Digital Markets, Competition and Consumers Bill: call for written evidence
Written evidence submitted by Santander UK plc

1. Santander UK plc ("Santander") welcomes the opportunity to respond to the House of Commons Public Bill Committee's ("the Committee") call for written evidence in relation to the Digital Markets, Competition and Consumers Bill ("the Bill").

2. We have actively engaged with UK Finance and are supportive of the consolidated response written on behalf of the UK banking sector and broader industry, submitted on 13 June 2023 (hereafter "the UK Finance Submission"). This response builds on specific points in the UK Finance Submission that we believe are particularly important and provides evidence on an additional issue with the Bill.

3. We would be happy to discuss our comments and can be contacted at publicpolicy@santander.co.uk to arrange a meeting or with any further queries.

4. Santander welcomes the powers the Bill grants to the Digital Markets Unit to regulate the conduct of large technology companies. We believe that the Bill's digital proposals can be effective in preventing these companies from engaging in anticompetitive practices in the financial services sector. This will be essential for maintaining healthy competition in these markets.

5. Santander does, however, have serious concerns about some of the proposed reforms in Part 2 of the Bill that relate to the UK's market investigation regime. These concerns are borne from our experiences with Competition and Markets Authority ("CMA") market investigations including the Retail Banking Market Investigation and the the Payment Protection Insurance Market Investigation. The proposals, taken together, greatly increase regulatory uncertainty and therefore risk weakening the UK investment case for overseas investors.

Executive summary

6. Santander recommends that the Committee make amendments to the following provisions in Part 2 of the Bill (and related schedules):

    1) The new CMA duty to monitor the effectiveness of market investigation remedies, coupled with the power to vary them for up to 10 years after they are imposed (including retrospective application), as set out in clause 133 of the Bill;

    2) The new CMA fining powers set out in section 136 and schedules 8 and 9 of the Bill including, in particular, the power to fine companies up to 5% of global worldwide group turnover for breach of market investigation remedies (including retrospective application), as set out in part 3 of schedule 9 of the Bill;

    3) The new CMA power to require trialling of remedies that relate to the provision of information to consumers before they are finalised, as set out in section 132 and schedule 7 of the Bill;

7. More detail about Santander's proposals on each of these points is set out below.

1) Remedy variation powers

8. Santander agrees with the evidence provided in the UK Finance Submission on this issue and would like to develop further the points made there.

9. The Bill will place a duty on the CMA to monitor the ongoing effectiveness of a remedy package in addressing the adverse effects on competition ("AECs") that were identified during a market investigation. The CMA will have the power to make any variations that it considers necessary to make the remedy package effective. This power lasts for a period of up to 10 years after the remedies take effect and is subject to a 2-year cooling off period between each variation. As a result of this change, the CMA will have great discretion to impose new interventions that go beyond the original scope of the remedy package. This power will not be subject to effective scrutiny as the CMA will not be required to undergo a fresh market investigation before imposing the new interventions.

10. Santander believes that the market investigation process is an important safeguard before substantive interventions are imposed. It requires the CMA to demonstrate that the proposals are cost-effective, proportionate, and do not result in unanticipated distortions to competition. Market investigations are also important because they provide the companies involved the right to comment and submit evidence in relation to the CMA's concerns, which is essential for their right of defence.

11. While new interventions will need to relate to the AECs originally identified, the nature or severity of the AECs could change over a period of 10 years - particularly in the financial services sector, where a great deal of technological and regulatory change can take place in that time. Holding a market investigation before new interventions has the additional benefit of ensuring that the AECs originally identified remain relevant.

12. The proposals will inevitably increase uncertainty for an extended period of time for companies involved in a market investigation and will increase implementation and compliance costs if the CMA regularly varies an agreed remedy package.

13. Santander has recent experience of the CMA expanding the scope of market investigation remedies (even without having any formal powers to do so). The Retail Banking Market Investigation Order (the "Order") resulted in obligations being placed on the 9 largest retail banks in the UK at that time (the "CMA9"). It required them to create and make available APIs for the purpose of sharing certain account and transaction data with third parties (also known as the Open Banking remedy). Since the Order was first imposed in 2017, the CMA has repeatedly expanded its requirements such that it now also includes obligations related to payments, Confirmation of Payee and PSD2. In the absence of formal powers to expand the Order, the CMA has taken a purposive approach to interpreting the Order's requirements and has placed considerable pressure on the CMA9 to voluntarily accept the additional obligations. Santander believes that this is indicative of the likely approach that the CMA will take in applying its new powers (as proposed).

14. The CMA's initial cost-benefit analysis for the Order estimated that it would cost c. GBP 20 million and would be implemented in c.2 years. Because of the expansion of the Order, that estimate has now been greatly exceeded. The cost to the industry is now several multitudes above the original estimate, and obligations on the CMA9 are ongoing 7 years later (even after the completion of the implementation stage of the Order).

Retrospective application

15. As the Bill is currently drafted, these new powers will have retrospective application and therefore could be used on remedies that were imposed before the Bill takes effect. This could potentially result in the CMA being able to re-visit the Order until 2027. The lack of safeguards in the Bill would mean that the CMA would have almost

complete discretion to impose further obligations on the CMA9, even after completion of the Order's implementation roadmap.

