



Department for  
Business, Energy  
& Industrial Strategy

# Reforming Competition and Consumer Policy

Driving growth and delivering competitive  
markets that work for consumers

Closing date: 1 October 2021

CP 488

July 2021





# **Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers**

Presented to Parliament  
by the Secretary of State for Business, Energy  
and Industrial Strategy  
by Command of Her Majesty

July 2021



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## General information

### **Why government is consulting**

This consultation is to seek views on a range of issues in relation to competition and consumer policy.

### **Consultation details**

**Issued:** 20 July 2021

**Respond by:** 1 October 2021

**Enquiries to:**

Consumer and Competition Policy Directorate  
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**Consultation reference:** Reforming Competition and Consumer Policy

**Audiences:**

Government is seeking views of those with knowledge and expertise in competition and consumer law and policy. This includes consumer organisations, those in

the legal profession, charitable organisations particularly where there is expertise in how to help vulnerable consumers, those in the public sphere such as public enforcers and sector regulators, and advice and resolution services like ombudsman and mediation providers. Government is also seeking views of those with a specific interest in businesses, such as trade associations and membership bodies, both relating to general business interests and specific to those markets particular to the proposals below. Government is also seeking the direct views of consumers and businesses.

### **Territorial extent:**

Consumer protection is devolved to Northern Ireland but reserved for Scotland and Wales. Consumer advice and advocacy were devolved to Scotland on 23 May 2016 by the Scotland Act 2016. Competition policy is reserved for the whole of the United Kingdom.

## How to respond

Responses and requests for meetings can be sent via electronic or hard copy using the details below.

### Respond online at:

<https://beisgovuk.citizenspace.com/ccp/reforming-competition-and-consumer-policy>

or

**Email to:** [RCCPconsultation@beis.gov.uk](mailto:RCCPconsultation@beis.gov.uk)

### Write to:

Consumer and Competition Policy Directorate  
Department for Business, Energy, and Industrial  
Strategy  
4th Floor  
1 Victoria Street  
London  
SW1H 0ET

A response form is available on the GOV.UK consultation page:

[www.gov.uk/government/consultations/reforming-competition-and-consumer-policy](http://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy)

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

## Confidentiality and data protection

Information you provide in response to this consultation, including personal information, may be disclosed in accordance with UK legislation (the Freedom of Information Act 2000, the Data Protection Act 2018, and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please tell us, but be aware that we cannot guarantee confidentiality in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not be regarded by us as a confidentiality request.

We will process your personal data in accordance with all applicable data protection laws. See our [privacy policy](#).

We will summarise all responses and publish this summary on [GOV.UK](#). The summary will include a list of names or organisations that responded, but not people's personal names, addresses or other contact details.

## Quality assurance

This consultation has been carried out in accordance with government's [consultation principles](#).

If you have any complaints about the way this consultation has been conducted, please email: [beis.bru@beis.gov.uk](mailto:beis.bru@beis.gov.uk).

## Foreword

Looking back on the past sixteen months, it is clear that this pandemic has had a more profound impact on the way business and the economy functions than



anything else in recent history. Government has had to intervene on an unprecedented scale to deliver financial support to protect businesses and jobs as well as people across the UK.

Now that our vaccination programme has helped us to end our lockdown rules, it is time to focus on building back better. Key to this will be making an economy that drives enterprise, innovation, productivity, and growth. It is clear to me that competitive, open and fair markets will be fundamental to achieving this goal: well-functioning markets encourage competition to drive down prices, offer increased choice and new products, and maintain high consumer standards. This in turn drives investment decisions, creating jobs and growing the economy. This

is why competitive free markets are a key feature of *Building Back Better: our plan for growth*.

The way consumers have shopped during the pandemic has seen a drastic change. Although we've seen a steady rise in online shopping over the past twenty years, that has seen an unprecedented increase over the past sixteen months. Businesses too have innovated in how they are selling goods, services, and digital content to consumers. These innovations are good, and we must ensure that these changes are serving consumers' best interests so everyone can benefit from innovative and productive markets.

The UK starts from a strong foundation. The UK's competition system is internationally well regarded. UK consumers benefit from a strong set of rights. When consumers' rights are breached, they have multiple routes to independently enforce their rights, and regulators to step in where needed to enforce the law on consumers' behalf.

But we should always strive to be better and go further. Markets and the way consumers and businesses engage with each other has changed dramatically since our current legislation was enacted. We need to bring

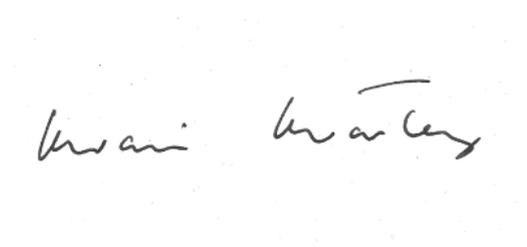
our competition and consumer policies into the 21st century and make the most of the UK's departure from the European Union to revolutionise the way we protect the British public's hard-earned money.

This consultation sets out a vision for transforming our competition and consumer policies to make it best in class. Under this new vision we will bolster the Competition and Markets Authority, enhance consumers' rights, and ensure those rights are robustly enforced. This will all work to protect consumers and help businesses, particularly start-ups, thrive.

Without an open and dynamic economy, we cannot hope to level up the country, eradicate our contribution to climate change, or build the foundations for making the UK the best place in the world to start and grow a business.

Building back better from the COVID-19 pandemic relies on the strength of our markets and consumers' faith in them. By delivering on our Manifesto commitment to give the Competition and Markets Authority enhanced powers to tackle consumer rip-offs and bad business practices, we can build back a better and fairer economy, giving businesses confidence that they're competing on fair

terms, and the public confidence they're getting a good deal.

A handwritten signature in black ink, reading "Kwasi Kwarteng", is positioned on the left side of a horizontal line. The signature is written in a cursive style.

**THE RT HON KWASI KWARTENG MP**

Secretary of State for Business, Energy and Industrial Strategy

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## Executive summary

0.1. *Building Back Better: our plan for growth* sets out a strategy focusing on three pillars of investment – infrastructure, skills, and innovation – as the foundation on which to build the UK’s economic recovery and long-term prosperity. This strategy underpins government’s commitment to unite and level up the UK. Competition and consumer policy has a central role to play in delivering this mission and creating a thriving free market economy. Competition policy is crucial in driving innovation, productivity, and growth, and creating the right conditions for healthy competition between traders in markets. Consumer policy is vital in underpinning consumer confidence so they can engage in those markets in an assured manner, knowing that they have a strong set of legal rights that will be respected and enforced. These policies work together to deliver a whole range of economic benefits because the focus of a competitive market is the consumer.

0.2. The UK starts from a strong foundation. The UK has internationally respected competition and consumer authorities. These authorities, the Competition and Markets Authority (CMA) in particular have delivered billions of pounds of benefits to consumers through generating lower prices, better products and services and a firm commitment to upholding consumer rights.

0.3. The UK cannot rest on these successes, however. A world class economy capable of delivering long term prosperity requires world class competition and consumer policies. Unfortunately, there is increasing evidence that our competition and consumer policies are failing to keep pace with the challenges of the 21<sup>st</sup> century. The leading firms in some markets have increased their market power in recent years. There is evidence both internationally from the International Monetary Fund and domestically from the CMA which shows that overall levels of competition have declined in the decades since our legislative framework was last overhauled in 1998, and further since the 2008 financial crisis.<sup>1 2</sup> The economic effects of the COVID-19 pandemic which have been felt up and down our country are likely to have compounded these challenges.

0.4. Additionally, there are markets with stubbornly high levels of consumer harm, where problems are not being resolved, and consumer satisfaction is low.<sup>3</sup> Although consumers in the UK generally trust traders to respect their rights, trust in the market system is on uncertain ground: in one survey, 53%

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<sup>1</sup> Diez F. J., Fan J., Villegas-Sánchez C., (2019). Global Declining Competition, IMF Working Paper.

<sup>2</sup> State of Competition Report 2020, Competition and Markets Authority

<sup>3</sup> According to survey data (for example EU consumer scoreboard) and also covered by the CMA's State of Competition Report (chapter 1) this is mostly concerning service markets - transport, telecoms, utilities, and property services.

of British consumers agreed with the statement that ‘capitalism does more harm than good’.<sup>4</sup> To restore public confidence in the market system, it is important to ensure that people see that competitive markets make their lives better.

- 0.5. On top of this, these challenges come at a time of significant change of the UK’s competition and consumer policy. While the UK was a member of the European Union many of the most important decisions affecting competition in UK markets were taken or influenced by the European Commission. Now the UK has full autonomy to decide how we promote competition in our markets for the benefit of our citizens. This gives our competition authorities a newfound freedom to decide what markets or conduct to investigate, and what the best outcomes are for UK markets specifically.
- 0.6. Greater autonomy brings opportunities, but it also brings additional challenges, especially for the enforcement of competition law in the UK. The CMA will now be conducting more investigations. These will not only be more strategically significant to the UK’s economy, but they are also likely to be more complex than many of the investigations previously undertaken by the CMA. So, the CMA must have the right resources, powers, and procedures to deal

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<sup>4</sup> Edelman Trust Barometer 2020

with these cases effectively and efficiently to deliver the best outcomes for the UK.

- 0.7. Government set out the ambition in *Building Back Better: our plan for growth* to make the UK's competition regime 'best in class'. These reforms seize the opportunity of the UK being able to chart its own way now that the UK has left the EU to deliver that ambition. This package of reforms will also deliver on the ambitions set out in the 2018 Consumer Green Paper, and address reforms to the CMA proposed by the then Chair, Lord Tyrie in February 2019, and by John Penrose MP in his February 2021 report.<sup>5 6</sup> This paper also sets out how government will deliver the manifesto commitment to give the CMA enhanced powers to tackle consumer rip-offs and bad business practices.<sup>7</sup>
- 0.8. The reforms in this consultation cover three areas: competition policy, consumer rights, and consumer law enforcement.

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<sup>5</sup> Andrew Tyrie, letter to BEIS Secretary of State, February 2019 [www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy](http://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy)

<sup>6</sup> John Penrose MP, Power to the people: independent report on competition policy, February 2021 [www.gov.uk/government/publications/power-to-the-people-independent-report-on-competition-policy](http://www.gov.uk/government/publications/power-to-the-people-independent-report-on-competition-policy)

<sup>7</sup> 2019 Conservative Manifesto, page 15: "We will also give the Competition and Markets Authority enhanced powers to tackle consumer rip-offs and bad business practices." [www.conservatives.com/our-plan](http://www.conservatives.com/our-plan)

0.9. A separate consultation sets out a vision for the UK's new pro-competition regime for digital markets, to tackle the unique challenges of fast-moving digital markets and the powers of the new Digital Markets Unit, already operating in non-statutory form within the CMA. The regime will aim to boost competition and innovation by tackling the sources of market power. It draws upon the 2019 Furman Review, the 2020 advice from the Digital Markets Taskforce and the 2020 CMA market study into online platforms and digital advertising markets, which highlighted the specific characteristics which make these markets susceptible to competition issues and the need for specific ex ante intervention.

## Competition policy

0.10. Competition is at the core of innovative well-functioning markets. Promoting healthy competition in markets creates the right incentives for traders to innovate to offer the best deal for consumers to win the most custom, for example by reducing barriers to entry for new firms with new ideas. This in turn drives enterprise, growth, and productivity.

0.11. The UK's internationally well-regarded competition regime seeks to keep markets competitive by:

- Preventing businesses from restricting competition.

- Screening mergers to prevent anticompetitive consolidation and maintain rivalry.
- Intervening in markets to unblock competition.
- Advising government on how its policies will affect competition.

0.12. Despite the actions that the UK has taken to promote competition, there is evidence from the CMA that competition in the economy may have weakened over the last 20 years. It is therefore essential that the competition regime does more to encourage and maintain competitive markets.

0.13. In order to secure our long-term prosperity and build back better from the pandemic, the UK needs a competition policy that delivers greater competition, innovation, and growth in UK markets. Recognising this, government has actively encouraged a debate on the upgrades required, seeking contributions from Professor Furman, Lord Tyrie in his role as Chair of the CMA, and John Penrose MP. They have argued that the regime can be slow and lacking in the powers necessary to prevent harms in the UK's 21<sup>st</sup> century economy. Alongside these formal reports there has been a vigorous debate taking place in the academic, legal, and business communities about how competition policies around the world should evolve and respond to the challenges they now face.

0.14. In response, government is proposing a package of competition policy reforms to fix the problems

identified and ensure that the UK makes the most of the opportunities presented by leaving the EU.

0.15. The first step to delivering this is a more active pro-competition strategy to deliver more targeted and effective pro-competitive interventions capable of driving new growth and innovation in key UK markets. This includes:

- Adopting the advice of John Penrose's report to use the CMA as a micro-economic sibling for the Bank of England to better monitor the state of competition in key UK markets.
- Providing the CMA with clearer and more regular steers from government to help align the UK's competition policy with *Building Back Better: our plan for growth* and wider economic policy.
- Requesting advice from the CMA on how competition law can better support the UK's transition to an environmentally sustainable and net zero economy.

0.16. However, for open, fair, and competitive markets to be created and maintained UK competition authorities must have the tools they need to deliver this. The UK needs a best-in-class competition law system fit for the 21<sup>st</sup> century and the digital age. To deliver this government is consulting on the following five-point plan to update the UK's competition regime.

## More effective market inquiries

0.17. Reforms here will provide a more efficient, flexible, and proportionate market inquiry process. The reforms proposed include:

- Changes to the structure of the market inquiry process to allow the CMA to tackle harms sooner.
- Enabling the CMA to use interim measures in market investigations, to prevent potential harm while its investigations continue.
- Greater flexibility for the CMA to define the scope of market inquiries.
- New powers to resolve competition concerns more quickly through binding commitments.
- A more versatile and effective process for remedy design.
- Greater flexibility to monitor and review remedies from previous market inquiries.

## A rebalanced merger control regime

0.18. Reforms will provide a more effective and proportionate review process. On most metrics, the UK's merger control system is working well. However, there remains room for improvement. The reforms proposed include:

- Revised turnover thresholds to help reduce the potential burden of merger control on small businesses.
- A new jurisdictional threshold to better address emerging threats to competition such as ‘killer acquisitions’ in fast-moving markets.
- Reforming the CMA’s investigative procedures to make these quicker and more efficient.

### Reforms to the CMA’s Panel

0.19. Reforms to the CMA’s Panel will deliver faster and more consistent decisions in merger and market inquiry cases. The reforms proposed include:

- A smaller, more dedicated pool of Panel members to help to speed up cases.
- A revised role for CMA Panel members to allow the CMA greater administrative flexibility in investigations.

### Stronger enforcement against unlawful anticompetitive conduct

0.20. Stronger enforcement will deliver faster and more flexible investigations which identify and

resolve unlawful anticompetitive conduct more quickly.<sup>8</sup> The reforms proposed include:

- Greater incentives for businesses and individuals to inform the CMA of unlawful anticompetitive conduct.
- Stronger interim measures to ensure the CMA can intervene to prevent harm, where this is necessary while investigations are ongoing.
- More effective processes for the CMA to conclude investigations more quickly through agreements with the business under investigation.
- Streamlining the CMA's handling of the evidence it obtains.
- Greater flexibility for the CMA in its decision making.
- Reviewing appeal procedures and standards of review.

### Stronger investigative and enforcement powers across competition tools

0.21. Reforms will deliver more consistent, efficient, and effective investigative procedures across the CMA's competition tools. The reforms proposed include:

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<sup>8</sup> The UK operates a concurrency regime for competition law enforcement with sector regulators having the power to carry out competition enforcement in the regulated sectors for which they are responsible. Unless the context indicates otherwise the proposed reforms to the CMA's competition law enforcement powers or procedures set out in this consultation would also apply to the concurrent regulators' competition law enforcement powers or procedures.

- Stronger powers to obtain information and sanction companies which refuse to cooperate or comply with the CMA's investigations and remedies.
- Stronger powers to facilitate more effective cooperation and collaboration between the UK's competition authorities and their international counterparts.

## Consumer rights

- 0.22. Consumer rights play an essential part in fair, free and competitive markets, providing consumers with the confidence to choose how and where they spend. Fair treatment of consumers must give traders a commercial advantage and those who misbehave must not undermine the commercial success of those who abide by the law. Now, in the wake of the pandemic, it is especially right to consider opportunities for strengthening consumer rights, where consumer confidence will be critical to the revival of markets. No one should feel they are being left behind or excluded from the benefits of economic recovery. Consumer protection legislation plays a crucial role in ensuring that competition and markets work for everyone.
- 0.23. Markets are continually changing and adapting to new opportunities. These changes bring myriad benefits to consumers in the form of better, more valuable services, and to businesses in the form of growth and higher profits rewarding their innovation.

Building on the UK's strong track record of consumer rights must, therefore, be balanced with proportionate requirements for businesses, particularly SMEs. Consumer rights must keep pace with market innovations, so that consumers remain confident engaging with businesses offering new products and services, and markets must retain the flexibility to continue developing and meeting consumers' evolving needs.

0.24. Government has identified two main developments where there is an opportunity to update consumer rights:

- **The rise of online shopping, accelerated by the pandemic:** There has been a stark increase in online shopping during the pandemic.<sup>9</sup> Websites are increasing the collection and use of consumer data, and some are using this insight unfairly to exploit consumers' behavioural biases, forcing them into purchases they would not have otherwise made – for instance by presenting options in a way that leads consumers to make choices to their potential detriment. Fake reviews are also rife online. This

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<sup>9</sup> Amazon reported that their online sales grew by 45% in 2020, their highest growth in 12 years. [www.statista.com/statistics/1035592/net-sales-amazon-united-kingdom-uk/](https://www.statista.com/statistics/1035592/net-sales-amazon-united-kingdom-uk/)

has been a subject of a series of investigations by Which? and by the CMA.<sup>10 11</sup>

- **An increase in subscription contracts:** Estimated consumer spending on subscriptions is between £28 billion and £34 billion a year across multiple sectors. While subscriptions can be convenient and low-cost way to purchase goods, services, and digital content for consumers, they are not without issues. For example, some traders make it too difficult for consumers to cancel a subscription. This can cause ongoing detriment because such subscriptions can auto-renew, sometimes indefinitely, for goods, services, or digital content that a consumer does not need or want.

0.25. Government is proposing a series of updates to consumer rights to keep pace with these developments.

### Tackling subscription traps

- Tackling subscription traps by strengthening and clarifying the law on pre-contract information so that consumers know what they are signing up for and are given a choice on auto-renewal; nudging consumers so they are aware of ongoing

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<sup>10</sup> [www.which.co.uk/news/tag/fake-reviews/](http://www.which.co.uk/news/tag/fake-reviews/)

<sup>11</sup> [www.gov.uk/government/news/cma-to-investigate-amazon-and-google-over-fake-reviews](http://www.gov.uk/government/news/cma-to-investigate-amazon-and-google-over-fake-reviews)

[www.gov.uk/government/news/facebook-and-ebay-pledge-to-combat-trading-in-fake-reviews](http://www.gov.uk/government/news/facebook-and-ebay-pledge-to-combat-trading-in-fake-reviews)

subscriptions; and making it easier for consumers to exit subscriptions.

