1. SUMMARY

1.1 The Competition and Markets Authority (the “CMA”) was set up to handle cases more quickly and more robustly than its predecessors under the previous regime. Two recent court judgments may make it more difficult for the CMA to meet these objectives.

1.2 First, *Cartes Bancaires* may require the CMA in more cases to prove that allegedly anticompetitive practices have negative effects on competition. This may make it easier for parties to defend themselves, for example by arguing that there are no anticompetitive effects, or that the practices in question give rise to efficiencies. Secondly, *Skyscanner* could discourage the CMA from accepting commitments (a way of closing cases quickly) in the future. In combination, there is a significant risk that the judgments will slow the CMA’s decision-making down or make its decisions more likely to be challenged on appeal.

2. THE TWO JUDGMENTS

*Cartes Bancaires*

**Background**

2.1 In 1984, the main French banks established and became members of the *Groupement des cartes bancaires* (the “GCB”) with the aim of making their card and payment systems interoperable. Members issued bank cards and "acquired" merchants (i.e., ensured that merchants would accept the cards in payment).

2.2 In 2002, the GCB adopted some new pricing measures, which imposed additional costs on members whose issuing activities exceeded their acquiring activities by more than a certain margin. In 2007, the European Commission (the “Commission”) found that these measures had an anti-competitive “object” in the market for the issuing of bank cards. The GCB appealed to the Court of Justice.

**Relevant law and grounds for appeal**

2.3 European competition law prohibits practices that have an anticompetitive "object" or "effect". Where a competition authority finds that a practice has an anticompetitive effect, it has to prove the negative effect on competition, which can impose a high evidentiary burden on the authority. Where an authority finds that a practice has an anticompetitive object, however, it does not have to prove any effect. Central to the GCB’s appeal was the argument that the Commission had construed the object category too widely.

**Judgment**

2.4 The court agreed with the GCB. Advocate-General Wahl opined that a practice could only have an anticompetitive object where the practice’s "harmful nature is proven and easily identifiable, in the light of experience". By experience, he meant “what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law”. In essence, he said that an
object infringement must be justified by precedent (whether in the economic literature, authorities' decisions, or court judgments). The court appeared to endorse this view.

2.5 The Advocate-General said that the object category exists primarily for the purposes of “procedural economy”. The court echoed this, making it clear that the category of object infringements has to be construed narrowly, so to include only those infringements which are "so likely to have negative effects… that it may be considered redundant… to prove that they have actual effects".

**Skyscanner**

**Background**

2.6 In September 2010, the CMA’s predecessor, the Office of Fair Trading ("OFT"), opened an investigation into the supply of hotel accommodation by online travel agents. One of the OFT’s concerns was that online travel agents had entered into agreements with hotels under which the online travel agents were not allowed to discount the hotel’s rates. In order to address this concern, the parties under investigation offered to give the OFT certain commitments, under which they would remove the prohibition on discounting, and have as a minimum the flexibility to offer discounts to customers who had signed up to be members of a "closed group". The OFT accepted these commitments, and closed its investigation.

**Relevant law and grounds for appeal**

2.7 Skyscanner, an online meta-search site, was not bound by the commitments, because it was not one of the parties under investigation, nor did it participate in the online travel agency market. Nevertheless, it appealed against the OFT’s decision on the grounds that the commitments would adversely affect its own business: if discounted prices were only available to closed groups, and not on Skyscanner’s online platform, its price comparison services would be undermined. Skyscanner argued that its concern was “plausible”, and therefore that the OFT should have investigated it further before making its decision. The OFT’s counterargument was that it would be unduly onerous for it to have to investigate every “plausible” concern raised during its investigation.

**Judgment**

2.8 The Competition Appeal Tribunal ("CAT") agreed with Skyscanner, ruling that "the OFT failed properly to consider or conscientiously to take into account the objection to the proposed commitments raised by Skyscanner" and "failed properly to investigate a plausible point further". It is notable that the CAT reached this conclusion even though Skyscanner raised its concern very late in the procedure.

3. IMPACT OF THE JUDGMENTS

3.1 As a result of *Cartes Bancaires*, the CMA will need to reconsider whether it can still run certain cases as object infringements. In some, it may now need to argue that the practices in question have anticompetitive effects. This expansion of the effects category could have one of two possible results. On the one hand, it could lead to a retrenchment, with the CMA investigating only those practices which are very clearly object infringements (such as cartels). On the other hand, it could drive the CMA to put more effort into proving effects.

3.2 The former course is perhaps the more likely. The CMA has not taken a decision in an effects case in the last five years. This is logical: object cases impose a lower burden of proof on the CMA. If, however, the CMA takes the latter course, and starts pursuing more effects cases, parties under investigation will have two ways to respond. First, they will be able to argue that there is, in reality, no negative effect on competition, and
thus that there is no infringement in the first place. Secondly, even where there is some negative effect on
competition, parties may find it easier to deploy the so-called "efficiencies" exemption. This provides that an
anti-competitive practice is permissible where it “contributes to improving the production or distribution of goods
or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit”,
as long as the restriction is indispensable and there is no foreclosure. This exemption is generally easier to use
successfully in effects cases than in object cases.

3.3 As a result of Skyscanner, the CMA will need to examine every plausible concern expressed by third parties
before accepting commitments. When commitments were first introduced in April 2004, it was hoped they
would allow the OFT to close cases quickly and conclusively. Skyscanner has shown that commitments are
susceptible to challenge. They will not, therefore, constitute a robust way of closing a case unless the CMA has
investigated all plausible concerns that they may cause, not only in the primary market under investigation, but
also in all adjacent markets.

4. CONCLUSION

4.1 When the Government established the CMA in 2014, it hoped the CMA would handle cases more quickly and
more robustly than the OFT. As a result of both Cartes Bancaires and Skyscanner, the Government’s vision is
now less likely to be realised.

4.2 Cartes Bancaires will either reduce the number of cases the CMA is willing to pursue or impose a higher burden
of proof on it by requiring it to prove effects. In either eventuality, the number of cases that the CMA handles is
likely to be lower, and it may well struggle to meet the Government’s objective of increased speed. Moreover,
if the CMA pursues more effects cases, parties under investigation may find it easier to defend themselves
successfully (either before the CMA or on appeal), which could make it more difficult for the CMA to achieve
the Government’s objective of increased robustness.

4.3 Skyscanner will either expose more commitments decisions to the possibility of appeal or impose a higher
burden of proof on the CMA by requiring it to investigate all plausible concerns. As a result, either the CMA’s
decisions will be more vulnerable or commitments decisions will take longer. Both possibilities will militate
against the Government’s objectives.