of those other clauses or parts. However, while we have not provided comments on the consumer law reforms, the Committee is broadly supportive of the changes to consumer protection law to be introduced by the Bill, on the basis that they bring the consumer regime up to date to enable more efficient enforcement by the CMA while ensuring continued high levels of protection.

1.6 The main points we raise can be summarised as follows:

(a) The Bill gives the CMA substantial powers and discretion regarding the digital markets regime. We consider it critical that the Bill builds in sufficient safeguards to ensure due process, respect for rights of defence and reasonable predictability for firms designated as having Strategic Market Status ("**SMS**") in respect of one or more of their digital activities. In this connection, it is critical that the exercise of the CMA's discretion is subject to appropriate judicial scrutiny. We outline our concerns in Section 2 below regarding: (i) statutory duties; (ii) SMS designation; (iii) conduct requirements; (iv) pro-competition interventions ("**PCI**"); (v) standard of review; and (vi) powers under the digital markets regime to compel any person to give information during a dawn raid.

(b) The proposed new "acquirer focused" threshold for the general merger control regime will provide a clear basis for the CMA to take jurisdiction over transactions raising potential "killer acquisition" or other non-horizontal concerns. However, in introducing this threshold, we consider that the existing 25 per cent share of supply threshold should be refined to ensure its use is limited to cases involving genuine horizontal overlaps (i.e. not killer acquisitions or other non-horizontal transactions falling below the acquirer focused threshold).

(c) We do not agree with the proposal that the CMA should be able to compel a foreign-domiciled company to provide documents or information by way of a s26 Notice where that company lacks a clear connection with the UK but is nonetheless under investigation for a suspected infringement of Chapter I or Chapter II Competition Act 1998 ("**CA98**"). It is also not clear that a foreign company which lacks a UK connection could in fact be compelled – through court enforcement in third countries – to comply with any s26 Notice.

(d) The proposed new duty to preserve evidence regarding Chapter I and Chapter II investigations (and foreign investigations where the CMA is providing investigative assistance) is currently broadly drafted, uncertain and subjective as to when this duty would arise. This raises concerns given the potentially significant penalties for infringing this duty, as well as the considerable expense of document "holds" and disruption to routine document management processes.

(e) We understand it is not yet decided whether proposed higher penalties for breach of remedies would apply where a breach occurs after the Act comes into force but in relation to remedies that pre-date the Act. We think there would be issues of fairness and certainty in applying the new penalties to such remedies, and those penalties may not be appropriate depending on the nature of the remedies concerned.

2. Digital markets regime

2.1 The Bill gives the CMA substantial powers regarding the digital markets regime, and even more significant discretion on how it exercises these powers. However, predictability is important so that designated firms can plan their UK investments, business models and wider business activities with the requisite degree of confidence. We therefore consider it critical that the Bill includes sufficient safeguards to ensure due process, respect for rights of defence and to ensure reasonable predictability for SMS firms. It is also critical that the

CMA's exercise of its discretion is subject to effective judicial scrutiny. We suggest below key areas which we believe should be reconsidered.

Statutory duties

2.2 When applying the digital markets regime, the CMA should be subject to an overarching statutory duty to have regard to the principles of best regulatory practice, which may include principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.[1] Legislation empowering UK sectoral regulators typically incorporates such a requirement. The Bill introduces a digital markets regime which is essentially a form of sectoral regulation, yet does not impose a similar duty on the CMA.

2.3 In addition, SMS firms are likely to be active across international boundaries, and subject to regulation/decisions by international competition and consumer authorities. We agree with the CMA's position in its updated Digital Markets Strategy that a reasonable degree of international cooperation would be beneficial, to minimise fragmentation[2] and propose that this is enshrined in the legislation.

2.4 The proposed amendments set out in **Annex I** ensure that the Bill: (a) includes similar protections to those which exist under current UK sectoral regulation; and (b) more closely aligns with the CMA's Digital Markets Strategy.

SMS designation

2.5 Designation as an SMS firm should be based on "strong and compelling evidence" that the firm meets the SMS conditions in relation to a digital activity.