### Preventing online exploitation of consumers

- Strengthening the law to better prevent posting of fake reviews online.
- Championing ‘fairness by design’ principles in how online transactions are presented.

### Better prepayment protections

- Strengthening prepayment protections for consumers by amending the law to mandate that consumer prepayment schemes like Christmas savings clubs have means to safeguard customers’ money e.g., through insurance or trust accounts.

## Consumer Law enforcement

0.26. For consumer rights to have an impact on and improve the function of markets, traders must comply with the law and consumers must have confidence that their rights will be respected. To achieve this, traders must have sufficient understanding of the law that they do not accidentally breach the law in a way that harms consumers, and consumers must have the confidence to engage. Consumers and traders must be empowered to resolve disputes between themselves, and state enforcers must have the right

powers to step in where consumers and traders cannot resolve disputes.

- 0.27. The majority of consumer transactions do not involve any dispute between a trader and a consumer caused by a breach of the law. Where these do arise, either can, in general, bring the dispute before a court for resolution. If this is seen as an unattractive option, there are Alternative Dispute Resolution services like mediation and ombudsman services frequently on offer that provide an easier, lower cost alternative to the courts.
- 0.28. Where traders engage in actual or likely breaches of certain consumer protection laws, which harm the collective interests of consumers, the CMA and certain other public enforcers and regulators can bring court proceedings to prevent or stop the breach and obtain redress for consumers.
- 0.29. Where a trader has committed a criminal breach of the law affecting the collective interests of consumers, those with the power to investigate and enforce the law include local authority trading standards services who generally take a lead on consumer matters. They generally act independently for issues in their local areas and receive support and coordination from National Trading Standards and Trading Standards Scotland where cases are large and complex. In Scotland, prosecutions are conducted by the Crown Office

and Procurator Fiscal Office on behalf of the Lord Advocate.

0.30. This system generally works and has delivered significant benefits. However, there are remaining weaknesses which are undermining consumer confidence and exposing traders to unfair competition:

- The CMA and the economic regulators do not have the powers to act quickly and decisively to seek solutions to aid the collective interests of consumer in markets, and there are only weak sanctions available to them to deter breaches of the law.
- The provision and quality of alternative dispute resolution services is patchy and inconsistent, so not enough consumers and traders can benefit.
- Local authority trading standards services could be better supported to act on behalf of consumers in their local areas and beyond.
- Despite traders already having access to relevant guidance and advice on their responsibilities, there may be scope for improving the delivery of guidance to better meet traders' needs.

0.31. Government is proposing a package of reforms to the enforcement of consumer law to address these issues.

## Stronger enforcement powers for enforcers

- Allowing the CMA to decide for itself where consumer law has been breached, which is an approach mirroring their abilities in competition law enforcement. Government is seeking views on the scope, decision-making process, and appeals process of this system, including appropriate safeguards to traders.
- Testing the case for extending these powers and abilities to economic regulators.
- Fines of up to 10% of global turnover for traders that breach consumer protection law.
- Sanctions for traders that seek to frustrate, delay, or otherwise not comply with the enforcement process including flouting information gathering powers and breaching undertakings.

## Supporting consumers and traders to resolve more disputes independently

- Providing more support to consumers in individual disputes with traders by improving consumers' access to arbitration and mediation services, thus avoiding the need to go to court. This includes a proposal to make arbitration/mediation compulsory in the used car and home improvement sectors where consumer detriment is relatively high.
- Improving the quality and oversight of alternative dispute resolution services.
- Improving consumer awareness and signposting.

- Seeking views on making it easier for consumers to band together to seek redress collectively from traders.

### Supporting local authority trading standards services tackling rogue traders

- How national and local enforcement can work together to tackle national scams.

### Giving businesses the right support to comply with consumer protection law

- Seeking views on whether the current business education offer meets businesses' needs and how it can be improved.

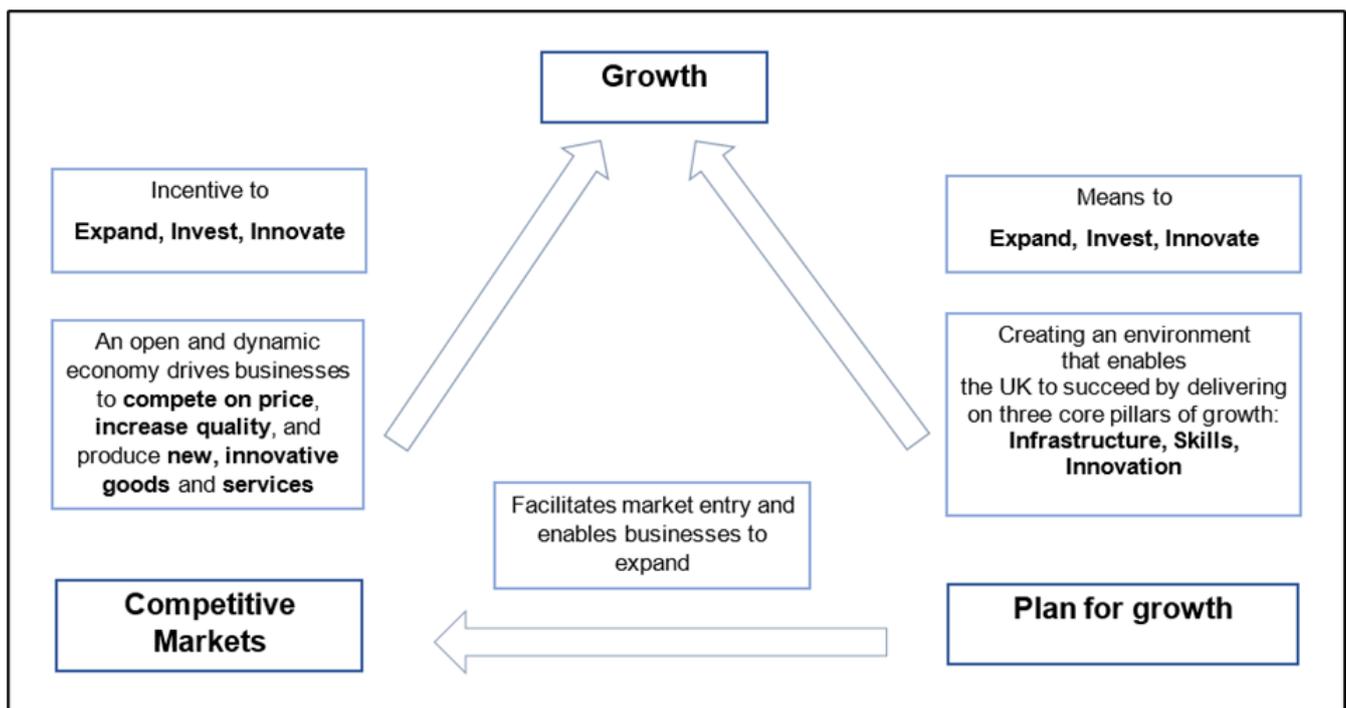
## Chapter 1: Competition policy

- 1.1. Fair and open competition is the bedrock of the UK economy. The competitive process creates incentives for firms to deliver the deals on goods and services that consumers want and need and to innovate to create new goods and services to win market share from rivals.
- 1.2. We have progressively developed and improved our competition policy over the last 50 years. In the 1980s our privatisation programme led to the creation of independent regulators across many key markets increasing competition and delivering better outcomes for consumers. The UK has become a world-leader in opening up markets to competition and establishing a regime that tackles anti-competitive behaviour and creates a level playing field between consumers and firms.
- 1.3. This year the UK's competition policy entered a new phase. While the UK was a member of the European Union many of the most important decisions affecting competition in UK markets were taken or influenced by the European Commission. Now the UK has full autonomy to decide how to promote competition in markets for the benefit of UK citizens. This gives UK competition authorities a newfound freedom to decide what markets or conduct to investigate, and what the best outcomes are for UK markets specifically.

- 1.4. For all the opportunities the UK's exit from the European Union brings, it also comes with challenges. The CMA will now be conducting more investigations. For example, the CMA has estimated that it expects the number of mergers it is required to investigate to increase by up to 50%. Many of these new investigations will not only be more strategically significant to the UK's economy, but they are also likely to be more complex than many of the investigations previously undertaken by the CMA and involve a greater degree of cooperation with the CMA's international counterparts. It is imperative that our competition authorities have the right resources, powers, and procedures to be able to deal with these cases effectively and efficiently in order to deliver the best outcomes for the UK.
- 1.5. Having to manage larger and more complex investigations is not the only challenge facing the UK's competition authorities. Greater autonomy over our competition policy also means a greater responsibility for ensuring that competition in the UK's markets is benefiting UK consumers and supporting the UK's long-term prosperity.
- 1.6. *Building Back Better: our plan for growth* sets out a strategy focusing on three pillars of investment – infrastructure, skills, and innovation – as the foundation on which to build the UK's economic recovery. This strategy is central to delivering the people's priorities: levelling up the whole of the UK,

supporting our transition to net zero, and supporting our vision for Global Britain. Delivering this strategy requires markets that support and encourage innovation and investment. Competition policy cannot deliver these changes alone, but it has a central role in promoting a sustainable, dynamic, and innovation-led economy.

**Figure 1: How *Building Back Better: our plan for growth* and competition policy complement each other**



1.7. The UK needs a commercial and regulatory environment that supports businesses to innovate, grow and compete on their merits. Unfortunately, there is growing evidence, including the CMA's own State of Competition report, that competition in the

UK may have weakened over the last 20 years.<sup>12 13</sup> There appears to be an overall trend towards less competitive, more concentrated markets. The global financial crisis accelerated this trend and the COVID-19 pandemic is likely to have compounded these challenges. There remains a public perception that our competition law can be slow and unresponsive to the needs of businesses and consumers. It is becoming increasingly clear that business as usual is not delivering the open, dynamic, and sustainable economy the UK needs to drive the UK's longer-term prosperity.

**1.8. The first step to delivering this is a more active pro-competition strategy** to deliver more targeted and effective pro-competitive interventions capable of driving new growth and innovation in key UK markets. This includes:

- Adopting the advice of John Penrose's report to use the CMA as a micro-economic sibling for the Bank of England to better monitor the state of competition in key UK markets.
- Providing the CMA with clearer and more regular steers about government's economic priorities. Clearer strategic steers will help ensure that competition policy can be used to best support the UK's plan for growth and wider economic policy.

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<sup>12</sup> See the evidence cited in paragraphs 1.1.23 to 1.1.29 below.

<sup>13</sup> [November 2020 State of UK Competition Report.](#)

- Requesting advice from the CMA on how competition law can better support the UK's transition to an environmentally sustainable and net zero economy.

**1.9. To be truly effective, government's ambition for a revised competition policy needs to be matched by reforms to our competition authorities' powers and procedures.** Independent reviews including the National Audit Office's review of the UK's competition system, the Furman review, John Penrose's report, stakeholder feedback, and the CMA's own recommendations have all suggested the UK's current policy framework and enforcement regime needs updating.<sup>14 15 16 17</sup> We are working from a strong foundation, but the UK's competition law has not kept pace with the challenges of the modern UK economy, including the revolution in digital markets.

**1.10. If we want open, fair, and competitive markets we need to ensure that our competition authorities have the tools they need to deliver this.** The UK needs a best-in-class competition law system fit for the 21<sup>st</sup> century and the digital age. To deliver this government is consulting on the

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<sup>14</sup> The National Audit Office's February 2016 report: ['the UK Competition Regime'](#)

<sup>15</sup> The Digital Competition Expert Panel's March 2019 report: ['Unlocking digital competition'](#);

<sup>16</sup> John Penrose MP's February 2021 independent report: ['Power to the people'](#).

<sup>17</sup> [Letter from the former chair of the CMA Lord Tyrie to the Secretary of State for Business, Energy and Industrial Strategy dated 25 February 2019.](#)

following five-point plan to reform the UK's competition policy.

### **More effective market inquiries**

1.11. Reforms here will provide a more efficient, flexible, and proportionate market inquiry process. The reforms proposed include:

- Changes to the structure of the market inquiry process to allow the CMA to tackle harms sooner.
- Enabling the CMA to use interim measures in market investigations, to prevent potential harm while its investigations continue.
- Greater flexibility for the CMA to define the scope of market inquiries.
- New powers to resolve competition concerns more quickly through binding commitments.
- A more versatile and effective process for remedy design.
- Greater flexibility to monitor and review of remedies from previous market inquiries.

## **A rebalanced merger control regime**

1.12. Reforms will provide a more effective and proportionate review process. On most metrics, UK's merger control system is working well. However, there remains room for improvement. The reforms proposed include:

- Revised turnover thresholds to help reduce the potential burden of merger control on small businesses.
- A new jurisdictional threshold to better address emerging threats to competition such as 'killer acquisitions' in fast-moving markets.
- Reforming the CMA's investigative procedures to make these quicker and more efficient.

## **Reforms to the CMA's Panel**

1.13. Reforms to the CMA's Panel will deliver faster and more consistent decisions in merger and market inquiry cases. The reforms proposed include:

- A smaller, more dedicated pool of Panel members to help to speed up cases.
- A revised role for CMA Panel members to allow the CMA greater administrative flexibility in investigations.

## **Stronger enforcement against unlawful anticompetitive conduct**

1.14. Stronger enforcement will deliver faster and more flexible investigations which identify and resolve unlawful anticompetitive conduct more quickly.<sup>18</sup> The reforms proposed include:

- Greater incentives for businesses and individuals to inform the CMA of unlawful anticompetitive conduct.
- Stronger interim measures to ensure the CMA can intervene to prevent harm, where this is necessary while investigations are ongoing.
- More effective processes for the CMA to conclude investigations more quickly through agreements with the business under investigation.
- Streamlining the CMA's handling of the evidence it obtains.
- Greater flexibility for the CMA in its decision making.
- Reviewing appeal procedures and standards of review.

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<sup>18</sup> The UK operates a concurrency regime for competition law enforcement with sector regulators having the power to carry out competition enforcement in the regulated sectors they are responsible for. Unless the context indicates otherwise the proposed reforms to the CMA's competition law enforcement powers or procedures set out in this consultation would also apply to the concurrent regulators' competition law enforcement powers or procedures.

## **Stronger investigative and enforcement powers across competition tools**

- 1.15. Reforms will deliver more consistent, efficient, and effective investigative procedures across the CMA's competition tools. The reforms proposed include:
- Stronger powers to obtain information and sanction companies which refuse to cooperate or comply with the CMA's investigations and remedies.
  - Stronger powers to facilitate more effective cooperation and collaboration between the UK's competition authorities and their international counterparts.
- 1.16. **These reforms complement government's proposed pro-competition regime for digital markets**, which is being set up to tackle the unique challenges of fast-moving digital markets. While digital markets vary considerably, some share a combination of characteristics (such as network effects, the importance of ecosystems and unequal access to data) which can cause the market to 'tip' in favour of one, or a few, firms. This can be difficult to reverse and may result in poor outcomes.
- 1.17. The proposed pro-competition regime will be implemented by the Digital Markets Unit within the CMA. It will address the unique challenges of these markets by making clear how firms with significant

and far-reaching market power are expected to behave and addressing the sources of market power to open up markets to greater competition. The Digital Markets Unit will be responsible for:

- Identifying which key digital firms will fall within scope of the new regime.
- Overseeing a mandatory code of conduct for those firms, which sets out how they are expected to behave.
- Implementing pro-competitive interventions, to open up markets to greater competition.

1.18. The CMA's experience operating the UK's competition law over the last seven years has also highlighted a small number of other technical improvements which could be made to the UK's competition law system. Government believes these improvements would increase the effectiveness and consistency of the UK's competition law system, in part by remedying some of the inconsistencies that have developed through previous reforms. **Further details of these reforms can be found at the end of this chapter.**

# The UK's competition law and the state of competition

## The UK's competition law regime

- 1.19. Promoting competition has long been an important part of the UK's economic policy. Competition policy in the UK developed from a series of Acts passed in the decades following the Second World War which introduced bans against collusive agreements, developed a system for reviewing and preventing mergers that could reduce competition, and established independent institutions responsible for enforcing the rules.<sup>19</sup>
- 1.20. The promotion of competition accelerated during the 1980s and 1990s, when the UK government used the privatisation of a number of previously state-owned monopolies as a tool to promote better competition in key markets. Subsequent governments further developed the competition regime, with a significant set of reforms occurring in 2014 through the Enterprise and Regulatory Reform Act 2013 (ERRA) which created the CMA from its

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<sup>19</sup> Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, Restrictive Trade Practices Act 1956, Fair Trading Act 1973. The Monopolies Commission, later to become Monopolies and Mergers Commission, and Office of Fair Trading.

predecessor institutions, the Office of Fair Trading and the Competition Commission.<sup>20</sup>

1.21. The UK's competition law is formed of three pillars:

- **Prohibitions on unlawful anticompetitive conduct** which prohibit companies from colluding or exploiting their established market power instead of fairly competing for customers.
- **Market inquiries** (comprising market studies and market investigations) which allow the CMA to investigate potential barriers to competition, growth and innovation in poor performing markets and, if necessary, impose binding orders to promote or restore competition in those markets or remedy the harms caused to consumers by the problems identified.
- **Merger control** which helps to keep the UK's markets dynamic and competitive by allowing the CMA to investigate and, if necessary, block mergers and acquisitions which have the potential to substantially lessen competition in UK markets.

1.22. The UK's competition law and competition authorities are well regarded internationally.<sup>21</sup>

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<sup>20</sup> Government published a review of this change as presented to Parliament in July 2019: '[Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013](#)'.

<sup>21</sup> For example, the CMA was recently awarded the GCR Award for Government Agency of the Year 2021 and in 2018 it was awarded the GCR Award for Enforcement Agency of the Year (Europe), in recognition of its work across various tools.

Government has set the CMA a target to deliver at least £10 of consumer benefit for every £1 of taxpayer funding it receives, and the CMA has met or exceeded this target.<sup>22</sup> The CMA has also been successful in establishing itself internationally as a thought leader on competition, in particular in the areas of digital markets regulation and merger policy.<sup>23</sup> Since the creation of the CMA in 2014 the UK's competition regime has become notably more efficient, delivering more cases more quickly.<sup>24</sup> Despite the UK's competition regime being well-regarded internationally, the section below sets out the growing evidence that competition in the UK may have weakened over the last 20 years. It is therefore essential that the system is equipped and enabled regime to do more to encourage and maintain competitive markets.

## Competition in the UK today

### **Market power and the state of competition in the UK**

1.23. Last year, the CMA produced a report into the state of UK competition.<sup>25</sup> This summarised and built on a body of academic research undertaken in

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<sup>22</sup> As part of the CMA's [performance framework agreement](#) with BEIS, the CMA is required to report annually on its performance against this target in its [impact assessment](#).

<sup>23</sup> See, for example, [the CMA's Digital Comparison Tools Market Study](#), [Digital Advertising Market Study](#) and [the Digital Market Taskforce's advice](#) and the CMA's new [merger assessment guidelines](#).

<sup>24</sup> Government's July 2019 '[Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013](#)'.

<sup>25</sup> Competition and Markets Authority (2020). [The State of UK Competition](#).

recent years which have found evidence of a potential increase in market power and a decline in the health of competition in UK markets over the past two decades.<sup>26</sup> This evidence builds on already widely publicised concerns around the state of competition in specific sectors such as digital markets.

