

**By email only**

██████████  
Frontier Economics Limited

██████████ [@frontiereconomics.com](mailto:██████████@frontiereconomics.com)

From: ██████████  
██████████  
Our ref Case ██████████  
Your ref  
Date 22 July 2022

Dear ██████████

**Retainer letter: Procurement N° PROC 409 – 2022**

I am pleased to confirm that the CMA would like to appoint ██████████ in relation to an investigation under the Competition Act 1998 (“CA98”), Case ██████████, which concerns ██████████ ██████████ ██████████ ██████████ ██████████ ██████████ (the “Investigation”) and if necessary any related litigation.

The Letter of Instruction will set out what ██████████ is required to do in ██████████ capacity as an expert.

Below are the principal terms of this Retainer for the supply of expert advisory services as well as the duties and obligations placed on Frontier Economics Limited (“Frontier”), its employees and in particular ██████████. Please sign and return a copy of this letter, including completing any information required in Appendices 1-3 where applicable, to indicate Frontier’s acceptance of each of the terms and undertakings. Please also ensure that ██████████ signs this letter to confirm understanding of, and agreement to comply with, the duties and obligations on the expert that Frontier have undertaken to procure in this Retainer.

Both the CMA and Frontier may be referred to together as “Party” or “Parties” within this Retainer.

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## **Terms of the Retainer**

1. The Retainer shall commence on the date of the last signature and shall remain in force for a maximum period of two years thereafter, with the option for the CMA to extend should this be necessary, the time period being dependent upon the requirements of any litigation and the timetable in respect thereof.

## **The Expert**

2. It is agreed that Frontier will procure that [REDACTED] (the “**Expert**”) is involved in all aspects of the provision of services under this Retainer to the CMA and further that they will supervise and review all work carried out by others and take full responsibility for the end product of all services provided under this Retainer to the CMA.

## **Duty of Independence**

3. Expert evidence, and any report produced by the Expert, must be, and must be seen to be, produced independently by the Expert, uninfluenced by any pressure. In particular, the CMA requires that:
  - a) Frontier will not (and will procure that the Expert will not) act as an advocate for the CMA or promote the point of view of the CMA as an instructing party.
  - b) Frontier will procure that the Expert will take into account all material facts, including those that could detract from or change the Expert’s concluded opinion.
  - c) Frontier will procure that the Expert will make clear when a particular question or issue falls outside the Expert’s expertise, or where the Expert does not have enough information to reach a definite opinion.
  - d) If, at any time after providing advice, the Expert’s opinion changes on any material matter, Frontier procure that the Expert will notify the CMA without delay.

Further details on the duty of independence will be set out in the Letter of Instruction.

4. In order to preserve the Expert’s ability to provide expert evidence in any litigation related to the Investigation, Frontier must ensure (and will procure that the Expert ensures) that any services provided under this Retainer do not risk interfering with the Expert’s independence. To this end, it is agreed that any services provided by Frontier will be prepared as if the Expert is instructed to act as an expert witness, or, where not provided by the Expert, be prepared in such a manner as not to put at risk the future instruction of the Expert to act as an expert witness.

## **Expert Witness Instruction**

5. In the event that the Expert is instructed to prepare and give evidence, the CMA shall provide the Expert with clear instructions in writing, unless it is not practical to do so. Where applicable, such provision shall be in accordance with Section 8 of the Protocol for the Instruction of Experts to give Evidence in Civil Claims.
6. Upon receipt of the CMA's instructions, the Expert shall discuss and agree with the CMA the exact range of services with possible deadlines that the Expert is to provide (the "**Expert Services**").
7. If, in the reasonable opinion of the Expert, the Expert is not able to provide the Expert Services or any part of them within any agreed time scales, then the Expert shall inform the CMA at the earliest opportunity, taking into consideration the impact that this may have upon any timetable set by the court, where applicable.
8. The Expert shall use reasonable endeavours to meet any deadlines set by the CMA in the instructions given by the CMA to the Expert, except for deadlines or dates for compliance which are set by the court, where the Expert shall use best endeavours, subject always to the duty of the CMA to promptly inform the Expert of such court deadlines and court set dates for compliance.
9. Frontier retains the discretion to charge for any reasonable costs incurred in connection with any variation in or delay in carrying out the work resulting from the CMA's instructions, delay in providing instructions, or lack of instruction. Frontier will notify the CMA of any additional costs in advance of these being incurred. Frontier may terminate this Retainer forthwith if the Expert considers that the instructions provided by the CMA or the work ■■■ carries out place ■■■ in conflict with ■■■ duties as an expert or to the court, and the CMA has refused to amend such instructions.
10. The CMA shall provide any court orders and timetables which the Expert is required to comply with.
11. The CMA shall provide all relevant documents and answer any questions the Expert has in order to carry out the Expert Services.
12. The CMA shall not influence the Expert in any way. The Expert shall provide the Expert Services as an independent individual giving opinions on the evidence provided.
13. The CMA shall provide any necessary training required at CMA's cost, should the Expert be required to attend court.