Desired amendment

16. Santander believes that the risks posed by the proposals are so great that the only effective solution would be for clause 133 should be removed from the Bill entirely. Santander believes that the Government should be required to complete a robust and focused consultation before expanding the CMA's market investigation powers further.

17. If the Committee is not willing to remove the clause entirely, it should at a minimum amend it to reduce the period within which the CMA can vary a remedy package from 10 years down to 3 years. It should also clarify that these powers only apply to market investigations that have commenced after the Bill has come into effect.

2) New fining powers

18. Santander agrees with the evidence provided in the UK Finance Submission on this issue and would like to develop further the points made there.

19. Santander agrees in principle that effective fining powers should be available to the CMA to deal with breaches of market investigation remedies. Santander also recognises that the current fine cap is so low that it can effectively be disregarded. Raising the cap to 5% of worldwide group turnover is clearly disproportionate as a solution however. The Banco Santander group had worldwide reported turnover of EUR 51.42 billion in FY2022. The theoretical maximum fine for a technical breach of a CMA remedy would therefore be EUR 2.6 billion.

20. The possibility of such a large fine being imposed would effectively mean that Santander would need to significantly increase its investment in compliance and monitoring to avoid even minor technical breaches of any CMA remedies. This would reduce the resources available for developing new and innovative products that can benefit customers. Santander's concerns on this point would equally apply to any other large multinational company that is active in the UK.

21. Santander has received directions from the CMA several times in recent years in relation to market investigation remedies. These directions have all been related to delays in implementation or inadvertent technical errors (for instance, a branch failing to put up posters). In each case, Santander proactively approached the CMA about the breach and reached an agreed plan to return to compliance in a timely manner. Substantial fines were not required to incentivise Santander to self-report these breaches. Santander was already sufficiently motivated by a desire to reach good customer outcomes and avoid the reputational risks of being in breach of CMA directions. In addition, the forthcoming Consumer Duty also gives Santander further incentive to take a proactive approach in reaching good customer outcomes.

22. As a safeguard, the Bill sets out that the CMA will need to prepare a statement of policy explaining how it will exercise its new fining powers. Depending on what that statement contains, it could potentially provide some comfort that the CMA will exercise restraint with its new powers. The Bill does not, however, currently provide any legislative limits on the CMA's discretion. Santander therefore believes that this safeguard is insufficient.

23. While Santander is mainly concerned about the proposed fining powers that relate to market investigation remedies (in part 3 of schedule 9), the same principles also broadly apply in relation to the CMA's proposed new fining powers in other areas (as set out in schedule 8 and the rest of schedule 9).

Retrospective application

24. As with the remedy variation powers mentioned above, the CMA's new fining powers also have retrospective effect (as the Bill is currently drafted). As a result, Santander could indefinitely face the prospect of the CMA seeking to impose substantial fines for historical breaches, even if the breach in question has already been resolved following engagement with the CMA.

Desired amendment

25. The fee caps in schedules 8 and 9 that apply to companies should be amended such that they only apply to an undertaking's UK turnover from activities that are relevant to the investigation or transaction in question. In addition, section 136 should be amended to clarify that the provisions of schedules 8 and 9 do not have retrospective effect.

26. At a minimum, the Committee should consider applying these amendments (i.e. limiting the turnover within scope of the fining cap and removing retrospective effect) specifically to part 3 of schedule 9 (i.e. to the new fining powers that relate to market investigation remedies).

3) Powers to require remedy implementation trials

27. Development of new consumer-facing solutions is a resource-and-time intensive process for retail banks. This can be seen, for example, in Santander's experiences to date implementing the Order (as described above). Beyond technical challenges, there are also fraud-prevention protections to consider, as well as the need to comply with wider financial services regulatory requirements. Santander therefore believes that it is important to avoid the scenario where the CMA uses its new powers to mandate poorly designed implementation trials at considerable cost to the industry, the results of which are found to be ineffective and discarded when the remedy is finalised. There is also a risk that the CMA could impose a trial that conflicts with Santander's wider financial services regulatory requirements.

28. As a safeguard, the Bill requires the CMA to issue a provisional implementation trial notice which sets out its justifications for imposing a trial. Companies involved will also have a chance to make representations. There are, however, no legislative limits on the CMA's discretion in the use or design of trials (including maximum periods for which they can be imposed), or any requirement for an evidence-based cost-benefit analysis. Santander therefore believes that the safeguards are insufficient.

29. On the other hand, Santander recognises that the use of trials could potentially lead to mistakes being avoided in the design of a remedy package, which could lead to better customer outcomes and cost savings for industry in the long-term. This would require the trials to be targeted and limited to testing specific issues which cannot otherwise be resolved through the current remedy consultation process.

30. Implementation trials should therefore be carefully scoped in discussion with the companies involved, with the wider industry and with relevant sector regulators (which in Santander's case would usually be the FCA or the PSR). Trials should only commence where there is widespread consensus that they will increase efficiency in achieving the CMA's aims.

Desired amendment

31. Schedule 7 of the Bill should be amended so that implementation trials can only be conducted with the agreement of the CMA, the companies that will be conducting the trial, and any relevant sector regulator.

32. If the Committee is not willing to make that amendment, it should at least consider placing additional safeguards in Schedule 7 before the CMA is allowed to impose an implementation trial. At a minimum, the CMA should be required to consult widely and undertake a cost-benefit analysis confirming that the trial will create long-term time and cost savings that outweigh its implementation costs.