1.24. The CMA examined market concentration between 1998 and 2018, and found that, at industry level, concentration rose across the economy following the financial crisis in 2008. While concentration decreased after 2010, it remained higher in 2018 than before the crisis. In 2018, the average combined market share of the ten largest firms in an industry remained 3% higher than in 1998.<sup>27</sup>

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<sup>26</sup> Market power is typically described as the ability for a supplier to profitably raise and maintain prices above the competitive level. More broadly, market power can describe the ability for a firm to influence the conditions in a market (such as restrict output or degrade quality) to increase its own profit at the detriment of other market participants. This situation typically arises where a firm does not face effective competitive pressure, such that the risk of losing market share to rivals as a result of its actions is low. Without competitive pressure, the incentives to innovate, increase productive efficiency, improve the quality of products or services, and offer competitive prices are weaker than they would be in a market with more competitors (or with greater threat of entry by new competitors). A firm with market power might also have the ability and incentive to actively harm the process of competition in other ways; for example, by excluding competitors, raising entry barriers, or deliberately slowing innovation.

<sup>27</sup> Market concentration refers to the extent to which market share is held by a small number of firms. This is typically measured in terms of revenue or sales. A market where a small number of firms account for a large share of the overall market is regarded as more concentrated than a market where market share is dispersed more evenly among a larger number of firms.

1.25. The CMA's results were similar to those seen in other studies. Corfe & Gicheva (2017) found high or moderate levels of market concentration among certain important consumer-facing markets in the UK: fixed-line and mobile phone contracts, broadband, gas, groceries, personal current accounts, electricity and credit cards.<sup>28</sup> Bell & Tomlinson (2018) found broad increases in concentration across sectors of the UK economy between 2003 and 2016, particularly in the years immediately following the financial crisis, partly due to relative growth of high-concentration sectors compared to others.<sup>29</sup> Data analysis produced by BEIS in 2020 also suggested an increase in concentration during the years following the financial crisis, although without a marked overall upward trend over 2006 to 2018.<sup>30 31 32</sup>

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<sup>28</sup> Defined through the Herfindhal-Hirschmann index (calculated by summing the squared market shares of the relevant group of firms): a score of between 1,000 and 2,000 being 'moderately concentrated' and a score in excess of 2,000 being 'highly concentrated'.

<sup>29</sup> Corfe, S., & Gicheva, N. (2017). Concentration not competition: the state of UK consumer markets. The Social Market Foundation.

<sup>30</sup> Bell, T., & Tomlinson, D. (2018). Is everybody concentrating? Recent trends in product and labour market concentration in the UK. Briefing, Resolution Foundation.

<sup>31</sup> Department for Business, Energy and Industrial Strategy (2020) Annex 2 – Existing competition indicators. State of Competition: letter from the Chancellor of the Exchequer and the Secretary of State for Business, Energy and Industrial Strategy to Andrea Coscelli, CMA.

<sup>32</sup> Concerns around levels of concentration and market power in digital markets are also considered as part of government's separate consultation in relation to a new pro-competition regime for digital markets.

- 1.26. The CMA also analysed market power by measuring trends in ‘mark-ups’, finding that the average mark-up for large UK companies rose from 1.22 to 1.31 over the last two decades, an increase of 7%.<sup>33</sup> Other academic studies used different underlying company data and found different mark-up levels but similar upward trends. Aquilante et al (2019) found a rise in average mark-ups from 1.23 in 1987 to 1.55 in 2017, an increase of 26% over 30 years.<sup>34</sup> Both the CMA and Aquilante et al (2019) found the increase in mark-ups to be pronounced amongst firms with the highest mark-ups: those at the top were pulling further ahead of the rest.
- 1.27. Looking at trends over a longer period, De Loecker and Eeckhout (2018) found average mark-ups amongst the firms for which data was available in the UK to have risen from 0.94 in 1980 to 1.68 in 2016, an increase of nearly 80% over 36 years.<sup>35</sup>
- 1.28. These UK-focused studies sit within a body of evidence of declining competition and increasing market power in the US (Council of Economic Advisers 2016, Grullon et al. 2019, De Loecker, Eeckhout & Unger 2020), and other countries (De

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<sup>33</sup> A mark-up is the ratio of a firm’s selling price to its marginal cost of production. A mark-up of 1 means the firm’s selling price equals its marginal cost; a mark-up of 1.5 means the firm sells at a price 50% higher than its marginal cost.

<sup>34</sup> Aquilante, T. et al. (2019), Market Power and Monetary Policy. Bank of England Staff Working Paper No. 798.

<sup>35</sup> De Loecker, J., & Eeckhout, J. (2018). Global market power (No. w24768). National Bureau of Economic Research.

Loecker & Eeckhout 2018, Diez et al. 2019, Akcigit et al 2021).<sup>36 37 38 39 40</sup>

## Implications of an increase in market power

1.29. Increases in market power have a number of potential negative implications for the wider economy. Relative to a competitive situation, market power allows firms to raise prices and decrease output. An obvious impact is an increase in prices faced by consumers: the estimates of higher mark-ups in De Loecker and Eeckhout (2018) implied an annual impact on price inflation of 1.6%.<sup>41</sup> A reduction in production output would lead to a simple reduction in GDP growth even in the absence of change to the production function, but some recent academic evidence suggests that this has been compounded by market power reducing business investment, with implications for reduced productivity (Furman 2016, De Loecker and

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<sup>36</sup> Council of Economic Advisers (2016) Benefits of Competition and Indicators of Market Power Issue brief, April 2016.

<sup>37</sup> Grullon, G., Larkin, Y., & Michaely, R. (2019). Are US industries becoming more concentrated? *Review of Finance*, 23(4), 697-743.

<sup>38</sup> De Loecker, J., Eeckhout, J., & Unger, G. (2020). The rise of market power and the macroeconomic implications. *The Quarterly Journal of Economics*, 135(2), 561-644.

<sup>39</sup> Diez, F. et al. (2019) Global declining competition IMF Working Paper WP/19/82.

<sup>40</sup> Akcigit, U., Chen, M. W., Diez, M. F. J., Duval, M. R. A., Engler, P., Fan, J., ... & Villegas-Sánchez, C. (2021). Rising Corporate Market Power: Emerging Policy Issues. International Monetary Fund.

<sup>41</sup> Bank of England calculations in Aquilante et al (2019).

Eeckhout 2017).<sup>42 43</sup> The increase in market power has also been suggested as a factor driving the fall in the share of income going to workers and thus potentially leading to stagnant wage growth (Autor et al 2019, Barkai 2020).<sup>44 45</sup>

## A new pro-competition strategy for the UK

1.30. It is important that the UK's competition policy takes full advantage of the potential of government to make markets more open and competitive. How countries should shape their competition policy has become a matter of debate around the world. **The UK remains committed to creating an economic environment where great UK businesses are able to compete fairly on their own merits, and where the UK is the best place to start and grow a business.**

1.31. *Building Back Better: our plan for growth* recognises that the UK's economic recovery must

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<sup>42</sup> Furman, J. (2016) Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth speech to Searle Center Conference on Antitrust Economics and Competition Policy.

<sup>43</sup> De Loecker, J., & Eeckhout, J. (2017). The rise of market power and the macroeconomic implications. (No. w23687). National Bureau of Economic Research.

<sup>44</sup> Autor, D., Dorn, D., Katz, L. F., Patterson, C., & Van Reenen, J. CEP Discussion Paper No 1482 Revised May 2019 (Replaces May 2017 version) The Fall of the Labor Share and the Rise of Superstar Firms.

<sup>45</sup> Barkai, S. (2020). Declining labor and capital shares. The Journal of Finance, 75(5), 2421-2463.

ensure the benefits of growth are spread to all corners of the UK, driving growth that delivers real positive benefits for the UK's citizens and businesses. *Building Back Better: our plan for growth* set out three key priorities; **Levelling Up, Net Zero and Global Britain**. Competition policy has a role to play in supporting the delivery of all of these objectives:

- **Levelling Up:** Government's most important mission is to unite and level up the country, improving everyday life for communities throughout the UK. To deliver this **it is important that the UK promotes competition that benefits UK consumers**. This is central to the CMA's mandate and must remain a cornerstone of the UK's competition policy. The UK's consumer protection legislation also plays a crucial role in ensuring that competition and markets in the UK work for consumers. These rules set the boundaries for fair business practices. Consumer protection laws help to ensure that consumers receive high quality products and services, and that companies are not undercut by rogue traders. Government is proposing a number of reforms to the UK's consumer protection laws and enforcement which are set out in the following chapters.
- **Net zero:** The UK will continue to be at the forefront of tackling climate change and is already a world leader in clean growth. Reaching our upcoming carbon budgets and net zero target will require

significant investment and is a major opportunity for economic growth across the country. Competition alone cannot deliver the changes needed to address the challenges posed by climate change, but effective competitive markets can support this. Government believes that there is more that the UK's competition policy can do to help deliver the UK's net zero commitments and support government's Ten Point Plan for a Green Industrial Revolution. Government is **requesting that the CMA prepare advice for government on how competition and consumer law can better support the UK's transition to an environmentally sustainable and net zero economy**. This advice should build upon the CMA's recently published sustainability guidelines and consider whether changes are required to the UK's competition laws to support the successful delivery of this objective.<sup>46</sup>

- **Global Britain:** The UK's prosperity is built on our integration into the global economic and financial system. Following our exit from the EU, we can also take advantage of the opportunities that come with our new status as a fully sovereign trading nation. The UK is a role model for free and fair trade and our competition policy plays an important role in this. Just as the UK supports free and open markets here at home, we expect UK businesses to be given

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<sup>46</sup> Competition and Markets Authority (2021), '[Environmental sustainability agreements and competition law](#)'.

the freedom to compete fairly in other national markets. **Government is committed to promoting open and fair competition globally to ensure the best opportunities for UK businesses and consumers.** Effective international cooperation on matters of competition policy forms an important part of this work and government intends to strengthen the CMA's legal powers to better facilitate cooperation with its international counterparts. Further details of these proposals are set out below.

### A more active role for government in setting the strategic direction for the UK's competition policy

- 1.32. In recent decades competition policy has been driven by a move away from political interventions towards decisions by impartial, independent regulators. Independent, evidence-based decision making remains crucial to effective competition policy. **However, to deliver *Building Back Better: our plan for growth* properly and support the UK's economic recovery government recognises that it is important that it uses all the tools available to it.**
- 1.33. Competition, innovation, and investment are mutually reinforcing and drive the UK's economy. Open and competitive markets provide both the opportunity, and the incentive, for businesses to innovate and invest. *Building Back Better: our plan*

*for growth* sets out how government intends to deliver an open and dynamic economic environment for UK businesses. Effective regulation by government has a critical role to play in this and government is clear in its commitment to better regulation. For example, government is publishing the Innovation Strategy which will outline our vision for the UK to become the world's most innovative and R&D focussed economy – placing innovation at the centre of everything our nation does. This includes ensuring the UK maintains world-class rules, regulations, and frameworks to be capable of effectively supporting innovation in the UK. This strategy will build on existing tools such as competition impact assessments that have been prepared by the CMA to help government consider how new regulations will impact competition in markets.<sup>47</sup>

1.34. The CMA's oversight of competition in UK markets gives it a unique and valuable insight into the state of the UK's economy. It therefore has an important role advising government on the potential impacts of new laws and regulations on competition in UK markets. Government wants to build on the work of the CMA to date and entrench the CMA's role as an independent, trusted advisor. In this regard government reaffirms its existing

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<sup>47</sup> [CMA Competition Impact Assessment: Guidelines for Policymakers](#). Following a review of the relationship between regulation and competition, the CMA is in the process of updating these guidelines.

commitment to respond to the recommendations made by the CMA in the context of its market study and market investigation reports within 90 days.

- 1.35. To be truly effective, however, government's regulatory and economic policy needs to be supported by strong and effective competition law that is enforced by independent regulators but responds to the strategic needs of the UK's economy. The following sections set out government's proposals to deliver this.

### **State of Competition reports**

- 1.36. An effective competition policy must be evidence driven. John Penrose's report recommended that the CMA should act as a micro-economic sibling to the Bank of England's well-established public macroeconomic role. More specifically, John Penrose's report recommended that the CMA should publish regular reports on the state of competition in the UK which measures and analyses progress and problems across all sectors of the economy, and all parts of the country.
- 1.37. Government commissioned the first such report in early 2020. Government agrees with the recommendation from John Penrose's report that **the CMA should now produce regular 'State of Competition' reports which assess the strength of competition in the UK economy.** These reports should provide government with better evidence to

inform government's overall competition policy and help shape any future action by government and the CMA.

- 1.38. To ensure that the CMA is not restricted in accessing relevant and accurate information that could support the production of these reports, government proposes that **the CMA should have a new power to obtain the information it needs for the specific purpose of preparing its State of Competition reports.** This would allow the CMA to gather information that may fall out of scope of its existing evidence-gathering powers.
- 1.39. Government is currently working with the CMA to develop the terms of reference for future State of Competition reports. To inform this work government is **seeking views on the metrics and indicators the CMA and government should use to best understand the state of competition in the UK.**
- 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?**
- 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?**

## **A new approach to government's strategic steer to the CMA**

- 1.40. The CMA has always been an important public authority with wide ranging powers and duties. However, with the UK's exit from the EU, the CMA has an enlarged role in maintaining competition in the economy, making it even more important that the CMA is using its powers and tools to best effect.
- 1.41. Government has traditionally provided the CMA with a high level, 'strategic steer' issued by the Secretary of State for Business, Energy and Industrial Strategy. These steers have been issued once a Parliament and set out government's expectations and priorities for the CMA's role in the UK's competition policy. The CMA takes account of the strategic steer when assessing the strategic significance of its work in accordance with the CMA's published prioritisation principles.
- 1.42. **Government is seeking views on the merits of a more active approach to setting the CMA's strategic steer going forward.** This could include:
- Making the existing strategic steer more regular, updating it as and when required to ensure the steer remains current and relevant to the issues facing the UK (rather than just once a Parliament).
  - Providing the CMA with greater clarity about which sectors of the economy should be strategic priorities for the CMA's investigations.

- Providing greater clarity about government's priorities and expectations, which may include setting out specific metrics against which government will measure the state of competition in the economy and the CMA's performance.
- Asking the CMA to set out more clearly in its annual plan and annual report how it is responding to the strategic steer and any problems with competition identified in its State of Competition reports.

**1.43. Government proposes to consult on the detail of a revised strategic steer for the CMA later this year following our review of the responses to this consultation.**

1.44. Government proposes that the strategic steer would remain non-binding so it would still be open to the CMA to depart from government's steer if it believed it appropriate to do so. Government would, however, expect the CMA to explain the reasons for this. The CMA would also remain able to set its own operational priorities outside of the areas covered by the strategic steer where it considered it appropriate to do so.

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

## **More effective market inquiries**

1.45. Market studies and market investigations (collectively 'market inquiries') are the CMA's most

powerful tools for promoting competition in UK markets. Unlike the enforcement of competition law, market inquiries are not limited to investigating potentially unlawful conduct. Market inquiries allow the CMA to consider wider competitive conditions in UK markets including barriers to competition such as customer behaviour, market structure and the impact of regulations. Market inquiries allow the CMA to conduct an in-depth analysis of how a market is working, publish its conclusions and, in the case of market investigations, propose regulatory remedies to address the harms identified.

- 1.46. Market inquiries can contribute to the UK being the best place to start and grow a business and ensure the interests of UK citizens are being protected by opening up markets to greater competition. The ability of the CMA to use market inquiries to investigate and remedy barriers to competition, growth and innovation is especially important in the light of the growing evidence that UK markets are becoming more concentrated and less competitive.

### **Figure 2: CMA's markets work**

#### **Market studies and market investigations**

A **market study** is designed to be a flexible tool to allow the CMA to explore problems in a market. A market study can last up to 12 months. A market study looks at whether a market 'has or may have

effects adverse to the interests of consumers'<sup>1</sup> and considers what steps might be taken to remedy such effects. A market study can result in non-binding recommendations, guidance to businesses or consumers, the opening of a market investigation, or the acceptance of 'undertakings in lieu' of a market investigation reference. It could also result in the CMA taking competition or consumer enforcement action.

**A market investigation** is an in-depth investigation which can result in structural or behavioural remedies being imposed to fix competition problems in a market. A market investigation is carried out by an independent inquiry group of CMA Panel members and can last up to 24 months. A market investigation can be launched if it is suspected that features of the market are causing an 'adverse effect on competition'.<sup>2</sup> A market investigation reference can be made without having first conducted a market study, but this is uncommon. Market investigation references can also be made by sector regulators and, under certain limited circumstances, the Secretary of State.

<sup>1</sup> See s.130A Enterprise Act 2002, and see also page 10 of '[Market studies and market investigations: Supplemental guidance on the CMA's approach](#)'.

<sup>2</sup> See s.131A Enterprise Act 2002, and see also paragraphs 18 to 20 of the revised '[Guidelines for market investigations: Their role, procedures, assessment and remedies](#)'.

- 1.47. The CMA and its predecessors have used their market inquiry powers to implement reforms in a number of UK markets, including important sectors such as airports, funeral services, retail banking and retail energy. Such interventions are of real benefit to consumers and the UK economy. CMA market investigations in particular saved consumers an average of £840 million annually between 2017/18 and 2019/20 financial years.<sup>48</sup>
- 1.48. While the overall impact of these interventions has been significant the benefits have been primarily focused on a relatively small number of markets. Government is concerned that the market inquiry process, and market investigations in particular, are overly cumbersome and significantly underused.
- 1.49. To address these issues, government proposes to reform the CMA's market inquiry tools to deliver:
- A more efficient, flexible, and proportionate market inquiry process.
  - New powers for the CMA to take interim measures in market inquiries.
  - New powers to resolve competitions concerns more quickly through binding commitments.
  - A more versatile and effective process for remedy design.

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<sup>48</sup> [CMA Impact Assessment 2019/20.](#)

- A greater ability to review and revise remedies from previous investigations.

### A more efficient, flexible, and proportionate market inquiry process

- 1.50. Market inquiries are unique in the UK's competition law toolbox because they remedy both harmful business practices and structural barriers to competition in markets, which may be hindering innovation and growth. However, government is concerned that they are not delivering their full potential and wants to explore whether and how they can be used more effectively.
- 1.51. The impact of the CMA and its predecessors' market investigations in sectors such as banking and energy show the benefits that market investigations can provide.<sup>49</sup> <sup>50</sup> However, the CMA can only impose binding remedies after conducting a market investigation. To realise the benefits of its market inquiry tools properly, the CMA needs to complete more market investigations, not just market studies.

### Figure 3: Case study on Open Banking

In 2014, the CMA launched a market investigation into the supply of personal current accounts and the

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<sup>49</sup> [www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk](http://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk)

<sup>50</sup> [www.gov.uk/cma-cases/energy-market-investigation](http://www.gov.uk/cma-cases/energy-market-investigation)

supply of banking services to small and medium sized businesses. The investigation concluded in 2016 with the publication of a report which highlighted the following issues:

1. Older and larger banks did not have to compete hard enough for customers' business.
2. Smaller and newer banks found their growth to be stunted.
3. This lack of competition led to customers paying more than they should and not benefitting from new services.