## **Overriding Duty to the Tribunal**

14. It is agreed that, to the extent the Expert is not already, Frontier will procure that the Expert will become familiar with those sections of the Competition Appeal Tribunal (the "**CAT**") Guide to Proceedings (the "**CAT Guide**") that relate to an

expert's overriding duty to the CAT, as well as Part 35 of the Civil Procedure Rules and its Practice Direction, which the CAT takes into account in relation to expert evidence, as well as the guidance published by the Civil Justice Council for the instruction of experts in civil claims.

### **Performance**

15. Whilst providing Expert Services under this Retainer, Frontier agrees to use (and will procure that the Expert will use) reasonable skill care and diligence in the provision of services and shall use (and will procure that the Expert will use) all reasonable endeavours to comply with any timetable for the provision of Expert Services specified by the CAT or agreed between the CMA and Frontier.

16. Nothing in this Retainer shall create the relationship of employer and employee.

### **Proposed work under this Retainer**

17. The CMA has issued a final infringement decision in relation to the Investigation. Should this decision subsequently be appealed,

18. this Retainer includes an option for the Expert's instruction as an independent expert witness in any appeal(s) before the CAT. The CMA is not in a position at this stage to confirm whether that option will be exercised.

### **Confidentiality, Data Protection and Communications**

19. It is agreed that Frontier will comply with (and will procure that the Expert complies with) all applicable laws about the processing of personal data and privacy arising out of information passed to it pursuant to this Retainer and will provide all reasonable assistance to the CMA with any lawful requests made by the CMA to Frontier and/or the Expert, in order to satisfy the CMA's personal data and privacy obligations.

20. The CMA follows Cabinet Office procurement policy in its contracts, a part of this procurement policy covers the UK GDPR and mandates the use of standard clauses. The current standard clauses are contained in Appendix 1 to this Retainer. It is agreed that Frontier will comply (and will procure that the Expert complies) with these clauses during the currency of this Retainer.

21. To the extent necessary, it is agreed that that further detail of the arrangements on data protection is provided under Appendix 1.

### **Confidential Information**

22. "**Confidential Information**" shall mean any and all information, including Results, Background IP and information relating to the business or affairs of the Party, provided directly or indirectly by one Party to the other Party in oral or documentary form or by way of models, biological or chemical materials or other tangible form or by demonstrations, whether before, on or after the date of this Retainer and which in each case at the time of provision is marked or otherwise designated to

show expressly or by necessary implication that it is imparted in confidence; and any copy of the foregoing.

- 22.1. Each Party shall keep confidential and secret any and all Confidential Information that is acquired through this Retainer.
- 22.2. Neither Party shall use the other Party's Confidential Information for any purpose other than to perform its obligations under this Retainer. Each Party shall be responsible for ensuring that its officers and employees comply with the provisions of this clause. If a Party intends to use the services of subcontractors, consultants or third parties to work on, advise or manage any aspect of the Expert Services, that Party shall first ensure such subcontractors, consultants or other third parties sign legally-binding retainers requiring them to abide by conditions of confidentiality no less binding than those provided herein.
- 22.3. In the event of one Party visiting any of the establishments of the other Party, the visiting Party undertakes that any information which may come to its knowledge as a result of any such visit, inclusive of the form, materials and design of the various elements of any relevant plant and equipment which may be seen at such establishments as well as all the plant as a whole, the methods of operation thereof and the various applications thereof, shall be kept strictly confidential and shall be regarded as Confidential Information for the purpose of this retainer.
- 22.4. The obligations in clauses 22.1, 22.2 and 22.3 shall not apply to Confidential Information, disclosed by one Party ("**Disclosing Party**") to the other Party ("**Receiving Party**"), where the Receiving Party can clearly demonstrate that the information:
  - 22.4.1. was in the public domain prior to its disclosure or enters into the public domain after disclosure otherwise than by default of the Receiving Party;
  - 22.4.2. becomes known to the Receiving Party by action of a third party not in breach of any obligation of confidentiality to the Disclosing Party;
  - 22.4.3. was in the Receiving Party's possession before receipt from the Disclosing Party and was not acquired directly or indirectly from the Disclosing Party;
  - 22.4.4. was independently developed by or for the Receiving Party at any time, independently of the Confidential Information disclosed to it by the Disclosing Party;
  - 22.4.5. is required to be disclosed by law or government regulation or court order. In such cases, the Receiving Party shall wherever

practicable give reasonable advance notice of the intended disclosure to the other Party and shall limit the disclosure to the extent legally required to be disclosed. The relaxation of the obligations of confidentiality shall apply solely for such compliance and for as long as is necessary to comply with the relevant law or regulatory requirement.