2.6 This would align with the cogency of evidence applied by the Competition Appeal Tribunal ("**CAT**") when assessing an infringement under Chapter II CA98, on the basis that these are serious matters with significant financial penalties. The CAA applies a similar degree of evidence when conducting a Market Power Test, reflecting this is a serious matter that will restrict the freedom of the airport in question.

2.7 The proposed amendments set out in **Annex II** would ensure that the same cogency of evidence as is currently applicable under Chapter II CA98 also applies to the substantive assessment of whether the SMS conditions are met. This would be proportionate given that the assessment of SMS conditions is akin to a dominance assessment and SMS designation will have significant consequences for the firm that is designated, including restrictions on its commercial freedom.

Conduct requirements

2.8 The obligations that will apply to SMS firms are not detailed in the Bill but rather in firm-specific codes of conduct to regulate each SMS firm's behaviour in relation to the activities

[1] See s2(4) Water Industry Act 1991, s4AA(5A) Gas Act 1986, s3A(5) Electricity Act 1988, s4(4) Communications Act 2003. This is also consistent with the principles set out in recent Government policy documents including Smarter regulation to grow the economy (10 May 2023), Economic regulation policy paper (January 2023) and the Better Regulation Frame: Interim Guidance (March 2020).

[2] See The CMA's Digital Markets Strategy: February 2021 refresh. Priority 5: International Cooperation states: "*Many digital firms are active across international boundaries and regulators face many common challenges. It is therefore imperative that we work together, both to understand the issues and in devising solutions. We will continue to forge close relationships with other competition and consumer authorities in relation to their digital work. In particular, we will pursue work with the aim of better co-ordinating our actions and driving a coherent regulatory landscape internationally.*"

for which they have been designated. The Bill grants the CMA significant discretion in determining conduct requirements.

2.9 Conduct requirements are analogous to *ex ante* enforcement of Article 102 TFEU/Chapter II CA98 given that the purpose is to (pre-emptively) regulate conduct that would have an adverse effect on competition. Such enforcement is subject to the principle of proportionality.

2.10 Whilst the CMA may need to exercise discretion in determining which conduct requirements to enshrine in the codes applying to SMS firms, we submit that there should be some checks to ensure that the interventions are proportionate. Suggested proposals to ensure that conduct requirements are imposed only when it is "necessary and proportionate" are set out in **Annex III**.

PCIs

2.11 To make a PCI in relation to an SMS firm, the CMA should be required to have "strong and compelling evidence" of factors that are having an adverse effect on competition. The CMA should also be satisfied that the PCI would be "proportionate, reasonable and practicable", and that any provisions in the PCI are "necessary and proportionate" to remedy, mitigate or prevent the detrimental effect.

2.12 PCIs may be imposed to address structural problems relating to the activity in question, in situations where conduct requirements are not adequate to mitigate any "adverse effect on competition". This is similar to market investigations under the Enterprise Act 2002 ("**EA02**"), although there are differences in the processes.

2.13 The Bill does not provide guidance on when a PCI would be justified – unlike the market investigations regime, under which the CMA may take any action that it considers "reasonable and practicable" to remedy, mitigate or prevent the adverse effect on competition. When assessing whether a market investigation remedy is reasonable and practicable, the CMA has previously considered implementation/compliance costs as well as proportionality of the package.[3]

2.14 We submit that the cogency of evidence applied to determine whether there is an adverse effect on competition should be similar to that applied to assess the SMS conditions. We have proposed amendments in **Annex IV** to bring the Bill in line with the current rules on market investigation remedies under EA02 and relevant case-law.