This investigation enabled the CMA to introduce a package of reforms to drive new competition in the UK's retail banking market including:

- allowing personal and small business customers to share their financial data securely with authorised third-party providers and other UK-regulated banks, and to compare banking products through a single digital application;
- requiring banks to be more transparent about the quality of their services and products; and
- measures to improve access to banking services for small businesses through technical support and financial tools.

1.52. While market studies and market investigations are separate processes, and a market investigation need not be preceded by a market study, in

practice, market investigations do normally follow a market study. End to end market inquiries combining both a market study and a market investigation can be a lengthy and resource intensive process. The statutory deadline for completing market studies is 12 months and the statutory deadline for completing market investigations is 18-24 months with additional time to implement the CMA's remedies. This means the end-to-end process can take over three years to complete.

- 1.53. A quick, efficient, and proportionate conclusion to an investigation is in the interests of businesses and investors just as much as it is in the interests of consumers. Government believes that the long statutory timeframes for carrying out both a market study and market investigation, and the inability of the CMA to impose remedies following a market study, even when there is a compelling case for doing so, may be inefficient.
- 1.54. Government is concerned that the time and cost of running both a market study and a market investigation may deter the CMA from opening market investigations and using the powerful procompetitive tools that market investigations provide. If this is the case, and it continues, the pro-competition and pro-consumer benefits that can arise from this tool risk being concentrated in a

small number of high-profile markets, without benefiting the UK's wider economy.

- 1.55. To support the UK's economic recovery and long-term growth, government and the CMA should consider as part of the process for regular State of Competition reports and strategic steers the areas of the economy which should be prioritised for market inquiries. Government would also like to see the CMA consider whether these tools can be used more regularly to support regional development by addressing harms to competition and consumers that may be specific to particular regions of the UK.
- 1.56. To address these issues, government proposes that the current market inquiry process should be reformed to allow the CMA to tackle harms sooner. To achieve this, government is seeking views on the merits of two alternative proposals for reform:
- **Proposal 1: Retaining market studies and market investigations, but enabling the CMA to impose certain remedies at the end of a market study.**
  - **Proposal 2: Replacing the existing market study and market investigation system with a new single stage market inquiry tool.** <sup>51</sup>

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<sup>51</sup> Sector regulators would be able continue to make market inquiry references to the CMA in the same way that they can currently make market investigation references.

1.57. Each proposal is discussed separately below.

### **Proposal 1: Remedial powers at the end of market studies**

1.58. If the CMA identifies reasonable grounds to suspect that there is an adverse effect on competition in a market during a market study, it can refer the issue for a market investigation. The CMA can also accept undertakings in lieu of making a reference if it believes they would adequately remedy the identified potential adverse effects on competition.

1.59. At the end of some market studies an adverse effect on competition and an effective and comprehensive remedy will be clear to the CMA. In these cases, government thinks the CMA should have the power to act and remedy the harm as quickly as possible and without the need for a market investigation. When added to the CMA's existing tools, this power would provide the CMA with greater flexibility in deciding how to resolve the harms identified when concluding a market study.

1.60. Under this option government proposes that:

- The same legal standard for imposing remedies would apply to both market studies and market investigations – the CMA would be required to have identified an adverse effect on competition and decided

that it should take action to remedy that adverse effect.<sup>52</sup>

- Not all the remedies available in a market investigation should necessarily be available at the conclusion of a market study. In particular, government believes it is likely to be appropriate to reserve structural remedies, such as the sale of assets or ownership separation, for use in market investigations only.

- To allow for a thorough consideration of the proposed remedies, government is open to considering whether the statutory timetable should be extended for an additional three or six months when remedies are proposed by the CMA at the end of a market study. Further, government proposes that, as is the case with a market investigation, the CMA should have an additional six months after the end of the market study to implement remedies.

1.61. If this option were adopted, government is seeking views on who should be the appropriate decision maker when considering whether to make an order to remedy an adverse effect on competition. **Government's preferred approach would be for the CMA's board to act as the responsible decision maker when deciding whether to impose remedies at the end of a**

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<sup>52</sup> Section 134 Enterprise Act 2002.

**market study.** Government believes this approach would have two principal benefits:

- the CMA Board would provide a fresh review or ‘second pair of eyes’ without the need for the appointment of a full independent panel such as that currently used for market investigations. Reserving this decision to the CMA’s board would also ensure it gets appropriate scrutiny; and
- it would align with the CMA Board’s mandate to decide whether to make a market investigation reference. Having the CMA Board take both decisions would allow it to assess whether issues should be remedied at the end of the market study or referred for further investigation.

1.62. If the market study and market investigation processes are both retained, government is also considering:

- **Removing the requirement to consult on a market investigation reference within the first six months of a market study.** The current process requires the CMA to begin a consultation on whether to make a market investigation reference within the first six months of a market study if certain conditions are met. It is important that the CMA consults potentially affected parties before making a market investigation reference. However, government believes the current statutory process for consulting on market investigation references during market studies is unduly restrictive

and does not materially speed up the making of a market investigation reference.

- **Providing the CMA with greater flexibility to define the scope of market investigations.**

Government considers that market investigations could be made more efficient if the CMA had greater flexibility to prescribe the scope of its market investigation references to focus its investigation on whether one or more specified features of the market referred have the effect of restricting or distorting competition. The CMA could use this increased specificity to conduct more focussed market investigations, where this would be more proportionate and efficient. The CMA would retain the ability to make market investigation references without such prescription, where appropriate.

## **Proposal 2: A single stage market inquiry tool**

1.63. As an alternative to introducing remedial powers at the end of a market study, government is seeking views on the merits of **replacing the existing market study and market investigation system with a new single stage market inquiry tool.**<sup>53</sup>

1.64. Responses to government's consultation on the competition regime in 2012 expressed strong support for retaining the distinction between market studies and market investigations.<sup>54</sup> However, the

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<sup>53</sup> Sector regulators could continue to make market inquiry references to the CMA.

<sup>54</sup> See paragraph 4.14 of government's response to the consultation: '[Growth, Competition and The Competition Regime](#)'.

declining use of market investigations has led government to reconsider adopting a single stage market inquiry.

- 1.65. Government proposes that the statutory timeframes for this new inquiry would be shorter than the current end to end timeframe for carrying out a combined market study and market investigation, but they would still need to be long enough to allow for an in-depth investigation where required.
- 1.66. Government proposes that this single stage process would have the following characteristics:
  - All that would be required for a market inquiry to be launched is a decision by the CMA that it should (a) consider the extent to which the features of a market may have the effect of preventing, restricting or distorting competition in that market or otherwise be adversely affecting the interests of consumers and (b) assess the extent to which steps can and should be taken to address those effects. The CMA could decide to launch a market inquiry on the basis of its own prioritisation assessment. This would retain the flexibility currently provided by the market study tool.
  - When conducting a market inquiry, the CMA should investigate potential harms to competition and consumers that might arise in the relevant market(s) under investigation. If an adverse effect on competition is identified the CMA should have the same set of

powers to impose remedies that it currently does when it makes such a finding in a market investigation. This would enable the CMA to continue to remedy: any adverse effect(s) on competition identified by the CMA; or any harm to consumers arising from the adverse effect(s) on competition. The CMA would also be able to continue to make recommendations to government, other regulators, or market participants to address any other harms to competition and consumers which cannot be fixed through the CMA's powers.

- The CMA would be able to use compulsory information gathering powers from the outset of the investigation, just as it currently can for both market studies and market investigations.
- The timeframe for the single stage process would be two years by default, with the option to extend the timetable for a further six months by exception, for example, in particularly important or complex investigations. The CMA would be expected to conclude investigations more quickly where appropriate, for example if it decided not to impose binding remedies in an investigation. This option could avoid the risk of duplication, which is inherent in the current market inquiry process, and allow the CMA to continue to carry out quick, more flexible market study-type investigations into markets without hindering its ability to conduct more in-depth investigations.
- These investigations should be primarily carried out by a CMA case team (as is currently the case in a

market study). However, if the CMA proposes in its provisional findings to impose binding remedies, the CMA would then be required to appoint independent decision makers drawn from the CMA Panel. These independent decision makers would be responsible for taking the final decision as to the existence of the harms identified and the appropriate remedies or recommendations to address those harms (similar to the current decision-making arrangements in a market investigation).

1.67. Government believes that a single stage process could remove many of the inefficiencies inherent to the current two stage market inquiry process. For example, it could reduce the incremental costs to both businesses and the CMA if it is determined there are features of the market resulting in an adverse effect on competition and that remedies are required. It will also give the CMA far greater flexibility to determine how best to use the statutory timetable available to it. Government believes that this flexibility could reduce the need for extensions and facilitate an overall quicker conclusion to an investigation.

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

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

Interim measures in market investigations

- 1.68. In Competition Act investigations, the CMA can impose requirements on businesses during its investigations where it is necessary as a matter of urgency for the purpose of preventing significant damage to a particular person or category of person, or to protect the public interest. These are referred to as ‘interim measures’ because they apply on a temporary basis, while the CMA completes its investigation and makes its final decision. The CMA can apply interim measures at *any* point during a Competition Act case.
- 1.69. In contrast, in market investigations the CMA can only impose interim measures *after* it has issued its final report finding that there are adverse effects on competition. At this late stage, the interim measures can be used to prevent a business taking action which would frustrate the CMA’s design and implementation of remedies.
- 1.70. The CMA cannot therefore use interim measures earlier in the market investigation process, even where they are considered necessary as a matter of urgency to prevent significant damage, or to protect the public interest. **Government is seeking views**

**on the merits of granting the CMA the same powers to impose interim measures in market investigations as it does in Competition Act investigations.**

- 1.71. Government recognises that allowing the use of interim measures in a market investigation could risk prejudicing regulatory incentives and could lead to unintended market distortions. Government is therefore seeking views on whether, if the CMA is given these powers, their use should be subject to additional limitations or safeguards.
- 1.72. If government decides to retain the current division between market studies and market investigations, and to provide the CMA with additional powers to impose certain remedies at the conclusion of a market study, government will consider whether to extend any new interim measures powers to both market inquiry tools.

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

**Accept binding commitments from businesses at any stage in the market inquiry process**

- 1.73. John Penrose's report recommended **enabling the CMA to accept binding commitments from businesses at any stage in the market inquiry process**. Government agrees that this recommendation offers a good way to speed up

some market inquiries by allowing the CMA to agree solutions earlier in the process and thereby avoid the need for a full investigation. Government agrees that this proposal may be beneficial.

- 1.74. Government proposes that commitments could be accepted to close all, or any part of, an investigation. Even when commitments are only offered to address part of an investigation, this may avoid costs and delay for both the CMA and businesses by narrowing the scope of the investigation. However, government recognises that commitments accepted earlier in the process may not be as effective as remedies imposed after a full inquiry.
- 1.75. There should be procedural safeguards in place to prevent the CMA's timetable being disrupted by the consideration of such commitments. These safeguards might include allowing the CMA to consider only commitments which had a high likelihood of remedying the CMA's concerns or allowing the CMA to 'stop the clock' when commitments are being considered.

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

### **More versatile and effective remedies**

- 1.76. The key difference between the UK's market inquiry process and other countries' market studies

or sector inquiries is the ability for the CMA to impose binding remedies at the end of the process. The effectiveness of the market inquiry tool depends, in large part, on the CMA's ability to design effective and proportionate remedies to the problems uncovered during the inquiry process.

- 1.77. When considering remedies in market investigations the CMA is under an obligation to have regard to the need to design as comprehensive a remedy as is reasonable and practicable. The CMA has a broad and powerful toolbox to resolve problems identified in a market investigation including, for example, structural remedies. Overall, government does not believe there is a need to make significant changes to the types of remedies that the CMA can impose.
- 1.78. Government is concerned, however, that the current remedies regime was designed for a more traditional 20<sup>th</sup> Century economy and may prove less effective in today's markets.<sup>55</sup> In particular, the current system limits the CMA's ability to revise the remedies imposed after a market investigation if they are failing to deliver their intended objective. Generally, the only way the CMA can revisit the scope and design of a remedy is by conducting a

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<sup>55</sup> Fletcher, Amelia (2020) '[Market Investigations for Digital Platforms: Panacea or Complement?](#)'.

new market investigation.<sup>56</sup> This may provide certainty to business, but it risks rendering the CMA's interventions in some markets obsolete. Government believes this is inefficient with the potential to be disproportionately burdensome to both businesses and the CMA.

- 1.79. The CMA has identified the need for more flexible remedy tools as being particularly important for the on-going effectiveness of its work in digital markets.<sup>57</sup>
- 1.80. Government is seeking views on how to update the CMA's toolbox and its remedy design process in market inquiries to make them more versatile and effective, while maintaining transparency and certainty for businesses. In particular, government is considering the following reforms.

### **A more flexible design process for market investigation remedies**

- 1.81. An effective design process is essential for effective remedies. Sometimes, especially in consumer-facing markets, this will require testing consumer responses to proposed interventions, assisted by the techniques and insights of

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<sup>56</sup> Under section 162 Enterprise Act 2002 the CMA has a duty to monitor compliance with undertakings and orders, which includes an obligation to consider from time to time, whether by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked.

<sup>57</sup> [Appendix G](#) of the Digital Market Taskforce Report.

behavioural economics, to ensure that the remedy has the intended effect on consumer behaviour. Giving the CMA a **power that requires businesses to participate in implementation trials would allow the CMA to test and trial how best to implement its remedies**, without changing the fundamental scope of the remedy imposed.

1.82. This power would allow the CMA to require businesses to test how its consumer-facing remedies are being implemented to ensure consumers are engaging with the remedies and that their interests are being protected. For example, if the CMA imposes a remedy requiring that certain information is communicated to a consumer on a website or by written correspondence, government proposes that the CMA should be able to require businesses to test different ways of presenting this information to consumers to ensure maximum engagement. This might include testing:

- which medium to use (for example: text message, email, letter, website pop-up).
- when the message should be presented (for example: before a renewal, at certain times of the year, at the outset of a purchase process).
- how the message is presented (for example: what does it say, does it stand out to consumers, is it on the face of a website or in a pop-up).

1.83. Having these powers available to the CMA could help ensure that it is better able to deliver its

obligation to design the most comprehensive remedies possible.

## **Improved monitoring and review of remedies from previous investigations**

- 1.84. Sometimes remedies in market investigations do not have the effect that was intended. Currently the only way to fix this is for the CMA to undertake another investigation. The CMA has argued that this is burdensome – both for the CMA and business.
- 1.85. Government is seeking views on **whether the CMA should have expanded powers to periodically review, and if necessary, vary, the remedies it imposes** (or the commitments it accepts) to ensure they are effective. Powers to review remedies more flexibly would help ensure that remedies are meeting their intended objectives and that the benefits of the CMA's market inquiries are not lost over time. **Government proposes that these powers should allow the CMA to expand or supplement the remedies where it finds this is required to implement the objectives of the remedies comprehensively and effectively.**
- 1.86. Expanded powers to periodically review and vary the remedies would also allow remedies to be more easily amended or revoked if they have become unnecessary. Currently, the CMA can only review remedies where there has been a change in market circumstances. A more flexible approach to

reviewing remedies could therefore reduce costs and red tape for businesses, as it would remove the need to open a new market investigation.

- 1.87. Government recognises that safeguards would be needed to ensure that businesses could be confident that remedies would not become subject to perpetual review. For example, government is considering imposing a mandatory cooling off period of several years following a review which would need to expire before the CMA could revisit the operation of a remedy. This cooling off period should not limit the ability of a party subject to a remedy to request a further review in response to changing market circumstances.
- 1.88. Government proposes to complement these review powers with additional compulsory information gathering tools to better allow the CMA to assess the effectiveness of remedies within markets.
- Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?**
- Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?**

## Rebalanced merger control

- 1.89. Mergers are a feature of dynamic markets and can promote investment, jobs and efficiency and help businesses to grow. However, mergers can also remove actual and potential competitors from a market, increasing the acquirer's market power. This may harm competition, lead to higher prices, and reduce innovation. Merger control therefore plays an important role in the UK's competition policy, and the CMA estimates that the direct consumer benefit of its interventions in mergers totalled £1.2 billion for the three-year period 2018-2020.<sup>58</sup>
- 1.90. The UK's merger control process should be as efficient as possible, focussing its attention on mergers most likely to be harmful to competition and consumers, without unduly hindering benign investment.<sup>59</sup> On most metrics, government believes the UK's merger control regime is working well. The CMA's work in this field compares favourably to many of its international counterparts and the CMA has established itself as a global leader in merger policy. However, the importance of mergers and investment to the UK economy means that the UK must not be complacent. Government

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<sup>58</sup> CMA Impact Assessment 2019/20 (n 45).

<sup>59</sup> The UK's merger control regime also provides for reviews of mergers to take place on the ground of specified public interest considerations. Public interest reviews of transactions are triggered via ministerial powers of intervention.

believes that there remains scope to update the UK's merger control thresholds and processes to enable the CMA to better scrutinise potentially harmful mergers while reducing costs to businesses in other cases.

- 1.91. Against this background, government is seeking views on how the current merger notification thresholds should be improved and how the CMA's merger investigations can be made more efficient. These are set out in the paragraphs that follow.

### Improving the jurisdictional thresholds for UK merger control

- 1.92. The UK operates a voluntary and non-suspensory merger regime. This means that businesses can choose whether to notify mergers to the CMA or not and businesses do not automatically need to pause integration while they wait for the outcome of a 'clearing period'. However, the CMA can also 'call in' for investigation mergers about which it has concerns and impose an initial enforcement order to prevent integration between the merging firms while it investigates the merger. As a result of the voluntary notification nature of the regime, the CMA examines only a very small proportion of mergers involving UK firms.
- 1.93. Government previously consulted in 2011 on whether the UK should replace its voluntary merger control regime with a form of mandatory merger

notification but decided to keep the existing voluntary and non-suspensory regime<sup>60</sup>, while strengthening the CMA's powers in relation to interim measures. Government has reconsidered this issue, given changes such as UK's exit from the EU and the passing of the National Security and Investment Act 2021, which have occurred since the 2011 consultation.<sup>61</sup> **In government's view, a voluntary and non-suspensory process continues to strike an appropriate balance between consumer protection and regulatory burden for the UK's economy-wide merger control regime and government is therefore not minded to change this.**<sup>62</sup>

1.94. Government is interested in seeking views on how the voluntary notification system can be improved. Merger control should place a proportionate burden on benign or low risk mergers while ensuring robust scrutiny of mergers that raise concerns. The voluntary nature of the UK's merger notification regime and the tests that determine

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<sup>60</sup> See paragraphs 5.7 to 5.12 of government's March 2012 response to the March 2011 consultation 'Growth, Competition and The Competition Regime'.

<sup>61</sup> The National Security and Investment Act 2021 introduced a system of mandatory notification for 17 sectors of the economy.

<sup>62</sup> Government recognises that mandatory merger notifications may be appropriate in specific sectors of the economy. For example, government is seeking stakeholder feedback on whether the introduction of a mandatory merger review process, for a small number of the largest transactions for companies with strategic market status, in digital markets would be proportionate.

whether the CMA has jurisdiction to investigate a merger play key roles in achieving this balance.

