October 2021

Response to the UK Consultation on Reforming Competition and Consumer Policy

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of more than three million enterprises of all sizes and sectors. The Chamber is a longtime advocate for strong commercial ties between the United States and the United Kingdom. Indeed, the Chamber established the U.S.-UK Business Council in 2016 to help U.S. firms navigate the challenges and opportunities from the UK's departure from the European Union as well as to represent the views of business as the U.S. and UK negotiate a new trade agreement. With over 40 U.S. and UK firms as active members, the U.S.-UK Business Council is the premier Washington-based advocacy organization dedicated to strengthening the commercial relationship between the U.S. and the UK.

According to a recent U.S. Chamber study, U.S. and UK companies have together invested over $1.35 trillion in each other's economies, directly creating nearly 2.8 million British and American jobs.[1] We are each other's single largest foreign investors, and the U.S. is the UK's largest trading partner.

The Chamber is also a leading business voice on digital economy policy, including on issues of data privacy, cross-border data flows, cybersecurity, digital trade, artificial intelligence, and e-commerce. In the U.S. and globally, we support sound policy frameworks that promote data protection, support economic growth, and foster innovation.

The Chamber's U.S.-UK Business Council welcomes the opportunity to provide Her Majesty's Government ("HMG") with comments in response to the consultation on reforming competition and consumer policy. We welcome further opportunities to discuss this input with colleagues from BEIS and other UK Government agencies as these proposals are considered in the coming weeks and months.

[1] U.S. Chamber of Commerce, *The Transatlantic Economy 2021,* https://www.uschamber.com/report/the-transatlantic-economy-2021.

Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

The U.S. Chamber of Commerce believes, and long experience confirms, that the best competitive metrics are those that focus on consumers: the state of price competition and non-price competition in areas such as quality, variety, and innovation. These indicia, which focus squarely on consumers, are the hallmarks of a competitive marketplace.

Unfortunately, the CMA's report, though excellent and comprehensive in many respects, focuses too heavily on artificial and secondary measures such as market concentration and the number of competitors in a market, rather than on the question of whether those competitors are providing consumers with high quality goods and services at low prices. Indeed, only in paragraph 1.29 does the CMA's report even discuss the supposed effects of market concentration on consumers.

In a comprehensive report that examined the empirical literature, the White House's Council of Economic Advisers explained why market concentration is a poor indicator of competition:

> Calls for changing the goals of the antitrust laws are based on empirical research that misinterprets high concentration as necessarily harmful to consumers and reflective of underenforcement. That argument was discredited long ago, when economists such as Demsetz (1973) and Bresnahan (1989) articulated the fundamental reasons why high concentration is not in and of itself an indicator of a lack of competition. The main point is that concentration may result from market features that are benign or even benefit consumers. For example, concentration may be driven by economies of scale and scope that can lower costs for consumers. Also, successful firms tend to grow, and it is important that antitrust enforcement and competition policy not be used to punish firms for their competitive success. Finally, antitrust remedies may not be required, even when firms exercise market power, because monopoly profits create incentives for new competitors to enter the market—unless substantive entry barriers or anticompetitive behavior stand in their way.[2]

The Chamber does not suggest that the CMA should completely ignore the structure of a particular market, including market concentration and the number of competitors, but these are at best secondary indicator of competitiveness. The real focus should remain on the prices that consumers pay and the quality and variety of goods and services they receive.

[2] CEA Report at 206, at https://www.nber.org/sites/default/files/2020-05/ERP-2020.pdf.

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK? (No answer to be provided)

Q3. Should government provide more detailed and regular strategic steers to the CMA?

It is important that competition enforcement remain apolitical. Any government desire to offer "strategic steers" to the CMA should be avoided. The government is free to pass legislation and corresponding regulation in an effort to strategically steer the market, competition enforcement should be governed by the consumer welfare standard and guided by rigorous economics to support a rule of reason analysis.

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

The U.S. Chamber of Commerce recommends against allowing the CMA to impose remedies at the end of the market study process, without a full market investigation. A market study provides very useful information about the state of competition, but as the government acknowledges, a market investigation provides independence and a far more thorough review. This independence and depth ensure that any remedies would protect consumers, rather than individual competitors.

Before the CMA intervenes in a market, potentially to the disadvantage of certain companies, it should understand that market fully. A meaningful, objective analysis of a particular market, and a firm's market power within that market, should entail a review of numerous documents, econometric analysis, and consultations with the firm at issue, its customers, and its competitors, along with an opportunity for rebuttals. Given that market interventions could carry heavy consequences for affected firms, the CMA should take the necessary time, and afford the necessary due process, to study the issues thoroughly.

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

For the reasons outlined in response to consultation question 4, the U.S. Chamber of Commerce recommends against a new single state market inquiry tool. In particular, given that the CMA would conduct the investigation, a single state inquiry would necessarily diminish the independence of the process and leave it more susceptible to influence from self-interested competitors.