Standard of review

2.15 In the Bill, CMA decisions under the SMS regime are only reviewable on a judicial review ("**JR**") standard (except certain merger-related procedural penalties). While JR is a flexible form of review, capable of being adapted to different contexts and types of decision, courts have been wary about extending JR, unless justified by particular factors. In other contexts, the courts have treated JR-type review of regulatory decisions as sufficiently flexible to allow (or require) more intensive scrutiny, e.g. to assess whether a decision is materially incorrect. However, this approach has invariably been taken to meet the requirements of underlying EU legislation. For CMA decisions under the SMS regime, there will be no such underlying EU legislation. It follows that the CAT – absent evidence of contrary Parliamentary intent

[3] See Groceries Market Investigation, paras 11.7 and 11.8 and Retail Banking Investigation, Section 19.

on the face of the legislation – is likely to adopt a narrower, "traditional" approach to JR and new legislation would be required to clarify the scope of a more enhanced review.

2.16 While there are some differences of views between members of our Committee, our overall view is that this provides insufficient judicial oversight of the CMA's significant discretion. In this respect, we note that:

(a) The kinds of decisions under the SMS regime bear significant similarity to decisions under Chapter II CA98. Codes of conduct will codify a set of rules for each firm that are derived, in the most part, from abuse of dominance enforcement, but as *ex ante* prohibitions/obligations. Unlike in abuse of dominance enforcement, the codification of these rules will mean there is no need to show evidence that the conduct in question has an anti-competitive effect. The SMS regime is likely to replace abuse of dominance enforcement under Chapter II CA98 for designated companies. Appeals from CMA findings of abuse of dominance under CA98 are decided by the CAT on the merits.

(b) Financial penalties under the SMS regime can be significant – up to 10 per cent of the undertaking's global turnover – which could be >£2billion for SMS firms. Decisions under CA98 result in monetary fines and other economic consequences and are subject to review on the merits,[4] which accords with jurisprudence that such fines are "quasi criminal" in nature.[5]

(c) The Bill already provides for a higher standard of review for certain merger-related procedural penalties, which are likely to be significantly lower than potential fines for code of conduct breaches.

2.17 In our view, the need for a higher level of judicial scrutiny than "traditional" JR will be particularly important in relation to the SMS regime, especially as it is developing. We consider this issue is particularly acute in relation to financial penalties for code of conduct breaches. The Government's ECHR Memorandum recognises that the penalty provisions of the Bill are likely to engage the criminal limb of Article 6 ECHR.[6] It follows that a higher (i.e. merits) standard of review should apply to fines even if the face of the legislation provides only for JR.[7] However, absent express legislative intent, additional clarificatory legislation may be needed in future. We are also concerned this will lead to unnecessary litigation, as this will lead to inevitable court time and costs being incurred debating the appropriate standard of review.

2.18 Finally, while we understand the objective behind this is in part to ensure decisions under the SMS regime are not held up by lengthy court processes, we note that JR is not always faster than a merits review. Even with an enhanced form of JR, the CAT cannot substitute its own decision for that of the regulator – it can only send the decision back to the CMA to

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[4] See *Roland (U.K.) Limited and Another v Competition and Markets Authority* [2021] CAT 8, para 30, where, citing Green LJ in the Court of Appeal judgment in *Flynn Pharma Limited and Pfizer Inc. v CMA* [2020] EWCA Civ 339, the CAT noted that its authority to undertake an assessment on the merits "*flows from important legal considerations relating to the rights of defence and access to a court, under fundamental rights such as article 6 of the [ECHR]".*

[5] In relation to financial penalties, we also note that under the EU antitrust regime, Article 31 of Regulation 1/2003 gives the Court of Justice unlimited jurisdiction, in particular, to review decisions whereby the Commission has fixed a fine or periodic penalty payment. This is therefore another possible approach regarding challenges to financial penalties.

[6] See European convention on human rights memorandum (publishing.service.gov.uk), para 19.

[7] When the criminal limb of Article 6 is engaged, a full merits review may be applicable. See *Saint-Gobain Glass France v Commission* (T-56/09 and T-73/09), 2014, para 62. However, even when the civil limb of Article 6 is engaged, the courts may draw inspiration from criminal matters. See Guide on Article 6 - Right to a fair trial (civil limb), para 93.

be made again. This has important implications for the speed of decision-making; while a JR appeal may be faster than a full merits appeal, a successful JR has the effect of restarting the clock – by requiring the decision-maker to retake the decision, re-run a consultation or otherwise repeat its processes. While this will be appropriate in some cases, in others this may well take much longer than the appeal or review proceedings themselves, and may lead to a further JR application in relation to the retaken decision. An appeal on the merits, on the other hand, can frontload a review of substance and the CAT can make any changes as necessary in an expedient and streamlined manner.