1.95. In some countries, such as the USA, Canada and Australia, there are no thresholds which a relevant transaction needs to meet for the transaction to be subject to merger control (the USA and Canada do, however, require mandatory notifications for larger mergers). A merger between parties of any size is capable of being reviewed on the basis of its likely effects on competition. In contrast, in the UK, the CMA has jurisdiction to conduct an in-depth Phase 2 investigation of a merger only if at least one of two thresholds is met. These are:

- a turnover threshold; or
- a ‘share of supply’ threshold.

1.96. Further detail on these tests is set out in Figure 4.

#### **Figure 4: Jurisdictional thresholds<sup>63</sup>**

##### **Jurisdictional thresholds for UK’s merger regime**

For the CMA to conduct a Phase 2 assessment of a merger or anticipated merger in most sectors of the economy:

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<sup>63</sup> On commencement of the National Security and Investment Act 2021, additional jurisdictional thresholds introduced in 2018 and 2020 will be removed.

- It must be the case or be anticipated that two business enterprises will cease to be distinct (typically, this is because one business acquires another)

*and, either*

- the business that is being acquired must have a UK turnover of more than £70 million (the “turnover test”); or
- the merger would result in the creation or enhancement of at least a 25% share of the supply of particular goods or services in the UK, or a substantial part of the UK (the “share of supply test”).

1.97. The UK’s jurisdictional thresholds have two policy aims. They are intended to focus the merger control regime on mergers which are most likely to lead to harm to UK consumers and to make clear the categories of lower risk mergers which will not be subject to CMA review. Government is committed to ensuring the UK’s jurisdictional thresholds are calibrated to achieve these policy aims and is therefore seeking views on the following proposals.

## Updating turnover thresholds

1.98. **Government proposes to make the following updates to the UK's existing turnover thresholds:**<sup>64</sup>

- **raise the current turnover-based threshold for the target of a merger** from £70m to £100m to adjust for inflation and maintain the balance intended when the UK's merger control regime was created.
- **create a safe harbour for mergers between small business** where the worldwide turnover of each of the merging parties is less than £10m, which would exclude these transactions from the CMA's jurisdiction even if the merger would otherwise qualify for review under the share of supply test.<sup>65</sup>

1.99. Government believes these reforms are consistent with its aim of ensuring a proportionate regime that reduces costs to business without unduly compromising the CMA's jurisdiction to review potentially problematic mergers. The reforms are designed to provide greater comfort to small businesses and those conducting mergers which are less likely to raise competition concerns.

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<sup>64</sup> Government also proposes making it simpler for government regularly to update these thresholds to reflect inflation.

<sup>65</sup> The proposed new safe harbour should be distinguished from the existing discretion of the CMA under s.22(2) of the Enterprise Act 2002 not to refer a merger for a Phase 2 investigation where the market concerned is of insufficient importance to justify the reference.

1.100. A safe harbour for small mergers supports government's desire to promote innovation and growth by making it easier for small and micro enterprises to grow and expand. **Government welcomes views on whether the proposed threshold for the small mergers safe harbour is set at the correct level to achieve government's objectives.**

### **Updating the share of supply test**

1.101. The share of supply test is intended to complement the turnover test. It allows the CMA to review acquisitions of businesses with smaller turnover that could still lead to a strengthening of an already strong market position. Government therefore intends to retain the share of supply test as a complement to a turnover test.

### **A new jurisdictional threshold**

1.102. Mergers are most commonly harmful to competition when they involve the removal of a current, direct competitor from a market. This is reflected in the current share of supply test which requires that the merging parties have overlapping shares of supply in a particular market or sector of the economy.

1.103. The current focus of the UK's share of supply test on mergers between current, direct competitors may now be outdated. The CMA's recently updated merger assessment guidelines note that traditional

theories of harm may not properly reflect the potential risks to competition posed by some mergers.<sup>66</sup> As noted above, a number of the UK's international partners also operate more flexible jurisdictional thresholds. For example, the USA, Canada, and Australia all apply a form of 'effects-based' jurisdiction which allows their competition authorities to challenge a merger which have the potential to restrict competition in their markets even if the merger falls below the notification thresholds.<sup>67</sup> Mergers between businesses other than direct competitors may still harm competition if:

- **The merger removes potential competition from a market.** This might be where a company is developing a new product or services and the business is bought out before it can develop to become a competitor or in some cases even bring the product to market. These acquisitions have become known as 'killer acquisitions.' In these situations, the new product may be discontinued or used by the acquirer to further strengthen their own market power. Killer acquisitions have been

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<sup>66</sup> The CMA's new merger assessment guidelines.

<sup>67</sup> In the USA competition authorities can challenge mergers which may restrict competition prior to completion. In Canada and Australia mergers can also be challenged post completion. Within Europe, the European Commission has recently revised its own approach to referrals from Member States to facilitate the investigation of such mergers, even if they fall outside the Member State's own merger control rules (See the EU Commission's revised guidance on Article 22 of the EU Merger Regulation, published on 26 March 2021).

recognised as a problem in digital markets in particular, but they can also occur in other markets.

- **The merger facilitates the leveraging of market power across different products or services.** Sometimes products may exist in different markets or at different levels of a supply chain, but companies can strengthen their market position by combining them or by foreclosing current or potential rivals. In some instances, a merger like this may have detrimental effect on competition by cementing the market power of an established company, leading to reduced innovation, higher prices, or lower quality.

1.104. The share of supply test in its current form may not allow the CMA to reliably review these kinds of potentially harmful mergers.<sup>68</sup> There are increasing concerns about the effects of such mergers, particularly in the context of fast-moving or innovative parts of the economy, such as in digital markets and pharmaceuticals. However, these types of harm also have the potential to arise in other sectors of the economy. These concerns are not limited to mergers in the UK. Competition

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<sup>68</sup> These concerns are not limited to mergers in the UK. Competition authorities and governments around the world are considering how to address these issues. For example, the European Commission has recently revised its own approach to referrals from Member States to facilitate the investigation of such mergers, even if they fall outside the Member State's own merger control rules (See the EU Commission's revised guidance on Article 22 of the EU Merger Regulation, published on 26 March 2021).

authorities and governments around the world are considering how to respond to these challenges.

1.105. Government is therefore considering whether the CMA's jurisdictional thresholds for assessing mergers need to be expanded to enable the CMA to review a wider variety of potentially harmful mergers more reliably. If a change to the UK's jurisdictional thresholds is required government is considering an additional test for determining whether the CMA has jurisdiction to review a merger. In particular, government is considering empowering **the CMA to review a merger if any business which is a merging enterprise to the merger<sup>69</sup> has both:**

- a. a share of supply of at least 25% of a particular category of goods or services supplied or acquired in the UK or a substantial part of the UK; and**
- b. a UK turnover of more than £100 million.**

1.106. This new jurisdictional threshold would allow the CMA to more easily investigate vertical mergers involving larger, established market players, or mergers that might increase the concentration of market power across different products or services. It would also allow the CMA to call in mergers that consist of large companies acquiring new start-ups

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<sup>69</sup> In practical terms this would normally be the acquiring business, but government proposes a more flexible test to ensure relevant merger situations such as joint ventures would be covered by this threshold.

or potential new entrants to a market even if the target does not yet have a qualifying share of supply in a UK market where this might affect customers in the UK. The proposed jurisdictional threshold would complement the reforms to merger control proposed in government's new pro-competition regime for digital markets.

- 1.107. Creating a new jurisdictional threshold for the UK's merger control regime is a significant step. **Government is seeking views on both the merits of the proposed new limb and the specific share of supply and turnover thresholds proposed within it.**

### **Clarifying the share of supply test**

- 1.108. Government is aware that concerns have been expressed by some businesses that the inherent flexibility of the share of supply test may reduce the predictability of the UK's merger control system for certain business and investors. Government recognises the importance of predictable regulation and ensuring that the CMA is able to properly scrutinise potentially harmful mergers. Effective merger control is an essential component of an open and dynamic economy and the impacts of the UK's merger system need to be assessed in the round.
- 1.109. In light of the above, government welcomes views on how the share of supply test could be

reformed to deliver greater predictability for merging businesses without prejudicing the overall effectiveness of the UK's merger control system.

### *Summary*

1.110. Government's proposed changes set out above would result in the following jurisdictional tests for merger control (changes to the current framework are underlined for ease of reference):

a. the business that is being acquired must have a UK turnover of more than **£100 million**;

**or**

b. the merger would result in the creation or enhancement of at least a 25% share of the supply of particular goods or services in the UK, or a substantial part of the UK;

**or**

c. any party to the merger has at least a 25% share of supply of particular goods or services in the UK, or a substantial part of the UK, and has UK turnover of more than £100 million.

### **However**

d. Irrespective of the above thresholds the CMA would not have jurisdiction over a merger if the worldwide turnover of each of the merging entities is less than £10m.

1.111. Government also welcomes views on whether it should consider other reforms to the jurisdictional

tests for the UK's merger control system and how they would work in practice.

**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?**

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

## Merger investigation procedures

1.112. As set out above, it is important that merger investigations are carried out as quickly and efficiently as possible without prejudicing the quality of the review. Prompt and efficient investigations help to reduce the burdens on businesses, especially for those mergers that are ultimately found to have a benign effect on competition.

1.113. Merger assessment in the UK follows a statutory process, which is subject to statutory deadlines. On average, its merger cases take less time than the statutory maximum time permitted. However, the CMA often exercises its powers to extend the statutory deadlines in Phase 2 merger investigation. For example, 30 of the 60 Phase 2 merger investigations included extensions. The reasons for these extensions often relate to accommodating the process for determining remedies, information

gathering requests, unusually large volumes of evidence to process and material changes in circumstances such as the effects of the COVID-19 pandemic. Overall, the evidence suggests that the speed of the UK's mergers investigations is broadly consistent with other similar countries.

**Table 2: summary of merger review stages**

Stage	Statutory time limit	Description
Pre-notification	None	<p>Before a formal investigation begins, the ‘pre-notification’ process is intended to provide the CMA with the information that it needs to begin its Phase 1 proceedings.</p> <p>There is no statutory time limit for this, although if a merger is already complete the CMA has a deadline of four months from finding out about the merger or the merger becoming public to decide whether to make a decision on the outcome of Phase 1.</p>
Phase 1	40 working days	The CMA determines whether the transaction falls

Stage	Statutory time limit	Description
		<p>within the UK’s merger jurisdiction, and if so, whether it has resulted in or may be expected to result in a realistic prospect of a substantial lessening of competition. If these tests are met, the CMA must refer the merger for a Phase 2 investigation (subject to some exceptions).</p> <p>The CMA will request further information from main and third parties and issue an ‘invitation to comment’ for the public and third parties.</p>

<b>Stage</b>	<b>Statutory time limit</b>	<b>Description</b>
Undertakings in Lieu	50 working days, extendable once by up to 40 working days	Where the CMA finds that the test for referral to Phase 2 is met, it can accept ‘Undertakings in Lieu’ from parties. These allow parties to address competition concerns (e.g., by agreeing to divest part of a business concerned) without going to Phase 2.
Phase 2	24 weeks, extendable once by up to 8 weeks.	The CMA carries out an in-depth investigation to determine whether the merger is expected to result in a substantial lessening of competition. This will include consulting with main parties and third parties, including producing

<b>Stage</b>	<b>Statutory time limit</b>	<b>Description</b>
		<p>provisional findings and a notice of possible remedies.</p> <p>The CMA can clear the merger unconditionally, clear the merger subject to remedies or prohibit the merger (and order that the merger be reversed, if already completed).</p>
Implementing remedies	Up to 12 weeks, extendable by up to 6 weeks.	<p>If the merger is cleared subject to remedies (such as divestment of certain businesses), the CMA has a period following its final Phase 2 decision to settle the package of remedies. Either the parties will offer final undertakings, or the</p>

Stage	Statutory time limit	Description
		CMA will impose a final order.

1.114. To support government’s goal of driving growth and investment and to reduce unnecessary burdens on business, government is seeking views on whether the merger control regime can be made more efficient.<sup>70</sup> A more efficient merger control regime will also help the CMA manage a larger and more complex workload following the UK’s withdrawal from the EU. Potential options which government is considering are set out below.

**Allowing the CMA to agree binding commitments earlier during Phase 2**

1.115. John Penrose’s report recommended that the CMA should be able to agree binding commitments at any stage of Phase 1 or Phase 2 to help to speed up a merger case if both the parties and the CMA agree on the solution. Commitments are offered by parties to resolve the CMA’s competition concerns raised by the merger. Currently, commitments can be offered either at the end of Phase 1 in lieu of a Phase 2 investigation or following provisional

findings in a Phase 2 investigation. The process of the parties and the CMA deciding on the commitments runs to a strict timetable set out in legislation.

- 1.116. Changing the commitments process at Phase 1 is unlikely to shorten the duration of Phase 1 because the CMA will still need to do the work to satisfy itself that the commitments resolve the competition concerns. However, government agrees that there may be merit to allowing the CMA to agree binding commitments earlier in Phase 2 which address its competition concerns, particularly if the parties were simply timed-out on agreeing commitments with the CMA at the end of Phase 1.
- 1.117. If this proposal is taken forward, government would consider whether the CMA would need a new power to pause the investigation while commitments were being considered.

### **Restrict the CMA to refer only the issues that are identified at Phase 1**

- 1.118. Under this proposal, the CMA would narrow the scope of its Phase 2 investigation to consider only the concerns that it had identified at Phase 1. While at Phase 2 the group will generally build on the Phase 1 work and conclusions, such a proposal may assist in streamlining the competition analysis carried out at Phase 2. This could help to use the

CMA's resources more efficiently and reduce overall timescales for Phase 2 mergers.

### **A new 'fast track' merger route**

- 1.119. Between 2014-2020, roughly 15% of Phase 1 cases went to Phase 2. It is inevitable that some mergers will be subject to a Phase 2 investigation. For example, if a merger involves businesses that would have a very high combined share of the total market, it is likely the merger will raise competition concerns or have a large number of closely competing interests. It is possible to 'fast track' a merger review so that the CMA does not need to follow all the normal procedural steps before agreeing remedies at Phase 1 or deciding to refer the case to Phase 2.<sup>71</sup> Before agreeing to fast track, the CMA must be satisfied that the statutory test for referring a merger to Phase 2 has been met.
- 1.120. The current fast track route is not often used. The reasons for this are not clear, but they might include the fact that the procedure requires businesses to accept in writing that there is a realistic prospect that the merger will substantially lessen competition (SLC), which might be unappealing to many businesses, notwithstanding that such a concession is not intended to have any bearing on the outcome of the Phase 2 investigation

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<sup>71</sup> See chapter 7 of *Mergers: Guidance on the CMA's jurisdiction and procedure* [www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure](http://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure) revised in December 2020.

that subsequently takes place. Government is interested in views about whether the fast-track route could be made more appealing so that it is used more frequently by businesses, which would reduce the burden of complex cases on businesses and the CMA.

1.121. Government is seeking views on the benefits of **allowing parties to request automatic reference to Phase 2**. Under this change, parties would provide a short-form submission prior to the start of the CMA's Phase 1 investigation requesting the referral to Phase 2 and explaining why the parties believe the CMA would have jurisdiction. Government proposes that, if this option were adopted, the case would then automatically proceed to Phase 2, without a Phase 1 investigation. Jurisdiction would be considered as part of the Phase 2 investigation. This would avoid the CMA needing to do a substantial competition analysis at Phase 1.<sup>72</sup>

1.122. Additionally, under this option parties would not be required to formally accept, for the purpose of the Phase 1 investigation, that the merger could result in an SLC. Government is seeking views on whether removing the requirement would

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<sup>72</sup> If the proposal for an automatic fast-track was implemented, government intends to ensure that it is implemented in such a way as to preserve ministers' powers to make public interest interventions in these mergers.

encourage more businesses to use the fast-track route.

1.123. Given much of the evidence gathered in the Phase 1 investigation is often used in the Phase 2 investigation and the analysis carried out during the Phase 1 investigation provides focus for the Phase 2 investigation (and often takes some theories of harm off the table), Government is considering whether some additional time should be added to a fast tracked Phase 2 investigation to ensure the CMA still has time to undertake an appropriate level of evidence gathering. Government provisionally proposes that a three-week extension would be appropriate. This would be shorter than the current statutory timescale for Phase 1 investigations (40 working days, or approximately 8 weeks) even accounting for the existing fast-track procedure.

### **Reducing unnecessary delays at Phase 2**

1.124. While the CMA is subject to a statutory duty of expedition in relation to its merger investigations<sup>73</sup>, the statutory timeframes for Phase 2 merger investigations allow the CMA to extend the timetable on a one-off basis for “special reason” by up to eight weeks. This power has been used by the CMA in approximately 50% of cases and in almost all cases the CMA extended the timetable by eight

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<sup>73</sup> See section 103 Enterprise Act 2002.

weeks, even if it did not always use the full extension time.

1.125. Government wants to ensure that the CMA is using this power as efficiently as possible without prejudicing the quality of its investigations. For example, in some jurisdictions, extensions to merger control timetables:

- are tied to specific stages of the merger control process such as a decision by the merging parties to offer remedies to address a competition authorities' concerns; or
- can only be used with the consent of the merging parties.

1.126. Some jurisdictions also have more flexible rules which make it easier to extend or pause the statutory timetable. Government recognises that in some cases greater flexibility in the CMA's statutory timetable might be to the merging parties' advantage, for example if it were to allow the CMA to coordinate with its international counterparts on a global solution. As set out in more detail below, being able to agree internationally coherent remedies when dealing with a multinational merger can significantly reduce costs for businesses involved.

1.127. Government is seeking views on whether the CMA's extension power could be used more

efficiently. In particular, government is seeking views on whether:

- the CMA's power to extend the timetable should be subject to additional conditions; and
- there are any circumstances in which the CMA should have greater flexibility to extend the statutory timetable unilaterally or with the agreement of the merging parties.

### **Publication requirements in the Gazette for mergers**

1.128. Businesses that wish to notify a merger to the CMA voluntarily should use the prescribed merger notification form, also known as a Merger Notice. Currently, the CMA is required to publish the latest version of this form in in the London, Edinburgh and Belfast Gazettes, the UK's official public record of statutory notices. Government is considering **the merits of replacing the existing obligation to publish the Merger Notice in the gazette with the requirement for the CMA to publish the Merger Notice on the CMA's website.**

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

## Streamlining CMA Panel Decision Making

### Figure 5: The CMA's panel

#### The CMA's panel

The CMA's independent Panel members are appointed by the Secretary of State for Business Energy and Industrial Strategy, for a period of no longer than 8 years. There are currently 33 Panel members, and they are appointed through an open competition for their experience, ability, and diversity of skills in competition economics, law, finance, and business. Most Panel members perform their roles on a part time basis, serving as decision makers on investigations as and when required.

A small group of CMA Panel members – currently five – are appointed to chair inquiry groups. The inquiry group chairs have significantly greater time commitments to working on CMA cases, than other Panel members.

1.129. Market studies and Phase 1 merger reviews are conducted and decided by CMA staff. Once a market investigation or Phase 2 merger review begins, they are overseen and decisions are taken by an 'inquiry group'.<sup>74</sup> Inquiry groups are made up

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<sup>74</sup> CMA Panels also oversee regulatory appeals to the CMA.

of at least three Panel members, led by an inquiry chair. The inquiry groups are supported by CMA staff.<sup>75</sup>

1.130. Independent Panel members are intended to act as an independent ‘fresh pair of eyes’. They also provide the CMA with important outside perspectives and experience to assist with the CMA’s decision making, including business acumen.