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

For the reasons outlined in response to consultation question 4, the U.S. Chamber of Commerce strongly recommends against enabling the CMA to impose interim measures from the beginning of a market inquiry. In addition, as the government recognizes, interim measures could prejudice the remaining investigation and distort the marketplace.

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

The U.S. Chamber of Commerce has no objections to the CMA accepting binding commitments at any stage in the market inquiry process. The Chamber believes, however, that the interests of transparency and consistency demand a full public report into the circumstances and terms of any such agreement.

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

The U.S. Chamber of Commerce has no objections to a more flexible design process for market investigation remedies, as described in the consultation, so long as this process continues to guarantee affected firms all of the procedural protections currently available to them.

In terms of the proposal regarding previous investigations, the Chamber agrees that the CMA should be able to use information gathered from those investigations to inform ongoing and future activities, without the need to start a new investigation from scratch. The Chamber believes, however, that an affected firm must retain all of the procedural safeguards currently afforded to them, including the right to submit evidence relating to any changes in the marketplace that might obviate the need for existing or additional remedies.

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

The U.S. Chamber of Commerce encourages the government to formally adopt the consumer welfare standard. This standard, which has served the United States well for almost half a century, brings objectivity, consistency, and transparency to competition policy and to market inquiries. It also protects consumers, not individual competitors, rewards innovation, and encourages investment. The UK would service both its consumers and its domestic economy by adopting such a tested and objective standard.

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

The U.S. Chamber of Commerce supports several of the proposed revisions but has concerns about others. In particular, the Chamber supports the government's proposal to maintain a voluntary and non-suspensory process, which continues to strike an appropriate balance between consumer protection and regulatory burden for the UK's economy-wide merger control regime. The Chamber also supports the general proposal, outlined in paragraph 1.98, to raise turnover thresholds and to create safe harbors for smaller mergers, though the Chamber offers no views as to the precise level the government should adopt. This proposal will allow the CMA to focus more resources on the types of large horizontal mergers that could raise genuine competitive concerns.

The Chamber, however, urges the government to maintain the current share of supply test. In general, vertical mergers and so-called "nascent" acquisitions raise few competitive concerns. These types of mergers generally benefit consumers, improve access to capital for smaller companies, and enhance competition across various markets. Any competitive harms are at best speculative and distant. Accordingly, there is no reason to adopt new thresholds for these types of mergers, and to the extent that any particular vertical merger raises genuine competitive concerns, the CMA can still "call in" that merger for additional review, if and where these transaction have a legitimate local nexus with the UK.

Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

The U.S. Chamber of Commerce encourages the government to continue to focus its merger control process on large horizontal mergers, which evidence has shown can sometime harm competition. In addition, the Chamber urges the government to base its enforcement decisions on competitive metrics focus on consumers, namely, the state of price competition and non-price competition in areas such as quality, variety, and innovation. These indicia, which focus squarely on consumers, are the hallmarks of a competitive marketplace. The structure and number of competitors in a particular market, while certainly relevant, are at most secondary factors.

Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

The U.S. Chamber of Commerce generally agrees with the government's proposals, outlined in this subsection, to improve the merger review process. Specifically, the

Chamber supports the proposal to permit earlier binding commitments, so long as those commitments are subject to the same types of public transparency as commitments reached at later stages in the process. The Chamber also supports the proposal to restrict the CMA to issues identified in Phase 1, a reform that should streamline the process.

In the same vein, the Chamber does not object to allowing parties to request automatic reference to Phase 2, so long as the CMA does not improperly pressure firms into doing so or draw adverse inferences from such a decision. As the government correctly explains, some mergers, particularly horizontal mergers, may merit additional scrutiny, even if they ultimately benefit consumers.

In terms of extensions, in general, the Chamber supports the idea that the CMA should have flexibility to extend statutory timetables, so long as those extensions do not prevent firms from consummating mergers if they choose to move forward during the pendency of a review. A meaningful, objective analysis of a particular market, and a firm's market power within that market, can easily take some time, given that such an analysis should entail a review of numerous documents, econometric analysis, and consultations with the firm at issue, its customers, and its competitors, along with an opportunity for rebuttals.

Finally, the Chamber agrees with the proposal to publish notices on the CMA's website.

Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?
(No answer is to be provided)

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?
The U.S. Chamber of Commerce generally agrees that the government should have the ability to review agreements that have a strong nexus to the UK For instance, both the Organisation for Economic Co-Operation and Development and the International Competition Network have stated best practices that jurisdictions should only review mergers where there is a local nexus.

The Chamber, however, strongly opposes the proposal to extend "abuse of dominance" concepts outside the UK, regardless of the market's geographical location. This proposal conflicts with principles of international comity and could lead to different governments placing inconsistent burdens on private firms, all to the ultimate detriment of consumers around the globe. Moreover, the proposal will lead to the government using scarce resources inefficiently – for instance, the government should rest assured that competition authorities in other jurisdictions, including the United States, are vigorously investigating potentially anticompetitive conduct that affect their markets.

Q15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

(No answer is to be provided)

Q16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

(No answer is to be provided)

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?