22.5. The provisions of this clause 22 shall survive any termination of this Retainer for a period of 5 years from termination.

## **Transparency**

23. The Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the Freedom of Information Act 2000 (“**FOIA**”) and/or the Enterprise Act 2002 (“**EA02**”), the content of this Retainer is not Confidential Information. The CMA shall be responsible for determining in its absolute discretion whether any of the content of this Retainer is exempt from disclosure in accordance with the provisions of FOIA/EA02. Notwithstanding any other term of this Retainer, Frontier hereby gives consent for the CMA to publish this Retainer in its entirety (subject to clause 24), (but with any information which is exempt from disclosure in accordance with the provisions of FOIA/EA02 redacted) including from time to time agreed changes to the Retainer, to the general public.

24. The CMA will consult with Frontier to inform its decision regarding any redactions, and both Parties will seek to agree on the redactions and publication of the Retainer, but the CMA shall have the final decision in its absolute discretion.

25. Frontier shall assist and cooperate with the CMA to enable the CMA to publish this Retainer.

26. It is agreed that Frontier will provide (and will procure that the Expert will provide) all reasonable assistance to the CMA in relation to any requests for information in relation to this Retainer which are made to the CMA in connection with FOIA, the Environmental Information Regulations 2004 and/or any statutory modification or re-enactment thereof or any related guidelines or codes or practice at no additional charge.

27. Frontier accept that the CMA is able to disclose this Retainer and any information it receives from Frontier and the Expert to the extent that the CMA deems such disclosure necessary or appropriate in the course of carrying out its public functions.

28. Please direct any communications on this matter to [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED] [REDACTED] and mark any correspondence or other documents as confidential. In the event that the CMA exercises the option referred to in paragraph 18 above, please mark any

correspondence, communications or other documents as confidential and privileged and prepared at the request of the CMA Litigation Unit for the purpose of litigation.

### **Intellectual Property**

29. **“Background IP”** shall mean all information, techniques, know-how, software, materials (regardless of the form or medium in which they are disclosed or stored) and intellectual property rights (owned by or licensed to the Parties at the date of this Retainer or generated outside of the Expert Services) that are provided by one Party to the other for use in the Expert Services (whether before or after the date of this Retainer).
30. **“Results”** shall mean all information, reports, designs, inventions, software and other matter capable of being the subject of intellectual property rights which is conceived and first reduced to practice or writing or developed in whole or in substantial part for the purpose of the Expert Services.
31. All Background IP used in connection with the Expert Services shall remain the property of the Party (or its licensors) who introduces it and no licence is granted to either Party’s Background IP unless specifically agreed to in writing.
32. Frontier shall promptly disclose all Results to the CMA and on payment of the full fees, specified in clause 44, all Results shall automatically become the sole property of the CMA.
33. At the request and expense of the CMA, Frontier shall execute such documents as may reasonably be necessary for the CMA to transfer title to and apply for patents or other protections for the Results.

### **Warranties, liability and indemnities**

34. All warranties, liabilities and indemnities as drafted here cannot and will not conflict with the overarching duty of the Expert to the CAT should an appeal be commenced.
35. Frontier undertakes that it will use (and procures that the Expert will use) all reasonable efforts commensurate with the highest standards of research and scientific practice to perform the Expert Services and if any part of the Expert Services is performed negligently or in breach of contract then, at the request of the CMA given within 6 months of the completion date, Frontier will re-perform the relevant part of the Expert Services, always subject to clauses 36 and 38 below.
36. Frontier’s aggregate liability to the CMA for any loss or damage suffered or incurred by the CMA as a result of Frontier’s breach of contract, negligence or otherwise howsoever arising shall be limited to the sums received or payable to Frontier under this Retainer in the year in which such liability arises. The Parties agree this to be a genuine and reasonable pre-estimate of anticipated possible losses. This



clause shall not limit or exclude any liability that as a matter of English law may not be limited or excluded such as liability for death or personal injury.