1.131. Government consulted in 2016 on changes to the CMA’s Panel, to increase the speed and quality of decision making.<sup>76</sup> Government wishes to revisit these issues and is considering the following potential options to reform the CMA’s panel.

- **Size and composition:** Government proposes a smaller pool of dedicated Panel members for whom work on the CMA’s Panel is their primary employment. Having a smaller, more dedicated pool of Panel members should help to speed up cases.<sup>77</sup> It should also help to deliver more consistent and predictable decision-making for businesses. This proposal would also allow the CMA to guarantee

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<sup>75</sup> The same panel process is also used for Phase 2 merger investigations.

<sup>76</sup> CMA (2016) ‘[Options to refine the UK competition regime: A Consultation](#)’.

<sup>77</sup> A smaller Panel would require individual Panel members to work on a greater number of cases. Panel members would therefore have greater familiarity with the CMA’s processes, leading to faster and more effective decisions. In addition, using dedicated Panel members would reduce the difficulties of co-ordinating the availability of Panel members that can currently arise when each Panel member has a range of time commitments outside of the CMA.

the Panel members a set income, which in turn should allow the CMA to attract a more diverse talent pool.

- **Role:** To reflect the smaller number of Panel members, government is considering revising the role of the Panel members to making final decisions on theories of harm and remedies. This would retain the role of the CMA Panel as a ‘fresh pair of eyes’ while allowing the CMA greater administrative flexibility during the course of the investigation itself.

1.132. Government believes that these changes should produce a system that is faster and more consistent. This would be beneficial for businesses under investigation, consumers and customers who will benefit from the remedies imposed and investors who will benefit from greater predictability.

**Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?**

## **Stronger and faster enforcement against illegal anticompetitive conduct**

1.133. UK competition law prohibits firms from colluding to restrict competition or abusing a dominant market position. These prohibitions are fundamental to free markets. When these rules are broken, businesses and consumers suffer from higher prices and poorer

choice, and the economy suffers from lower productivity, innovation, and growth.

1.134. The UK needs a tough and efficient competition enforcement regime to detect, investigate, penalise, and remedy breaches of competition law.

Government wants to ensure the enforcement process is as effective as possible, given the indications that competition in UK markets may in fact be decreasing and the concerning evidence of a significant lack of awareness among businesses about the UK's competition rules.<sup>78 79</sup>

1.135. The UK's competition enforcement regime is well-regarded internationally and its outputs in terms of caseload and timescales are improving.<sup>80</sup> However, recent assessments of the enforcement regime conducted by the CMA, government and independent reviewers suggest the UK's enforcement of its laws against unlawful

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<sup>78</sup> According to the CMA's [November 2020 State of UK Competition Report](#), competition in the UK has been decreasing in the last two decades. Some factors include the increase in concentration following the 2008 financial crisis and an average mark-up that rose by 7% over the course of that period. See 'Findings and conclusions' pp. 3-5.

<sup>79</sup> See the ICM's [Competition law research 2018](#) prepared on behalf of the CMA.

<sup>80</sup> The OFT made 12 infringement decisions over the period January 2008 to March 2014, with cases taking an average of 31 months. The CMA made 26 infringement decisions from April 2014 to March 2021, with cases taking an average of 22.7 months.

anticompetitive conduct could still be improved.<sup>81 82</sup>  
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## Figure 6: Anticompetitive conduct prohibitions

### *The prohibitions against anticompetitive conduct*

The Competition Act 1998 establishes two core rules about how firms should behave. These rules are named after the two chapters in the Act where they are set out.

- **The Chapter I prohibition** prohibits businesses from colluding with each other to restrict competition. It prohibits cartel behaviour such as price fixing and market sharing. It can also prohibit agreements between businesses at different levels of the supply chain, such as between manufacturers and retailers, for example where the agreements restrict competition in the retail market. For instance, a manufacturer might use agreements with retailers to ensure their products are sold above certain prices, reducing competition between retailers. Some conduct can be exempt from the Chapter I Prohibition if it leads to benefits which outweigh the anticompetitive harm.

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<sup>81</sup> Lord Tyrie (n13).

<sup>82</sup> See 'Competition law review: post implementation review of statutory changes in the Enterprise and Regulatory Reform Act 2013' (n5).

<sup>83</sup> See, for example, 'Power to the People' (n5), and 'Unlocking digital competition' (n5).

- **The Chapter II prohibition** prohibits businesses abusing a position of dominance in a particular market. This includes dominant businesses preventing competition, which is referred to as ‘exclusionary abuse’. This might include paying potential competitors to stay out of the market. It may also apply where dominant businesses exploit customers by, for instance, charging excessively high prices.

The UK competition authorities have powers to investigate and impose financial penalties on businesses which breach the prohibitions. These investigations will be referred to as ‘**Competition Act investigations**’. In addition to penalties, the competition authorities have powers to require businesses to change their conduct to bring infringements to an end.

Separate to the two prohibitions under the Competition Act 1998, a criminal offence was introduced in the Enterprise Act 2002 called the ‘**Cartel Offence**’. The offence is distinct from the Chapter I prohibition and applies only to the most serious types of collusion such as price-fixing and market sharing.

1.136. The evidence on the CMA’s current performance is mixed. Since its creation in April 2014, the CMA has significantly improved the overall efficiency of

civil enforcement against unlawful anticompetitive conduct ('Competition Act investigations'). Average case times fell from 31.1 months for cases opened between January 2008 and March 2014 to 22.7 months for cases opened after April 2014. The CMA also opened and concluded a larger volume of cases than the Office for Fair Trading (OFT) did in the years leading up to 2014. Twelve cases opened by the OFT after January 2008 resulted in a decision of infringement, compared to 26 cases by the CMA after April 2014.<sup>84</sup> The CMA's timeframes for conducting Chapter I investigations are also broadly in line with international comparators.<sup>85</sup>

1.137. These trends are positive, and government commends the CMA's work to improve the efficiency of its investigative processes. However, the timeframes for Competition Act investigations remain long, with one third of the investigations taking over three years. In the context of the UK's exit from the EU it is particularly important that the CMA can conduct large and complex investigations efficiently. The CMA will increasingly find itself

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<sup>84</sup> These figures include the decisions in the *Tobacco* and *Phenytoin* cases that were ultimately quashed and remitted back to the CMA respectively on appeal. Four of the cases counted here as being launched by the OFT were still in progress when the CMA opened and were completed by the CMA (*Paroxetine*, *Galvanised Steel Tanks*, *Phenytoin*, *Property Sales and Lettings*).

<sup>85</sup> Government is cautious about too readily drawing conclusions about the CMA's performance based on international comparisons. Different competition authorities will operate different procedures and have different remits and different resources.

faced with more challenging investigations relating to both the Chapter I and Chapter II prohibitions.

- 1.138. Government's concerns are not simply about case numbers, or the length of time taken to conclude investigations. Long investigations mean that potentially harmful conduct can continue in the UK, sometimes leading to irreparable harm to competition and consumers. This is bad for everyone in the UK. The more efficiently the CMA can enforce the UK's competition rules, the more effectively it can protect competition, growth, and innovation in the UK.
- 1.139. These concerns were shared by John Penrose MP, who recommended in his report that government establish a taskforce to complete an end-to-end review and redesign of the competition law enforcement process across the CMA's functions. Government agrees that the enforcement processes can be improved but does not want to wait at this stage for a further review. Rather it would prefer – subject to consultation – to act on a range of opportunities to make the CMA's investigations **faster and more flexible so that anticompetitive conduct can be stopped sooner**. These include changes to:
- The scope of the UK's prohibitions on anticompetitive conduct.
  - The CMA's tools for identifying potential infringements.

- The CMA's interim measures powers.
- The CMA's evidence gathering powers.
- The CMA's settlement procedures.
- How the CMA makes decisions on cases.
- How parties exercise certain procedural rights.

1.140. Government considers that these measures, together with those in the rest of this consultation, should significantly improve matters. However, if there remain significant concerns about the efficiency of the enforcement following implementation of these reforms, it may then be appropriate to establish a further independent review.

1.141. In addition to the changes outlined above, the Furman Review, John Penrose's report, and Lord Tyrie's reform proposals have all recommended that further consideration should be given to the standard of review and the procedures of the Competition Appeal Tribunal when it reviews the CMA's decisions in Competition Act investigations. In light of these recommendations, government also welcomes views on whether there are alternative standards of review or changes to the Competition Appeal Tribunal procedures which should be considered for appeals against Competition Act investigations, to improve the efficiency of enforcement whilst maintaining a robust process which produces high quality decisions.

## A Statutory Duty of Expedition

- 1.142. The CMA has proposed the introduction of a new statutory duty of expedition applying across its functions. This would extend the existing duty of expedition that applies to the CMA's merger control functions. The CMA believes that this new duty could help to speed up its Competition Act investigations.
- 1.143. Government agrees with the CMA that there is a public interest in quick and efficient Competition Act enforcement. To that end, **government supports the CMA's use of its powers to conduct robust and timely investigations, which respect parties' rights of defence without engaging in unnecessary delay.**<sup>86</sup>
- 1.144. However, the CMA already has a primary statutory duty to promote competition for the benefit of consumers. To fulfil its duty to promote competition, it is implicit that the CMA should use its resources and powers to conduct its enforcement investigations as efficiently and effectively as possible, without undue delay. This is something the courts can already take into account when assessing the CMA's conduct in its investigations. Government therefore considers that the CMA's

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<sup>86</sup> If, contrary to government's expectations, the current legal framework for assessing the CMA's conduct of investigations were found by the courts to give insufficient priority to the public interest in swift enforcement, government will revisit the need for further legislative change.

proposal would not materially alter how a court would assess its conduct of an investigation. Consequently, **government currently has no plans to propose an expanded duty of expedition for the CMA.**

1.145. As set out in this consultation, government is proposing a range of additional reforms to the CMA's powers and processes which government believes should further support the CMA in conducting its investigations more quickly and efficiently. In addition, government is considering the merits of providing indicative timescales as targets for the completion of Competition Act investigations in the revised strategic steer to the CMA which government intends to consult on later this year. Government considers that these indicative targets could help to clarify government's expectations as to the conduct of the CMA's investigations for the CMA and businesses.

### **Updating the scope of the UK's prohibitions on anticompetitive conduct**

1.146. The core principles that underpin the UK's competition rules remain sound and government sees no reason to change them. These principles underpin the prohibitions on anticompetitive conduct found in most developed competition laws and the UK has reaffirmed its lasting commitment to upholding them in a number of its recent free trade agreements, including those with the EU, Japan,

and South Korea. Government is, however, considering reforms to the scope of the UK's prohibitions and how they apply to small businesses.

## Territorial Scope

1.147. Both the Chapter I and Chapter II prohibitions require two jurisdictional tests to be met before anticompetitive agreement or conduct will be subject to the UK's competition law. Firstly, the anticompetitive agreement or conduct must have an effect on trade within the UK. Secondly, one of the following conditions must be satisfied:

**1. For the Chapter I prohibition:** the agreement must have been, or been intended to be, implemented in the UK.<sup>87</sup>

**2. For the Chapter II prohibition:** the business carrying out the anticompetitive conduct must have a dominant position within the UK, or any part of it.<sup>88</sup>

1.148. By contrast, both the USA and the EU allow their competition regulators to consider conduct occurring outside their jurisdictions, but which nonetheless has an impact on their markets and consumers. The UK has always been cautious about legislating to regulate conduct outside its borders and recognises that in doing so regard

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<sup>87</sup> Section 2(3) Competition Act 1998.

<sup>88</sup> Section 18(3) Competition Act 1998.

must be had to international norms. However, government recognises that globalisation is increasing the ability of agreements implemented outside the UK, or dominance in a market outside the UK, to harm competition or consumers in UK markets.

1.149. Government is concerned that in the case of competition law the disparity between the UK's approach and those of its international partners could leave the UK's competition authorities less able to protect the UK's interests in globalised markets. To address this government proposes to amend the additional jurisdictional requirements referred to above. In place of these requirements government is considering whether:

- a. the Chapter I prohibitions should apply to anti-competitive agreements which i. are, or are intended to be, implemented in the UK or ii. which have, or are likely to have, direct, substantial, and foreseeable effects within the UK; and**
- b. the Chapter II prohibition should apply to conduct which amounts to the abuse of a dominant position in a market, regardless of the geographical location of that market, where the conduct i. takes place in the UK or ii. has, or is likely to have, direct, substantial, and foreseeable effects within the UK.**

1.150. This approach would bring the UK's competition law more in line with that of its international partners and ensure the CMA has the necessary powers to protect competition and consumers in UK markets.

**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?**

### **Immunity from fines for small agreements and conduct of minor significance**

1.151. A business which infringes the Chapter I prohibition, except for price-fixing agreements, currently has immunity from financial penalties when the parties to the agreement have a combined turnover of £20 million or less (referred to as a 'small agreement'). A business which infringes the Chapter II prohibition currently has immunity from a financial penalty where its turnover is £50 million or less (referred to as 'conduct of minor significance')<sup>89</sup>. The CMA may however notify a business that it has concerns about its conduct and that it has

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<sup>89</sup> Regulations 3 and 4, Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, S.I. 2000/262.

withdrawn these immunities. The business can then face financial penalties for conduct which continues after the immunity is withdrawn<sup>90</sup>.

- 1.152. Since these rules were created, the risk that anticompetitive conduct in small and emerging sectors can be harmful to growth and innovation has become increasingly clear. Small markets can also be very important to the consumers who use them. Government is committed to ensuring a robust enforcement regime across the whole of the UK's economy.
- 1.153. The important public policy principles of predictability and proportionate enforcement on which these immunities are based also remain valid, however. Government is therefore reviewing how these immunities operate to ensure they are best they are better targeted at reducing compliance costs for small business without unduly risking distortions in wider UK markets.
- 1.154. **Government is exploring the merits of reducing the threshold for immunity for penalties for both Chapter I and Chapter II infringements to companies with an annual turnover of less than £10 million.** If this option were adopted, government would also review how turnover is calculated for the purpose of applying the immunities. The provisions for withdrawal of

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<sup>90</sup> Sections 39 and 40 Competition Act 1998.

immunity following notice by the CMA would remain in place.

1.155. In the case of the Chapter I prohibition, government is also seeking views on whether the immunity should apply to:

- any business which is party to an agreement, and which has an annual turnover of less than £10 million; or
- only to agreements to which all the businesses that are a party have an annual turnover of less than £10 million.

1.156. These options could have the potential to significantly expand the scope of the threshold for immunity for penalties for Chapter I infringements. This could help provide certainty for small businesses, but this needs to be balanced against the potential risks to deterrence that expanded immunity thresholds could bring. Government welcomes views on the potential impact of these reforms on these issues. Government is also considering whether any additional conditions should be placed on these immunities.

1.157. For businesses that would no longer be covered by these immunities there are other adequate

safeguards in place to ensure that the CMA imposes only fair and proportionate penalties.<sup>91</sup>

**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?**

**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?**

## **Identifying and prioritising investigations**

1.158. The first step of any investigation is to identify and prioritise cases. Doing this effectively is crucial to a regulator's success. The UK's competition authorities have a range of tools for identifying potential infringements of UK competition law including leniency applications, whistle-blowers, complaints, notifications from international partners and intelligence gathered through the authority's other tools such as market investigations, mergers, or sector regulation. Once potential cases are

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<sup>91</sup> The CMA is prevented from imposing a penalty which is larger than 10% of the undertaking's worldwide turnover. Further, the CMA must have regard to its own guidance on the appropriate amount of any penalty, which requires the CMA to satisfy itself that the penalty is proportionate.

identified, the CMA prioritises them according to publicly available criteria.

## **Incentives for leniency applicants**

- 1.159. There are inherent challenges to detecting cartels, given the efforts of participants to conceal their behaviour. Even where an authority investigates a suspected cartel, documentary evidence may be fragmentary, making it difficult to prove the suspected infringement without inside knowledge. The CMA's leniency regime gives immunity from fines to businesses that 'blow the whistle' on a cartel, admit their wrongdoing and cooperate with the investigation. It is a valuable tool in tackling cartels.
- 1.160. However, fines are not the only risk businesses face by participating in cartels. A cartel member can be sued by a victim of a cartel for the damage they have suffered. It is expected that private actions for damages in UK courts will continue to increase and that the potential exposure to liability for damages may become an increasingly important factor for cartel members in deciding whether to apply for leniency. While leniency recipients are protected from disclosure of leniency statements and joint and several liability in private actions, they can still be liable for damages claims from their own direct or indirect purchasers. **Government wishes to explore whether private damages may be**

**disincentivising leniency applications and, if so, how this might be addressed.**

1.161. In particular, government is **seeking views on the merits of providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel.** Providing immunity from damages claims would ensure that businesses who might otherwise consider coming forward with leniency applications are not disincentivised by the potential exposure to liability for damages. It may also help to mitigate concerns that leniency applicants can be an easy target in follow on claims. Government recognises that such a proposal may be seen to allow businesses to benefit from unlawful behaviour. This is a legitimate concern, but it needs to be balanced against the potential for this policy to result in more effective enforcement against cartels, and the benefit this would bring to businesses and consumers and the economy more generally. Parties suffering harm from anticompetitive conduct could continue to recoup their losses from the other cartelists, who are not holders of full immunity in the public enforcement process.

## **Protections for whistle-blowers**

1.162. Whistle-blowers can play an important role in competition law enforcement. In particular, a whistle-blower willing to identify themselves to an

authority is likely to provide greater assistance than an anonymous source. However, individuals may be reluctant to disclose their identity to a competition authority, given the serious personal or professional consequences they might face if their identity becomes known. The more certainty a competition authority can provide about how their identity will be protected, the more likely whistle-blowers are to come forward. Whistle-blowers may be more likely to tip off a competition authority if they know their identity will be protected. This can still have significant value to a competition authority which can then corroborate the whistle-blower's information through other sources.

**1.163. Government is therefore seeking views on whether improvements can be made to the current legal framework to give greater certainty over the handling of whistle-blowers' identity across the enforcement process.** For instance, the CMA has called for the courts to be required to give greater weight to the importance of anonymous whistleblowing to competition law enforcement when considering whether their identity should be disclosed to defendants.

**1.164. Government welcomes views on the merits of having an absolute prohibition on the disclosure of a whistle-blower's identity unless the CMA relies on the whistle-blower's evidence as part of its infringement decision.** Provided the

whistle-blower's evidence can be corroborated, this would allow the CMA to offer the whistle-blower an assurance that their identity will not be disclosed during the investigation. If an anonymous whistle-blower's evidence is relied on by the CMA in the CMA's infringement decision, the courts would still need to have regard to the importance of protecting the whistle-blower's identity to the fullest extent possible without undermining the defendant's procedural rights.

**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?**

Strengthening the CMA's interim measures powers

1.165. The CMA has powers to impose 'interim measures' in Competition Act investigations, which allow it to take action against certain conduct before concluding an investigation where it considers it necessary to act to prevent significant damage to a person, or a particular category of persons or to protect the public interest. For instance, the CMA could prevent a business from taking actions which might drive out competitors, while the CMA investigates and decides whether the actions are

legal. The impact of the CMA's investigations will be undermined if companies are able to inflict significant harm on a market before the CMA can conclude its investigation.