2.19 We have proposed a number of possible amendments to clause 101 of the Bill in **Annex V**.

Powers under the digital markets regime to compel any person to give information during a dawn raid (clauses 72(5)(b)(i) and 73(2)(f))

2.20 Proposed powers to require individuals to "give information" during inspections under the SMS regime (clauses 72(5)(b)(i) and 73(2)(f))[8] – with inspections carried out with a warrant omitting any requirement for the information to be relevant – go significantly further than the equivalent powers under CA98 (s27, s28 and s28A) which empower the CMA to "require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of their knowledge and belief, where it may be found".

2.21 There is a good reason for limiting the CMA's powers to requiring explanations of documents, as powers to compel individuals to provide information are the subject of the separate provision governing interviews (s26A CA98). The Bill also contains powers to interview individuals (clause 70), which are equivalent to those under CA98, so there appears to be no justification for also giving the CMA comparable powers under clauses 72 and 73. Doing so blurs the distinction between the CMA's interview powers and its powers to locate and gather documentary evidence during an inspection. Moreover, such information-gathering is not (unlike the use of interview powers in clause 70) subject to the protections against use in prosecution under clause 71 of the Bill.

2.22 We therefore submit that clauses 72(5)(b)(i) and 73(2)(f)) should use the same wording as used in s27(5)(b) and (c), s28(2)(e) and s28A(2)(e) CA98.

3. Competition Law Reforms

Mergers

3.1 The Bill (clause 124 and Schedule 4) introduces a new "acquirer focused" threshold for transactions where: (a) one party (intended to be the acquirer) has UK turnover exceeding £350 million and a UK share of supply of at least 33 per cent; and (b) another party (intended to be the target) has a UK nexus (i.e. is carried on by a UK body, has UK activities, or supplies goods or services in the UK).

3.2 The introduction of this threshold is intended to give the CMA a clearer basis for taking jurisdiction over transactions by large acquirers raising potential "killer acquisition" or other non-horizontal concerns where the target's UK turnover is below the target turnover threshold (currently £70 million but being increased to £100 million). This relates to criticism

[8] Clause 72(5)(b)(i) of the Bill would give the CMA the power to compel any person on premises that are subject to an inspection without a warrant to "give information to the authorised officer which the officer considers relevant to the breach investigation". Clause 73(2)(f) of the Bill – dealing with inspections with a warrant – goes further, omitting any requirement for relevance, allowing the CMA to "require any person on the premises to give information to the authorised officer".

the CMA has faced for "stretching" the 25 per cent share of supply threshold to take jurisdiction over a number of transactions involving arguably no real horizontal overlap in the UK.

3.3 Given the rationale behind the acquirer focused threshold, it would seem appropriate to narrow the 25 per cent share of supply threshold to ensure it is only used in cases involving real horizontal overlap, e.g. where the target has actual UK sales. We note that a new £10 million "safe harbour" is being added to the 25 per cent share of supply threshold, which will mean that threshold will apply only if the target or another "enterprise concerned" has UK turnover exceeding £10 million. A simple option to resolve concerns about stretching of the 25 per cent share of supply threshold would be to amend the proposed safe harbour to refer to only the target having UK turnover exceeding £10 million (i.e. so a transaction would fall within the safe harbour if the target's UK turnover does not exceed £10 million, regardless of the acquirer's UK turnover).