37. Each Party ("**Breaching Party**") shall be liable to the other Party for any loss, damage, destruction, injury or expense, whether direct or indirect, (and including but not limited to loss or destruction of or damage to such other Party's property, which includes data) arising from the Breaching Party's breach of contract or duty (whether arising in negligence, tort, statute or otherwise). For the avoidance of doubt, the liability of Frontier under this clause shall be subject to clause 36.
38. Neither Party shall be liable to the other Party for any damages, dispute or injury arising during the undertaking of the Expert Services unless caused by the wilful act, negligence or default of an employee, student, consultant or agent of that Party. Nor shall one Party be liable to the other Party for an indirect or consequential loss, damages, claims or demands arising out of this Retainer, including without limitation any economic loss or other loss of income, profits, business, opportunity or goodwill no matter how arising, whether by breach or by negligence and whether in contract, tort or otherwise.
39. The CMA shall indemnify Frontier against all proceedings, actions, claims, demands, costs (including legal costs), charges, expenses and any other liabilities arising from or incurred by reason of any infringement or alleged infringement of any third party's Intellectual Property Rights used at the request of the CMA by Frontier in the course of providing the Expert Services, provided that any such infringement or alleged infringement is not knowingly caused by, or contributed to by, any act of Frontier.
40. For the avoidance of doubt, the terms and conditions of this Retainer are agreed to be in lieu of any warranties, obligations or conditions implied by law, trade usage, custom or otherwise as to the merchantable quality or the fitness of any particular purpose of the Expert Services being supplied herein.

### **Responsibility for Work**

41. Frontier will not (and procure that the Expert will not) delegate any of the Expert Services under this Retainer without the prior approval of the CMA.
42. To the extent that it will be more cost effective for the Expert to delegate some aspects of the Expert Services, Frontier confirms (and procures that the Expert will confirm) that the Expert will inform the CMA, before involving anybody other than the Expert. Frontier will also inform (and procures that the Expert will inform) the CMA, which aspects of the Expert Services the Expert seeks to delegate, to whom the Expert is likely to delegate and the experience and the charge out rates of those involved.

## Conflict of Interest

43. In accordance with Appendix 2 (Conflicts of Interest) and the Conflict of Interest Statement at Appendix 3, Frontier agrees to notify the CMA if, at any time during the continuance of this Retainer, it becomes reasonably aware of the likelihood of the Expert undertaking any consultancy services which may cause a conflict of interest between the Expert's duties herein and his/her obligation to a third party. In the event of a conflict or potential conflict, the Parties agree to amend the Expert Services to avoid any conflict or where this is not possible or viable to terminate the Expert Services forthwith on written notice.

## Your fees

44. Please confirm the following:

- 44.1. Frontier's fees will be calculated by reference to the amount of time which the Expert spends on this matter.
- 44.2. The Expert's fees will be invoiced at an hourly rate of [REDACTED] plus VAT for all services provided under this agreement.
- 44.3. Frontier will also charge for reasonable travelling expenses and other disbursements, and will obtain the CMA's prior written authority before incurring any significant disbursements or expenses over [REDACTED].
- 44.4. Frontier will send invoices on a monthly basis for the work undertaken in the preceding month prior to the issue of the invoice, and the CMA shall pay the invoices within 30 days from date of invoice. The invoices should include a breakdown of work done and time spent by the Expert at any given date, and Frontier will procure that the Expert procures the provision of Expert Services under this Retainer to include this information. If the Expert keeps separate time records, it would be helpful if you could let the CMA have a copy of these. This information may be important at the assessment of the CMA's costs, if successful in this matter in any litigation, and may have to be shown to the other side and to the costs judge. In any event, the CMA will need that information to prepare costs estimates.
- 44.5. Please send electronic invoices to CMA Accounts Payable using the email address [invoices@cma.gov.uk](mailto:invoices@cma.gov.uk). In the event of a query regarding an outstanding payment you should contact CMA's Finance Team either by email to [Finance.Team@cma.gov.uk](mailto:Finance.Team@cma.gov.uk) or by telephone on 0203 738 6144/6617.
- 44.6. Frontier are to ensure that invoices are marked for the attention of [REDACTED] and include the matter reference number ([REDACTED]).

## **Termination**

- 45. The CMA can terminate this Retainer upon 14 days written notice. Such termination will not affect Frontier's entitlement to payment by the CMA of any fees which became properly payable before the date of the termination.
- 46. Upon termination, all documents and materials provided Frontier or the Expert or produced by Frontier or the Expert for the purpose of this Retainer must either be delivered promptly to the CMA or destroyed and any electronic material deleted as determined by the CMA.
- 47. Frontier can terminate this Retainer upon 30 days written notice to the CMA in circumstances where the Expert has been released by the Competition Appeal Tribunal.