- 1.166. Government is concerned that the interim measures tool in its current form may be ineffective. If the CMA proposes to issue interim measures against a business, it must not only provide that business with a chance to review and comment on the proposed decision but also a reasonable opportunity to inspect all the evidence it has obtained relating to the decision. This can be a time consuming and resource intensive process. If the powers are too burdensome to use, then their purpose is undermined.
- 1.167. CMA has only used its interim measures powers once, and both the Digital Competition Expert Panel and the CMA have suggested that the interim measures tool needs to be streamlined to make it easier for the CMA to use.<sup>92</sup>
- 1.168. The use of interim measures can impact on the commercial and reputational interests of the business concerned. Therefore, the need for the CMA to act swiftly needs to be balanced against the

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<sup>92</sup> Recommended Action 12 of the Furman Report: "To facilitate greater and quicker use of interim measures to protect rivals against significant harm, the CMA's processes should be streamlined".

business' rights of defence. Options for updating the current approach include:

- **Changing the rules regarding access to file in relation to interim measures** so that the CMA is only required to provide the business with notice of the proposed decision and the reasons for it, not provide access to the CMA's underlying file of evidence as a matter of course.
- **Changing the standard of review if a decision is appealed.** Currently, if an interim measures decision is appealed to the CAT, the CMA's decision is subject to a full merits review, in the same way as a final infringement decision. Government is considering whether, the CAT should, instead, review an interim measures decision in line with the principals of judicial review, in the same way it reviews the CMA's decisions in respect of its mergers and markets functions.

1.169. These reforms would allow the CMA to use the interim measures tool more efficiently, while still providing sufficient protection for the interests of the businesses under investigation.

**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?**

## New evidence gathering powers

1.170. The penultimate section of this chapter sets out proposed reforms to strengthen the CMA's investigative powers. This includes implementing the Penrose Report's recommendation that there should be tougher penalties for companies that slow down or obstruct cases. In addition to these more general reforms government is considering a number of options for improving the CMA's information gathering powers specifically for Competition Act Investigations.

### **Wider powers to interview relevant witnesses**

1.171. In Competition Act investigations, the CMA has the power to require an individual to answer questions at interview, but only if they have a connection to a business under investigation.<sup>93</sup> The CMA therefore relies on voluntary attendance by individuals without such a connection, such as the employee of a customer, supplier, or competitor of a business under investigation. In some instances, the customers or suppliers of those businesses under investigation may have incentives not to cooperate with the CMA's investigations. By contrast, in the context of the CMA's merger and market investigations, the power to require interviews is broader. The CMA can require an interview from an individual regardless of their

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<sup>93</sup> Section 26A(1) Competition Act 1998.

connection to a particular business under investigation.<sup>94</sup> **Government is considering whether to broaden the power to interview individuals as part of Competition Act investigations, so it aligns with the existing powers in the Enterprise Act 2002.**

### **More effective requirements for businesses to preserve evidence**

1.172. For investigations under the cartel offence, it is an offence to falsify, conceal or dispose of documents that a person knows or suspects to be relevant to an investigation, where that person knows or suspects that such an investigation is being or is likely to be carried out.<sup>95</sup> By contrast, businesses under Competition Act investigations are required to preserve evidence if the evidence falls within the scope of an information gathering notice or other investigative measure. There is currently no explicit statutory obligation not to destroy evidence which a person knows is relevant to a Competition Act investigation, but where the CMA happens not to have asked for it yet. **Government is considering whether to extend the legal duty to preserve evidence that exists in the context of investigations into the cartel offence to all Competition Act investigations.**

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<sup>94</sup> Section 109(1) and section 174(3) Enterprise Act 2002.

<sup>95</sup> Section 201(4) Enterprise Act 2002.

1.173. As is the case for the cartel offence, the prohibition would be proportionate and would only apply where it could be shown that the person knew that there was an ongoing investigation, or suspected that an investigation was likely to be carried out. Government is considering establishing civil penalties for breaches of the obligation in the context of investigations under the Competition Act. Separate to its consideration of establishing civil penalties for breach of the obligation, government is also considering whether breaches of the new obligation in the context of Competition Act investigations should attract criminal sanctions.

### **More flexible powers of inspection for domestic premises**

1.174. When inspecting a business premises under a warrant, the CMA has so-called ‘seize and sift’ powers.<sup>96</sup> These allow the CMA to remove material from the premises, where it would not be practicable to decide on-site whether it should be seized. The CMA can then sort through the evidence off the premises, returning non-relevant evidence to its owner. **Government is considering whether to give the CMA powers to ‘seize-and-sift’ evidence when it inspects a domestic premises under a warrant.** This change would

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<sup>96</sup> The powers of seizure in section 28(2) of the Competition Act 1998 are specified in Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 for the purposes of section 50 of that Act.

ensure that the CMA could conduct efficient and timely inspections. This would also give the CMA more flexibility to conduct parts of its searches off the premises where appropriate, reducing disruption for those under investigation.

**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?**

### **A more effective settlement regime**

1.175. Government believes it is important that the CMA can quickly and efficiently identify and fix anticompetitive conduct in UK markets. The ability for the CMA to use voluntary resolution procedures can help achieve significant efficiencies in enforcement by resolving investigations sooner, freeing up its resources to open more cases.

**Government therefore wishes to seek views on how to improve the use of voluntary resolution in the enforcement regime.** In any discussion of voluntary resolution, government recognises the need to balance the swift disposal of cases, with the need to maintain the deterrent effect of enforcement.

1.176. There are currently two forms of voluntary resolution used by the CMA:

- **Commitments:** The company offers binding commitments relating to future conduct in order to resolve the CMA's competition concerns regarding current practices. If the CMA accepts these commitments, it will close its investigation. There is no finding of an infringement, admission of liability or penalty.
- **Settlement:** The company admits to the infringement being investigated by the CMA, agrees to end its conduct and to a streamlined process for the investigation. Settlement can take place before or after the CMA has issued its provisional findings. The CMA will still issue an infringement decision. To incentivise settlement, the CMA will discount the financial penalty which would otherwise be imposed without settlement.

1.177. Each of these options has advantages and disadvantages. Commitments can allow early resolution of a case at relatively low cost. This allows for potential harm to markets to be fixed swiftly and the CMA to reallocate resources. However, the lack of an infringement decision and sanction means that if commitments are used too regularly it may reduce deterrence. Settlement involves greater deterrence as it involves an admission of liability, a public infringement decision and a financial penalty. However, it is more time consuming and resource intensive than commitments because the CMA must still issue an infringement decision.

## Streamlining the settlement process

1.178. Government is seeking views on the effectiveness of the procedures for the voluntary resolution of Competition Act investigations. In particular, it is seeking views on the following options to enable greater efficiencies from the settlement process.

- **Binding admissions:** The admission of facts or liability by a business who entered freely into settlement with the CMA via a fair process could, as a matter of law, be binding on that party as evidence of the facts admitted to.<sup>97</sup> The CMA could be entitled to rely on these admissions in any infringement decision addressed to that party without the need for further corroboration of those facts, in respect of that party's conduct. Government believes this could allow the CMA to maximise the potential efficiencies of the settlement process.
- **Short form decisions:** Currently, to mitigate against the risk of challenge, the CMA's infringement decisions in settlement cases are long and detailed and often resemble the decisions issued in a case without settlement. Preparation of these detailed infringement decisions creates significant work for the CMA and reduces the efficiencies that might be achieved by the

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<sup>97</sup> This proposal would not prevent the parties engaging in initial informal settlement discussions with the CMA on a without prejudice basis.

settlement process. In circumstances where admissions from a settling business are binding on the businesses making them and where all parties had chosen to settle, the CMA could, by default, prepare short form decisions.<sup>98</sup> Government believes this could lead to significant efficiencies.

- **A streamlined process:** Currently, the CMA Rules place certain requirements on the CMA in relation to its settlement process.<sup>99</sup> Government proposes to remove these requirements from the secondary legislation, so that the CMA has the autonomy to implement a robust and efficient settlement process.

### **A new settlement tool for abuse of dominance investigations**

1.179. In addition to streamlining the current settlement processes, government is considering whether alternative forms of voluntary resolution would improve the efficiency of the enforcement regime. John Penrose's report identified a concern that the requirement for an admission of liability as part of a settlement process increases a company's exposure to private claims for damages which may disincentivise settlement. This may be the case particularly in Chapter II investigations, where a

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<sup>98</sup> A short form decision should remain sufficiently detailed to ensure it has precedential value on the CMA's application of competition law, and can deter businesses from engaging in similar conduct.

<sup>99</sup> The Competition Act 1998 (Competition and Markets Authority Rules) Order 2014 S.I. 2014/458

business admitting it holds a dominant position in a market could risk exposing itself to significant liability, not just for claims in relation to the infringement under investigation but also for other unrelated matters. On the other hand, as noted above, an over reliance on commitments may harm deterrence.

1.180. In that context, government is seeking views on the potential benefits of introducing an **additional settlement procedure for Chapter II investigations which would allow the CMA and the business under investigation to enter into an Early Resolution Agreement**. Early Resolution Agreements could set out the basis for the CMA's concerns and may require the business under investigation to:

- not to contest the CMA's proceedings;
- accept certain factual matters relevant to the conduct under investigation;
- give commitments as to its future conduct; and
- agree to make a settlement payment in return for the closure of the investigation.<sup>100</sup>

1.181. However, unlike in settlement cases, government proposes that an Early Resolution Agreement should not require the business to admit to an infringement of competition law and would not

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<sup>100</sup> Like penalties imposed in infringement decisions government proposes that settlement payments would be paid into the consolidated fund.

be binding as to matters of fact and liability in follow on damages claims. Government envisages that Early Resolution Agreements would be published by the CMA.

1.182. Settlement payments in Early Resolution Agreements could help to deter future infringements of competition. For example, it may be appropriate to take account of the benefits the business under investigation is likely to have derived from the conduct under investigation when determining the payments required. However, it may also be appropriate for the settlement payments required under Early Resolution Agreements to be reduced compared to the penalty a business would have needed to pay if an infringement decision was reached. This reduction would recognise the potentially significant public policy benefits that early resolution of the CMA's investigations can bring.

1.183. **Government is seeking views on whether this procedure could help to bring complex Chapter II cases to a close more efficiently, while still preserving general deterrence via the imposition of the settlement payment.**

1.184. Government proposes that before entering into an Early Resolution Agreement, the CMA would have to be satisfied that it had reasonable grounds to believe, based on the facts admitted and any evidence it had already obtained in the

investigation, that an infringement had been committed. Government is also seeking views on whether Early Resolution Agreements should require the approval of the Competition Appeal Tribunal before they became binding. This would be analogous to the safeguards which apply to the use of Deferred Prosecution Agreements in criminal enforcement and could help to provide confidence that the use of an Early Resolution Agreement was appropriate and in accordance with the interests of justice.<sup>101</sup>

**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?**

### **Encouraging businesses to offer voluntary redress**

1.185. The CMA can approve schemes set up by businesses to provide redress to those harmed by breaches of competition law. An advantage of such a scheme is that those affected by the infringement can avoid the need for damages claims to be pursued through the courts, which can be time consuming and costly. Businesses that establish a voluntary redress scheme may also receive a

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<sup>101</sup> Section 45 and Schedule 17 to the Crime and Courts Act 2013 make provision for deferred prosecution agreements where a prosecutor is considering prosecuting for an offence specified in that Act.

discount to the penalty imposed by the CMA for the competition law infringement.

1.186. If a business decides to establish a voluntary redress scheme, it must submit information to the CMA for the scheme to be approved. These documents will include the explanation from the business of the level of harm caused by its anticompetitive conduct, including the scope and level of compensation that will be offered under the scheme. However, the establishment of a voluntary redress scheme does not prevent an individual from bringing a separate claim for damages to the courts, outside of the scheme. In the event of such a claim, the court may require that the defendant business disclose to the claimant evidence on the harm caused, which might include documents prepared by the business specifically in order to seek approval from the CMA to establish a voluntary redress scheme. A business therefore prepares such documents with the risk that they might be used against it by an individual seeking damages via the courts. The CMA has advised government that it believes this could risk disincentivising businesses from offering voluntary redress.

**Government is seeking views whether protecting documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation will encourage the use of these redress schemes.**

**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?**

### **Rights of defence and access to evidence**

1.187. If a company chooses not to settle an investigation with the CMA it must be given a fair opportunity exercise its rights of defence. In particular, the ability of parties under investigation to inspect the evidence held by the CMA is an important part of their rights of defence. However, the CMA's evidence may often contain confidential information, disclosure of which to a competitor may cause significant harm or distort the competitive process. Providing access to the CMA's file of evidence involves balancing the need to disclose evidence to businesses under investigation, while protecting confidential information through redaction. This balance can be contentious and access to file is currently a burdensome, time-consuming process that can significantly slow down an investigation.

1.188. Government supports the CMA's ongoing efforts to streamline access to file.<sup>102</sup> This has included the

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<sup>102</sup> In some cases, the CMA achieved significant efficiencies by disclosing only the 'key documents' – the documents actually referred to in its Statement of

greater use of confidentiality rings to quicken the process of deciding redactions.<sup>103</sup> Confidentiality rings can, however, be difficult to negotiate because they are contingent on all the parties involved agreeing to the same terms.

1.189. Government is seeking views on the merits of **new legal arrangements to deliver more efficient use of confidentiality rings in Competition Act investigations**. Government proposes that, as is currently the case, businesses under investigation would need to agree that evidence will be disclosed to their advisers via a confidentiality ring. However, having a prescribed legal framework means that the CMA would not be required to negotiate the terms of the ring with the parties (or any third parties). To ensure that the legal framework for the confidentiality rings can operate most effectively, government believes that it would need to:

- be open to use by both legal and non-legal advisors;

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Objections – which represent a subset of all the documents on the case file. Parties can then request further disclosure of non-key documents.

<sup>103</sup> Confidentiality rings are arrangements where documents are disclosed to a business' lawyer, with the lawyer agreeing that they will not share details of the documents with their client. The documents are placed within a 'ring', with the lawyers on the inside, and their clients on the outside. The lawyers can then review the documents inside the confidentiality ring and decide whether their clients need to see any, in order to exercise their rights of defence. Confidentiality rings can save time and resources because disclosing documents only to lawyers acting for another business, is unlikely to cause harm, and the CMA is therefore relieved of the burden of considering commercial confidentiality for each document.

- permit confidential, commercially sensitive information to be disclosed into the ring without the need to seek confidentiality representations or the consent of a third party who provided the information; and
- include sanctions for breaches of the confidentiality ring.<sup>104</sup>

1.190. Part 9 of the Enterprise Act 2002 already provides safeguards for the use of data provided to parties during the course of the CMA's investigations and breaches of the Part 9 rules may be a criminal offence. **However, government is considering whether civil sanctions should also be available if the rules for a confidentiality ring are breached.**<sup>105</sup> Government believes that civil penalties could be a more effective and proportionate tool for regulating compliance with confidentiality rings.<sup>106</sup> Government proposes that these penalties could be imposed upon either the individual that breached the ring and/or their employer. This would ensure that both the individual

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<sup>104</sup> The proposals to facilitate the use of confidentiality rings, should be distinguished from the obligations on the CMA regarding the disclosure of evidence. These proposals are not intended to prevent documents from being disclosed outside of confidentiality rings where appropriate and redacted appropriately for confidentiality.

<sup>105</sup> If civil sanctions are adopted government proposes that payment of a penalty under the civil regime could also discharge any potential criminal liability under Part 9.

<sup>106</sup> Given the importance of protecting commercially sensitive information and personal data government believes it is appropriate to retain the potential for criminal sanctions for the most serious breaches of the confidentiality ring rules.

and the employer are subject to the same incentives to protect the integrity of the confidential information in the ring. The penalty regime should also include incentives to ensure that breaches are notified to the CMA and remedied promptly.

**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?**

### **Case Decision Groups**

1.191. In Competition Act investigations, once the CMA has completed its investigatory work, it notifies the parties of its provisional findings via a 'statement of objections'. This provides the parties with the opportunity to review the case against them and make representations to the CMA before it makes a final decision on whether there was an infringement. The decision to issue the statement of objections is taken by the CMA staff that conducted the investigation.

1.192. After the provisional findings have been issued, the CMA Rules, which are made by secondary legislation<sup>107</sup>, require the CMA to appoint a new decision maker to make the final decision on the case. The new decision maker is subject to two requirements.

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<sup>107</sup> The Competition Act 1998 (Competition and Markets Authority Rules) Order 2014 S.I. 2014/458

- **Fresh decision making:** The individual must have had no previous involvement in the case.
- **Collective decision making:** There must be at least two individuals to act as the final decision makers on whether there has been an infringement.<sup>108</sup>

1.193. The CMA gives effect to the requirements of fresh and collective decision making by appointing ‘Case Decision Group’ (CDGs). Generally, the CMA appoints three people to the CDG, a mix of senior CMA staff members and members of the CMA’s independent panel.

1.194. Government recognises that the design of internal decision-making structures involves trade-offs. For instance, the use of fresh decision makers may mitigate concerns that the individual who conducted the investigation may display natural biases, leading to weaker decisions. On the other hand, the use of fresh decision makers creates delay while they acquaint themselves with what is likely to be a complex case, with which they have had no previous involvement. Similarly, the use of collective decision making may reduce certain types of error. On the other hand, requiring more than one individual to take a decision is a greater demand on the CMA’s resources, with each individual having to complete the work necessary to take a decision. In

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<sup>108</sup> Ibid.

addition, additional effort is required to coordinate the efforts of a group of decision makers compared to supporting a single decision maker in their role.

1.195. The CMA should have internal procedures to ensure that its Competition Act decisions are fair, and robust. However, government considers that these do not need to be prescribed in secondary legislation. Instead, government proposes that the CMA should have autonomy to determine the most effective internal decision-making processes for Competition Act investigations. **Government is therefore considering whether to remove the requirements from the CMA Rules on the decision makers for infringement decisions in Competition Act investigations.**

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

### **Appeals before the Competition Appeal Tribunal**

1.196. Rights of appeal ensure that businesses can challenge the CMA's decisions before an independent court or tribunal. An effective appeal process gives businesses confidence that decisions will be taken based on the evidence, via a fair process and on a proper interpretation of the law, without unduly limiting the authority's effectiveness or duplicating the initial process. Appeals against

the CMA's decisions in Competition Act cases are conducted before the Competition Appeal Tribunal (the 'Tribunal') and are an integral part of the UK's competition law system.

1.197. The scope and conduct of appeals can have significant implications for the effectiveness and efficiency of the UK's competition regime. Long, drawn-out appeals are just as undesirable as long, drawn-out investigations. It is therefore important that careful consideration is given to the design of regulatory appeals to ensure it can provide a swift, efficient, and proportionate procedure for resolving investigations.