3.4 For the reasons indicated above, we consider that the UK nexus test intended to apply to targets under the new acquirer focused threshold is unreasonably broad and will capture transactions involving overseas targets with *de minimis* UK activities and, therefore, no potential to lessen competition in the UK. To help address this, we have suggested an amendment to narrow the UK nexus test in **Annex VI**. The condition proposed in para (iii) of Annex VI would mean that the test catches circumstances (such as in *Sabre/Farelogix*[9]) in which goods or services are supplied to one or a small number of customers, but paid for by third parties.

s26 Notices

3.5 The Bill (Schedule 11) introduces extraterritoriality for s26 Notices issued by the CMA in CA98 investigations. It is proposed that a s26 Notice – requesting the provision of information under penalty for non-compliance – will be able to be sent to "a person" (which would include a company) outside the UK if: (a) their activities are being investigated as part of an investigation under s25 CA98; or (b) the person has a "UK connection" (meaning they are a UK national, an individual habitually resident in the UK, a body incorporated under UK law, or which carries on business in the UK).

3.6 The proposed approach is more aggressive than that the European Commission's approach under the EU competition regime. We understand that the Commission generally issues non-EU companies with voluntary information requests under Article 18(2) of Regulation 1/2003 (as opposed to compulsory requests under Article 18(3)). Also, if there was non-compliance, the CMA would need to seek (potentially lengthy) enforcement action in the courts of the country where the foreign company is domiciled – subject to the provisions of applicable international treaties. Whether foreign courts would be willing (or legally able) to enforce extraterritorial document demands is unclear. Indeed, it would appear to be directly in conflict with some national regimes – e.g. the French Blocking Statute prohibits French companies from exporting documents for use in foreign proceedings.

3.7 We query whether the proposed approach to extraterritoriality regarding s26 Notices is necessary or appropriate. The more appropriate route to obtain documents or information from such a company would be to seek investigative assistance from the jurisdiction where the company is domiciled. We understand that the Government and the CMA intend to

[9] See *Sabre Corporation v Competition and Markets Authority* [2021] CAT 11.

enter into agreements with foreign governments and competition authorities to facilitate international cooperation, including for the collection of documents by overseas authorities.

Duty to preserve evidence

3.8 The Bill (clause 117) introduces a new duty to preserve evidence where a person "knows or suspects" that an investigation under s25 CA98 "is being or is likely to be carried out", requiring that person not to: (a) falsify, conceal, destroy or otherwise dispose of; or (b) cause or permit the falsification, concealment, destruction or disposal of, a document which the person knows or suspects is or would be relevant to the investigation (which includes destroying the means of reproducing information recorded otherwise than in legible form). This duty will also apply where a person knows or suspects that the CMA is assisting or likely to assist an overseas authority (Schedule 25).

3.9 We recognise that the proposed new duty mirrors language from the EA02 in relation to cartel offence investigations. Nonetheless, we have concerns about the broad scope as currently drafted. As explained in the Explanatory Notes to the Bill, this duty would apply when a person receives a CMA case initiation letter, but could also arise at a much earlier stage, such as where a cartel member is tipped off that another member of the cartel has applied for leniency or a customer has complained to the CMA about potential price fixing and been interviewed by the CMA.

3.10 There are practical difficulties in companies introducing document holds prior to receiving a case initiation letter. In particular, it is likely to be difficult to determine the precise scope – including the time period – of any investigation and therefore the material that may be relevant. The issues become all the more complex regarding scenarios where the CMA might be providing assistance to an overseas authority. Moreover, breach of the proposed duty will incur potentially significant penalties, including fixed penalties for undertakings of up to 1 per cent of turnover and daily penalties of up to 5 per cent of daily turnover. This is unsatisfactory given the uncertainty and subjectivity as to when the duty will arise based on the current drafting.

3.11 We suggest that the duty to preserve evidence is narrowed and linked to an objectively identifiable point at which it would be reasonable to expect a business to make efforts to preserve documents, bearing in mind the considerable expense, disruption to routine document management processes and potentially severe penalties. In particular, we suggest that the duty to preserve evidence should apply only after notice of an investigation (i.e. receipt of a case initiation letter setting out the scope of the investigation) or from the time that it should be objectively apparent to senior management that an investigation in the UK by the CMA is being undertaken – and the scope of that investigation – to which documents held by the company might reasonably be expected to be called for.