## **Termination**

- 48. If any instructions under this Retainer become incompatible with the Expert's duties as an expert, or any other substantial and significant reason results in the Expert considering withdrawing from the case, Frontier are required to discuss this with the CMA and consider carefully whether it would be more appropriate for the Expert to make a written request for directions from the Competition Appeal Tribunal, during any litigation. If the Expert does withdraw, Frontier are required to give the CMA written notice.

## **Publicity**

- 49. Neither Party shall use the name, crest, logo, trademark or registered image of the other Party nor the name of any employee, member of staff or student of the other Party for any purpose without the express written permission of the other Party or individual, except that nothing in this clause shall restrict, delay, impede or prevent a Party from using the other Party's name when making statutory disclosures under FOIA or any subsequent re-enactment or modification thereof.

## **Notices**

- 50. Any notices required to be given to the CMA under this Retainer must be in writing and delivered to the addresses listed in paragraph 28 or as subsequently specified in writing.
- 51. Any notices required to be given to Frontier under this Retainer must be in writing and delivered to the addresses listed in the signature block below.

## **Non-assignment**

- 52. Neither Party may assign, delegate, sub-contract or otherwise transfer any or all of its rights and obligations under this Retainer without the prior written agreement of the other Party.

## **Force Majeure**

53. Neither Party shall be liable for any breach of its obligations under this Retainer resulting from causes beyond its reasonable control including, but not limited to, fires, strikes (excluding strikes by its own employees), floods, war, acts of God, pandemic or epidemic, catastrophic or partial failure of any part of the telecommunications or power supply network, insurrection or riots, embargoes, or regulations of any civil or military authority ("**Event of Force Majeure**").
54. Each of the Parties agrees to give notice forthwith to the other upon becoming aware of an Event of Force Majeure, the said notice to contain details of the circumstances giving rise to the Event of Force Majeure.
55. If the Event of Force Majeure shall continue for more than 30 calendar days either Party shall be entitled to immediately terminate this Retainer at any time thereafter subject to providing the other Party notice of such termination. Neither Party shall have any liability to the other in respect of the termination of this Retainer as a result of an Event of Force Majeure.

## **Dispute Resolution**

56. In the event of any difference, dispute or question, arising from this Retainer, the Parties shall endeavour to settle such matters amicably between themselves and in good faith. Should they be unable to do so within a period of 35 working days, the matter shall then be settled finally by referring it promptly to the 'Model Mediation Procedure' promoted by the Centre for Effective Dispute Resolution using Alternative Dispute Resolution techniques. Any decision reached in this way shall be final and binding upon the Parties.

## **Validity**

57. If any provision of this Retainer is held by any competent authority to be illegal, void, voidable, invalid, unenforceable or unreasonable in whole or in part it shall, to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the validity of the other provisions of this Retainer and the remainder of the provision in question shall not be affected.

## **Third Parties**

58. This Retainer does not in any way whatsoever entitle a person who is not a party to this Retainer (including, without any limitation, any employee, officer, agent, representative) to enforce or amend any term or condition of this Retainer, which expressly, or by implication, confers a benefit on him/her pursuant to the Contracts (Rights of Third Parties) Act 1999, without the prior written retainer of both Parties.

## **Entire Agreements**

59. This Retainer, including any attachments, supersedes all other agreements/retainers, understandings and representations whether written, oral,

express or implied between the Parties regarding the Expert Services and constitutes the entire agreement between the Parties concerning the Expert Services and constitutes the sole basis on which they have entered into this Retainer.

### **Jurisdiction**

60. The validity, construction and performance of this Retainer shall be governed by the laws of England and shall be subject to the exclusive jurisdiction of the courts of England to which the Parties hereby submit.

### **Conclusion**

61. Please do not hesitate to contact [REDACTED] or [REDACTED] if you would like to discuss any of the above or need any further clarification. The CMA looks forward to working with you in relation to this matter, and to receiving a signed copy of this letter by way of confirmation that Frontier and the Expert accept the terms of this Retainer.

Yours faithfully,

[REDACTED]

[REDACTED]

Please sign and date this letter and return it to indicate acceptance of the terms and undertakings set out above.

For and on behalf of Frontier  
[Name]

[Job title:]

[REDACTED]

Read and acknowledged by

[REDACTED]

Director

Date:

Date: 16 August 2022

Email address for Notices

[REDACTED]