(No answer is to be provided)

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?
The U.S. Chamber of Commerce strongly opposes the proposals to strengthen the CMA's use of interim measures and to weaken the appeal process. In the first place, the CMA should impose interim measures sparingly, only in circumstances similar to the standards whereby a court might issue a preliminary injunction: where irreparable harm would occur without immediate relief, and where an order serves the public interest, and not just the interest of a competitor. Otherwise, the CMA risks

becoming a tool that protects the private interests of individual competitors, rather than the public's interests or the principle of competition at large.

Absent that showing of irreparable public harm, the CMA should afford affected firms the full range of procedural protections. As the government notes, interim measures could impose serious handicaps on firms, particularly in fast-moving digital markets. Though enforcement agencies might find this step inconvenient, these procedures guard against impressionistic or politicized enforcement by giving the affected firms a chance to review the evidence and explain the benefits of their practices to consumers. Basic principles of due process require that affected firms receive full notice of the charges and evidence against them.

Similarly, the Chamber urges the government to maintain full merits review. Given that interim measures could severely penalize affected firms, due process demands an opportunity for an independent, objective review. Such processes can take time, but they instill confidence in the system, particularly among foreign companies.

Q19. Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

(No answer is to be provided)

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?

In general, the U.S. Chamber of Commerce agrees with the government's objective of seeking efficient investigations and, where appropriate, settlements. Accordingly, the Chamber supports the proposals to permit binding admissions, use short form decisions, and enter into Early Resolution Agreements. Because short form decisions could deprive the business community of valuable guidance into how and why certain decisions were made, however, the Chamber urges that any such decisions contain sufficient information to serve as precedents to guide future conduct.

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?

(No answer is to be provided)

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?

(No answer is to be provided)

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

(No answer is to be provided)

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

The U.S. Chamber of Commerce urges the government to maintain its current appeal standards, which instill great confidence in the private sector, particularly among foreign companies, that they will receive fair process throughout the UK's legal and regulatory system. The CMA has tremendous authority to regulate the behavior of foreign firms, including the imposition of substantial fines. Given the potential severity of such penalties, an independent, objective review is necessary to protect basic principles of fairness and due process.

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?

For the same reasons as outlined in response to consultation request 24, the U.S. Chamber of Commerce urges the government to maintain its current appeal standards and processes for these additional matters.

Q26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

(No answer is to be provided)

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

The U.S. Chamber of Commerce agrees that the CMA should have the authority to gather documents relevant to an investigation, subject to appropriate due process, and

that the CMA should have the authority to seek penalties for noncompliance. The Chamber, however, believes that the proposed penalty caps far exceed any demonstrated need. In the first place, the government has not pointed to any examples of willful noncompliance to evidentiary requests, whether from foreign or domestic firms. In addition, the Chamber notes that companies may well have valid bases for withholding or disputing the production of some material, including proprietary data and information that a company may reasonably argue is outside the scope of a particular investigation. The CMA should not penalize a company's good faith efforts to negotiate the release of documents reasonably responsive to a request, even if a company chooses to contest the release of every last iota of information. Indeed, given the complexity of markets and pricing decisions, some document requests could easily require the production of hundreds of thousands or even millions of pages of documents.

Similarly, the Chamber has serious concerns about holding a firm's directors personally liable for such issues. While directors and other senior management officials certainly set the tone for a company, including its commitment to compliance, very rarely will a senior official have deep knowledge about any particular evidentiary request. This proposal would lead either to punishments for people with no actual responsibility for responding to document requests, or force companies to ask their directors and senior officials to invest valuable time in matters outside their scope of expertise. Neither outcome makes sense.

Finally, the Chamber worries that the CMA would use these prospective penalties as sledgehammers against American companies. According to the government, the CMA "is likely to investigate larger global businesses with high turnovers." The Chamber agrees, of course, that all companies that have a sufficient nexus to the UK should cooperate in the CMA's investigations, but companies also have the right to contest evidentiary requests that they view as unreasonably burdensome or irrelevant. The CMA should not excessively punish a company's reasonable efforts to cabin the scope of information requests.

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

The U.S. Chamber of Commerce believes that the proposed enforcement mechanisms exceed anything necessary to address genuine competitive harms. Civil penalties should bear some relation to the harm imposed on consumers. Unfortunately, a 5% penalty on annual turnover, plus "an additional daily penalty of up to 5% of daily turnover of the company's corporate group," appear arbitrary and untethered to any competitive harm imposed on consumers. The Chamber also

worries that the CMA will interpret these figures to apply to an undertaking's worldwide turnover, which would completely untether the penalties to any harm suffered by consumers *in the UK*

In the ordinary course of business, regulators and companies sometimes reasonably disagree as to the exact scope of certain requirements. The CMA should not have these extreme penalties to use as a sledgehammer against companies, particularly foreign companies, that may interpret the CMA's orders differently than the CMA.

Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities? (No answer is to be provided)

Conclusion

We look forward to opportunities to collaborate and provide additional input as these policies continue to be developed and implemented.

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