3.12 In relation to foreign investigations where the CMA is providing investigative assistance, we consider that the duty to preserve evidence should only arise once the CMA has sent notice to the company or made a public announcement about the investigation, again which sets out the precise scope of that investigation.

Penalties for breach of remedies

3.13 The Bill includes reforms to increase penalties for infringements of procedural requirements and remedies under CA98 and EA02. These penalties are potentially very large, but also can be imposed by the CMA for even the most minor breach. In respect of breaches of

remedies, we understand it is currently undecided whether the new penalties would apply in relation to a remedy that was in place prior to the Act coming into force where the breach occurs after the Act comes into force.[10]

3.14 We have concerns about possible application of the new penalties to remedies imposed or accepted prior to the reforms coming into force. Such remedies were not drafted or imposed/accepted with these penalties in mind for possible breaches. Such remedies also often have very detailed, specific and absolute requirements (e.g. around periodicity of reporting), particularly orders and undertakings adopted in connection with market investigations. As a result, the penalties are unlikely to be appropriate, and there would be clear issues of fairness in applying the penalties to such remedies. In the interests of certainty and fairness we suggest that a clean line is drawn, i.e. that the new penalties for breach of remedies only apply to remedies imposed/accepted after the Act comes into force.

4. Conclusion

4.1 We welcome the opportunity to comment on the Bill, which introduces considerable changes in the business environment. We would also welcome continued dialogue as the Bill proceeds through the Parliamentary process.

CLLS Competition Law Committee

12 June 2023

[10] This was indicated in a meeting between the Committee and DBT and DSIT officials on 18 May 2023, at least in respect of market investigation orders.

Annex I: Statutory duties

Proposed new sections to the Bill (additions in blue):

NEW SECTION: Best regulatory practice

In exercising any of the powers under Part 1, the CMA shall have regard to the principles of best regulatory practice, including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

NEW SECTION: International cooperation

In exercising any of its powers under Part 1, the CMA must have regard to regulatory action and decisions taken by authorities and courts in other jurisdictions.

Annex II: SMS designation

Proposed amendment to clause 2(1) (additions in blue, deletions in red):

Clause 2(1) Designation of an undertaking

(1) The CMA may designate an undertaking as having strategic market status ("SMS") in respect of a digital activity carried out by the undertaking where the CMA ~~considers that~~ —

(a) considers that the digital activity is linked to the United Kingdom (see section 4), and

(b) has strong and compelling evidence the undertaking meets the SMS conditions in respect of the digital activity.

Annex III: Conduct requirements

Proposed amendments to Clause 19(5) (additions in blue):

> *Clause 19(5) Power to impose conduct requirements*
>
> *(5) The CMA may only impose a conduct requirement on a designated undertaking if it considers that it would be appropriate, necessary and proportionate to do so for the purposes of one or more of the following objectives—*
>
> > *(a) the fair dealing objective,*
> >
> > *(b) the open choices objective, and*
> >
> > *(c) the trust and transparency objective.*

Annex IV: PCIs

Proposed amendments to Clause 44(1), (2), (4) (additions in blue):

> *Clause 44(1), (2) and (4) Power to make pro-competition interventions*
>
> *(1) The CMA may make a pro-competition intervention (a "PCI") in relation to a designated undertaking where, following a PCI investigation (see section 45), the CMA considers that—*
>
> *(a) there is strong and compelling evidence that a factor or combination of factors relating to a relevant digital activity is having an adverse effect on competition, and*
>
> *(b) making the PCI would be proportionate, reasonable and practicable and likely to contribute to, or otherwise be of use for the purpose of, remedying, mitigating or preventing the adverse effect on competition.*
>
> *(2) In considering whether to make a PCI, and the form and content of any PCI, the CMA may have regard to any benefits to UK users or UK customers that the CMA considers have resulted, or may be expected to result, from a factor or combination of factors that is having an adverse effect on competition.*
>
> *(4) A PCI may include provision necessary and proportionate for the purposes of remedying, mitigating or preventing any detrimental effect on UK users or UK customers that the CMA considers has resulted, or may be expected to result, from the adverse effect on competition to which the PCI relates.*

Annex V: Standard of review

Possible proposed amendments to Clause 101 (additions in blue, deletions in red):

***Option A*: Full merits review**

Clause 101(6) Applications for review etc

(6) In determining an application under this section, the Tribunal must take due account of the merits of the case ~~apply the same principles as would be applied — (a) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; (b) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court~~.

***Option B*: Merits review for financial penalties and JR+ standard for other decisions**

Clause 101(4), (6) and (7) Applications for review etc

(4) A person on whom the CMA imposes a penalty under section 83(1) or (3), or under section 85 in connection with a function of the CMA other than a function under Chapter 5 (mergers), may apply to the Tribunal in accordance with Tribunal rules for a review of the CMA's decision on its merits. ~~—~~

~~(a) to impose the penalty,~~

~~(b) about the amount of the penalty, or~~

~~(c) about the date by which the penalty is required to be paid or the different dates by which portions of the penalty are required to be paid.~~

(6) In determining an application under this section, the Tribunal may intervene to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds ~~must apply the same principles as would be applied~~ —

(a) the CMA failed to have proper regard to its duties under Part 1;

(b) the decision was based, wholly or partly, on an error of fact;

(c) the decision fails to achieve, in whole or in part, the effect stated by the CMA;

(d) the decision was wrong in law;

(e) any grounds that would be engaged: ~~(a)~~ (i) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; ~~(b)~~ (ii) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court.

(7) The Tribunal may —

(a) dismiss the application or quash the whole or part of the decision to which it relates, ~~and~~

(b) ~~where it quashes the whole or part of that decision,~~ refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal,

(c) substitute the Tribunal's decision for that of the CMA (to the extent that the application is allowed) and give any directions to the CMA or the applicant.

***Option C*: JR+ standard for all decisions under the SMS regime**

Clause 101(6) and (7) Applications for review etc

(6) In determining an application under this section, the Tribunal may intervene to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds ~~must apply the same principles as would be applied —~~

(a) the CMA failed to have proper regard to its duties under Part 1;

(b) the decision was based, wholly or partly, on an error of fact;

(c) the decision fails to achieve, in whole or in part, the effect stated by the CMA;

(d) the decision was wrong in law;

(e) any grounds that would be engaged: ~~(a)~~ (i) in the case of proceedings in England and Wales or Northern Ireland, by the High Court in determining proceedings on judicial review; ~~(b)~~ (ii) in the case of proceedings in Scotland, by the Court of Session on an application to the supervisory jurisdiction of that Court.

(7) The Tribunal may —

(a) dismiss the application or quash the whole or part of the decision to which it relates, ~~and~~

(b) ~~where it quashes the whole or part of that decision,~~ refer the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal,

(c) substitute the Tribunal's decision for that of the CMA (to the extent that the application is allowed) and give any directions to the CMA or the applicant.

Annex VI: Mergers

Proposed amendments to Paragraph 4(F) of the EA02 (additions in blue):

Paragraph (4F) EA02:

(4F) The condition mentioned in this subsection is that, were it not for the enterprises concerned ceasing to be distinct enterprises, an enterprise within subsection (4G) would satisfy one or more of the following additional conditions—

(a) the enterprise would be carried on by a body of persons corporate or unincorporate formed or recognised under the law of any part of the United Kingdom;

(b) the activities, or part of the activities, of the enterprise would be carried on in the United Kingdom;

(c) the person, or persons, by whom the enterprise would be carried on supply goods or services to a person or persons in the United Kingdom in connection with the enterprise that satisfy one or more of the following conditions:

(i) the goods or services were supplied to at least 10,000 persons in the United Kingdom in the most recent calendar year;

(ii) the total value of the turnover in the United Kingdom of the enterprise exceeds £1 million; or

(iii) the total value of goods or services that were supplied by the enterprise to one or more persons in the United Kingdom (whether or not paid for by those persons) in the most recent calendar year exceeds £1 million.