1.198. Most decisions taken by public authorities are subject to review by a court or tribunal in accordance with the ordinary principles of judicial review. This is also the case for many of the CMA's functions, including decisions taken by the CMA in relation to its merger control, market study and market investigation functions. As an exception to this, the Competition Act 1998 provides that for many of the decisions taken by the CMA in relation to its Competition Act investigations, the Tribunal must determine the appeal "on the merits".<sup>109</sup> While not a re-hearing of the decision, this approach provides for an in-depth review of the law and of the facts by the court. It is for the appellant to set out the decision against, or with respect to, an appeal is

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<sup>109</sup> Paragraph 3(1) in Part 1 of Schedule 8 to the Competition Act 1998.

brought and whether that was based on an error of fact or was wrong in law, and the extent to which they are appealing against the CMA's exercise of its discretion in making the disputed decision. The Tribunal can hear fresh evidence, including fresh evidence not before the CMA, and make findings of both fact and law.

1.199. Appeals against decisions by the CMA to impose financial penalties for non-compliance with statutory requests for information (whether in relation to its functions under the Competition Act 1998<sup>110</sup> or its functions in relation to merger control, market studies or market investigations<sup>111</sup>) are made by application to the Tribunal, which has the power to quash and substitute penalties, or the dates by which they must be paid, if it considers it "appropriate to do so".<sup>112</sup>

### **Judicial scrutiny of CMA decisions**

1.200. When the Chapter I and Chapter II prohibitions were introduced in 1998, government believed that the combination of two factors justified a higher level of scrutiny provided for in the Competition Act.

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<sup>110</sup> Section 40A Competition Act 1998 allows the CMA to impose penalties where it considers a person has, without reasonable excuse, failed to comply with a requirement imposed on the person under sections 26, 26A, 27, 28, 28A or 40ZD Competition Act 1998.

<sup>111</sup> Section 110(1) Enterprise Act 2002 allows the CMA to impose a penalty if it considers a person has, without reasonable excuse, failed to comply with any requirement of a notice under s.109.

<sup>112</sup> Section 114(5) Enterprise Act 2002

- 1.201. The view was that the higher standard of review adopted for appeals against Competition Act investigations was appropriate because Competition Act investigations are a relatively unique type of regulatory measure. Most economic regulation applies only to specific regulated businesses or to a specific sector of the economy and generally involves the imposition or enforcement of specific legal requirements related to a particular aspect of the company's business. By contrast, the Chapter I and Chapter II prohibitions under the Competition Act are generally applicable to all businesses in all sectors of the economy, and to all aspects of a business. In this regard the Chapter I and Chapter II prohibitions operate in a similar way to prohibitions on unlawful conduct in criminal law. Additionally, infringing the Chapter I and Chapter II prohibitions can also incur significant financial penalties.
- 1.202. Government revisited the issue in a consultation in 2011 and concluded that the system at that time for the enforcement of the Competition Act prohibitions was not working as well as it should. This conclusion was illustrated not only by the consultation responses but also by the protracted nature of cases and the strong challenge that is often mounted to decisions on appeal. It considered that the standard of review for appeals against Competition Act investigations remained appropriate and that the system could be improved

through enhancements to the administrative stage of the enforcement process, then conducted by the OFT.<sup>113</sup>

1.203. As noted above, since its creation in April 2014, the CMA has significantly improved the overall efficiency of civil enforcement against unlawful anticompetitive conduct. However, in recent years there have been calls in the Furman Review, the Penrose Report, and Lord Tyrie's reform proposals for the standard of review in appeals against Competition Act investigations to be reviewed again.<sup>114 115 116</sup> Additionally, in 2016 the National Audit Office noted that "*many stakeholders and legal practitioners we spoke to think there are strong incentives for businesses to litigate if they lose a case, which can lead to risk aversion in the competition authorities*".<sup>117</sup> In his 2019 recommendations Lord Tyrie argued that the appeal system for Competition Act investigations is more

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<sup>113</sup> See paragraph 6.18 of 'Growth, competition and the competition regime: government response to consultation', published March 2012 and available at [www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform](http://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform)

<sup>114</sup> Recommended Action 13 of the Report of the Digital Competition Expert Panel was that '*The review applied by the Competition Appeal Tribunal to antitrust cases, including interim measures, should be changed to more limited standards and grounds*'.

<sup>115</sup> Section 2.7 of the Penrose Report, which recommended that appeal standards should form part of the scope of an end-to-end review of case management at the CMA and the Tribunal.

<sup>116</sup> Lord Tyrie (n13).

<sup>117</sup> The National Audit Office's February 2016 report: '[the UK Competition Regime](#)', paragraph 2.15.

protracted and cumbersome than is necessary. In Lord Tyrie's view the current standard of appeal encourages resource intensive appeals, with greater use of expert and factual witnesses, and leads the CMA to conduct disproportionately exhaustive investigations and produce lengthy 'gold-plated' decisions.

1.204. Businesses and their advisors appear, in general, to remain supportive of the current system, which they consider to be well established and understood. It is also unclear whether or not the concerns that have been expressed about the level of scrutiny applied by the Tribunal are borne out in practice. The CMA has a strong success rate before the Tribunal. To date, only one Competition Act infringement decision taken by the CMA has been overturned on appeal.<sup>118</sup> The Tribunal itself argued strongly that the current standard of review was appropriate in response to government consulting on the issue in 2013.<sup>119</sup> Government recognises

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<sup>118</sup> This case – *Phenytoin* - involved allegations of excessive pricing which is a relatively rare infringement in competition law and therefore makes this appeal a difficult decision to use as a test case outside of its specific facts. The Tribunal also varied or cancelled financial penalties imposed by the CMA in *Ping* and *Paroxetine*.

<sup>119</sup> Response of the Competition Appeal Tribunal to government's June 2013 consultation 'Streamlining Regulatory and Competition Appeal' available at: [www.catribunal.org.uk/about/announcements/streamlining-regulatory-and-competition-appeals-fri-23082013-1200](http://www.catribunal.org.uk/about/announcements/streamlining-regulatory-and-competition-appeals-fri-23082013-1200)

that the Tribunal's view was supported by many other respondents.<sup>120</sup>

1.205. Government considers that the scrutiny and powers exercised by the courts should ensure that:

- The overall competition law enforcement system functions efficiently, with the competition authority able to ensure competition law is followed throughout the economy, minimising overall delays to the final resolution of cases, and ultimately tackling competitive harms.
- Appropriate deference is given to an expert regulator's decisions on matters of technical judgment and expertise.
- The appeals framework respects the procedural rights of businesses and provides an effective oversight of the administrative decision making process.
- The courts provide robust quality assurance of the CMA's interpretation of competition law.

1.206. There may be multiple ways in which these requirements can be satisfied within an appeal framework. The appropriate level of scrutiny to be applied to regulatory decisions should be kept under review and in the past government has revised this where it was considered appropriate. However, to justify departing from the current

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<sup>120</sup> See: [www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform](http://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform)

system, any change would need to deliver a more efficient enforcement process without unduly prejudicing the overall robustness of the UK's competition enforcement and the quality of the decisions it produces.

1.207. In light of the above, **government welcomes views on the appropriate level of judicial scrutiny of the CMA's decisions in Competition Act investigations.**

1.208. Government also welcomes views on the appropriate standard of judicial scrutiny when reviewing penalties imposed by the CMA when a business fails to comply with the CMA's investigative and enforcement powers, including information requests and remedies across its functions.

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

**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?<sup>121</sup>**

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<sup>121</sup> This would include Interim Enforcement Orders in merger control investigations.

## Procedures in Competition Act appeals

- 1.209. The Tribunal's procedures when hearing appeals are also an important part of the enforcement regime for Competition Act investigations because they affect how cases proceed through appeal and how private claims are litigated. The Tribunal's procedures also have a significant impact on how cases are investigated and decided by competition authorities and how businesses choose to defend themselves during the investigation. For instance, rules governing the admissibility of new evidence at the appeal stage may affect the evidence submitted by a business when defending itself to the competition authority at the administrative phase.
- 1.210. Eight of the Competition Act investigations launched by the CMA or OFT since 2008 (out of 38 investigations resulting in an infringement decision) have resulted in concluded appeals to the Tribunal. The average time from an appeal being lodged to a judgment was 15 months, although there is significant variation. In *Galvanised Steel Tanks*, the Tribunal handed down a judgment 7.5 months after the appeal compared to 15.9 months in *Phenytoin*.<sup>122</sup> Appeals can constitute a significant

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<sup>122</sup> There were 60.9 months between the appeal and the Tribunal's final decision in *Paroxetine*. However, the Tribunal stayed its consideration of the case for 22 months between March 2018 and January 2020, while the EU courts provided clarification on EU law. A duration of 38.9 months has therefore been used in calculating the average time across all 8 cases of 15 months.

portion of the duration of an enforcement case and involve significant resources for the CMA and businesses. The time taken to decide a case will be even longer if it is remitted back to the CMA for further consideration.

- 1.211. Government believes it is important that the Tribunal's original mandate to perform a streamlined, efficient, and expert review of the CMA's decisions is maintained. The Tribunal's rules were revised in 2015 to support this objective following a review led by Sir John Mummery of the previous rules.
- 1.212. Government has recently concluded a call for evidence on the 2015 amendments to the Tribunal's rules.<sup>123</sup> The call for evidence is part of a statutory review which will examine whether the 2015 amendments are delivering their intended objective. Government will consider the responses to the call for evidence alongside responses to this consultation to determine if further reform of the Tribunal's processes is necessary. **Government would welcome feedback on these views.**

**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**

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<sup>123</sup> See ['Post-implementation review of the Competition Appeal Tribunal Rules 2015: call for evidence'](#).

## **Tribunal's appeal process for Competition Act investigations?**

### **Stronger investigative and enforcement powers across competition tools**

- 1.213. In addition to the proposals specific to the CMA's merger, markets and Competition Act tools set out above, government is proposing a range of reforms that would apply across the CMA's competition tools. These cross-cutting reforms are intended to enable the CMA to remedy more harm and sooner. Government intends through these reforms to give the CMA the tools necessary to promote competition effectively in a modern economy.
- 1.214. The CMA's promotion of competitive markets will play a central role in the UK's economic recovery from the pandemic and, following the UK's withdrawal from the EU, its caseload will grow and become more complex. Government now wishes to review and upgrade the CMA's information gathering and enforcement powers, so that investigations can be conducted more swiftly and effectively.
- 1.215. The reforms set out in this section cover:
- more effective investigative and enforcement powers including tougher penalties for non-compliance with CMA investigations.

- strengthening the ability of the UK's competition authorities to cooperate with their international counterparts.

### More effective investigative and enforcement powers

- 1.216. The CMA has a diverse set of investigatory and enforcement powers. Its powers differ between its tools, but include the power to issue compulsory information requests, the ability to compel witnesses to attend interviews and the ability to conduct inspections or searches of a company's premises.<sup>124</sup> The CMA also has the power to impose remedies or accept commitments from businesses to remedy the CMA's concerns about anticompetitive harms in UK markets.
- 1.217. Government is concerned, however, that gaps in the CMA's information gathering powers may have developed over time. To address this government is seeking views on following additional evidence gathering and enforcement powers to ensure the CMA's enforcement capabilities remain in line with international best practice:

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<sup>124</sup> Whilst the CMA is empowered to search a company's premises without a search warrant under section 27 of the Competition Act 1998, it will usually not conduct a search without one (according to paragraph 6.30 of the [Guidance on the CMA's investigation procedures in Competition Act 1998 cases](#)).

- effective evidence gathering powers backed by strong sanctions if companies obstruct the CMA's investigations; and
- the ability to hold companies to account effectively if they fail to comply with the CMA's remedies or fail to honour the commitments they have given to the CMA.

### **Tougher penalties for companies that slow down or obstruct cases**

1.218. As John Penrose's report recognised, effective investigations depend on parties co-operating with the CMA and responding in a full, timely and honest way to requests for information. The CMA should have adequate tools to ensure that businesses comply with its investigations. The CMA can fine a business a £30,000 fixed penalty and/or a daily rate of £15,000, if it fails to comply with its information gathering powers. The CMA has identified these penalties are '*significantly weaker than those of other competition authorities in Europe*', and John Penrose's report recommended the penalties be 'strengthened and brought into line with international norms'.<sup>125 126</sup>

1.219. Government agrees with these assessments and considers that the current caps on penalties risk larger businesses failing to have adequate

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<sup>125</sup> Lord Tyrie (n13).

<sup>126</sup> See section 2.3 of John Penrose's report.

incentives to comply with the CMA.<sup>127</sup> The CMA is likely to investigate larger global businesses with high turnovers, following the UK's departure from the EU, which is likely to exacerbate the problem.

1.220. Government proposes that the CMA should have fining powers that will apply to information gathering across all its competition tools to enable effective and proportionate sanctions for businesses which fail to comply with investigations, in line with international best practice. **Government proposes that the CMA should be able to impose fixed penalties of up to 1% of a business' annual turnover, as well as the power to impose an additional daily penalty of up to 5% of daily turnover while non-compliance continues.** Penalties for individuals would remain capped at £30,000 along with the possibility of a daily penalty of up to £15,000 while non-compliance continues.

<sup>128</sup>

1.221. These penalties would be available to the CMA where it believes, on a civil standard of proof, that a company or individual has:

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<sup>127</sup> For instance, in 2016, a business with a turnover of £1.15bn failed to comply with a written request for information from the CMA. The CMA imposed a penalty of £10,000.

<sup>128</sup> Government proposes that these powers would also apply to information requests in public interest intervention cases, within the merger regime.

- failed to comply with an information request or other investigative notice issued by the CMA, and lacks a reasonable excuse for this non-compliance;
- concealed, destroyed, or falsified evidence; or
- provided false or misleading information to the CMA.

1.222. The turnover thresholds set out above are the statutory maximum penalties that could be imposed by the CMA, and not the penalties which would be applied in each case. As with all the CMA's existing turnover-based penalties, government proposes that the CMA should be obligated to publish guidance detailing how it will determine the level of penalty to impose in individual cases. These penalties, and their level, will be appealable by the company affected. Government proposes that power to impose civil penalties would sit alongside the CMA's ability to seek criminal prosecution of the existing relevant criminal offences.

**1.223. Government would welcome views on whether these proposed statutory maximum penalties are set at the right level.**

### **Personal accountability for the provision of evidence**

1.224. Government is also seeking views on whether to require an individual or a company director whose company is responding to an information request to make a personal declaration, certifying that:

- a. the information provided is, to the best of their knowledge, full, complete, and correct; and
- b. the individual or company has carried out all reasonable checks to verify this.<sup>129</sup>

1.225. Government is separately consulting on reforms to hold directors to greater account for the accuracy and reliability of corporate reporting.<sup>130</sup> Government believes that the same should be true of information submitted to the CMA. Directors should take responsibility for ensuring their companies are providing complete and correct information. **Government is considering whether a false declaration by a director should attract the same civil penalties as supplying false and misleading information to the CMA, proposed above.**<sup>131</sup> **Flagrant breaches of this obligation might also provide grounds for director disqualification.**

## **A wider prohibition against providing false or misleading information to the CMA**

1.226. Businesses are prohibited from providing the CMA with false or misleading information in connection with the CMA's use of market studies or

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<sup>129</sup> An information request made under section 26 of the Competition Act 1998, section 109(2) or (3), section 174(4) or (5), or section 193 of the Enterprise Act 2002.

<sup>130</sup> See '[Restoring trust in audit and corporate governance: Consultation on government's proposals](#)'.

<sup>131</sup> Government proposes that the maximum penalty for an individual providing false or misleading information would remain £30,000.

market investigations, mergers, and competition enforcement functions.<sup>132</sup> However, the CMA can ask businesses to provide information voluntarily for reasons unrelated to these statutory functions. This might include an informal call for evidence on a matter of general relevance to consumers and markets such as the CMA's recent work on the impacts of algorithms.<sup>133</sup>

1.227. Businesses can choose whether and how they wish to respond to these requests, but if they do it is important the information does not present a false or misleading impression of their business or industry. **Government is considering whether to extend the current prohibition against the provision of false or misleading information, the proposed civil fining regime, to cover the provision of information to the CMA in response to such voluntary information requests, outside the CMA's formal investigatory function.**

**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**

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<sup>132</sup> For instance, the prohibition includes information provided voluntarily, or in response to an informal information request, where the information is provided in connection with the CMA's statutory functions. (See s.40 Competition Act 1998, s.117 Enterprise Act 2002 and s.180 Enterprise Act 2002)

<sup>133</sup> CMA's January 2021 consultation on '[Algorithms: How they can reduce competition and harm consumers](#)'.

## **the CMA's evidence gathering powers which government should be considering?**

### **Stronger penalties for companies that fail to comply with remedies imposed or accepted by the CMA**

1.228. For the CMA's work to be effective, it must be able to ensure that businesses comply with the measures it imposes to fix anticompetitive harms. Government is concerned that the CMA's powers to ensure compliance are insufficient. For instance, since 2018 the CMA has detected 185 breaches of remedies put in place through its market inquiry regime. There is variation in the scale of these breaches, but refunds and goodwill payments made by businesses to customers to address these breaches have totalled around £60 million.<sup>134</sup>

1.229. If a company fails to comply with a direction or order imposed by the CMA (or an undertaking accepted by the CMA) in its investigations, the CMA can take the company to court to obtain an enforcement order. This is a lengthy process and places significant costs on the CMA.<sup>135</sup> The harm identified by the CMA is likely to continue during this

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<sup>134</sup> Data provided by the CMA.

<sup>135</sup> Enforcement orders and enforcement undertakings accepted by the CMA in respect of its merger control, and market studies and investigation functions, are enforceable by an application to the court for an injunction or interdict or any other appropriate relief or remedy under section 94 (in respect of undertakings and orders which relate to merger control) and 167 (in respect of undertakings and orders which relate to market studies and market investigation references).

process, which will damage businesses and consumers.

- 1.230. **Government proposes to give the CMA the power to impose civil penalties on companies that fail to comply with the CMA's directions, orders, or undertakings or commitments the company has given to the CMA.**<sup>136</sup> Government proposes to adopt the penalty regime for breaching interim enforcement orders in merger investigations for these penalties. which means the penalty should be capped at 5% of annual turnover. Government proposes an additional daily penalty of up to 5% of daily turnover of the company's corporate group while non-compliance continues.<sup>137</sup> These penalties, and their level, will be appealable by the company affected. It is proposed that the new civil penalties would be without prejudice to any action the CMA may already take where it considers a commitment or undertaking has not, or is not, being complied with.
- 1.231. Government would welcome views on whether the proposed statutory maximum penalties are set at the right level.

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<sup>136</sup> The civil penalties are proposed to be without prejudice to any action the CMA may already take where it considers a commitment or undertaking has not, or is not, being complied with.

<sup>137</sup> Government proposes that these powers would also apply to remedies imposed or commitments accepted by the Secretary of State in public interest intervention cases.

**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?**

Stronger powers and tools for more effective international cooperation

1.232. International cooperation in competition enforcement and policy is becoming increasingly important. The CMA has long been regarded as a thought-leader in competition law.<sup>138</sup> The CMA regularly contributes to global policy debates and consultations through international fora such as the OECD and International Competition Network (ICN), with some recent papers setting out its views on algorithms and collusion, excessive pricing in pharmaceuticals and consumer facing remedies.

1.233. The way that competition authorities carry out their investigations and interact with one another is changing. Markets are increasingly global with interconnected supply chains and multinational companies making decisions that affect consumers in multiple geographies. Stages of production are often located across countries, as the firm seeks the most efficient place of operation. The OECD estimates that the top 300 global companies have

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<sup>138</sup> In 2018, the CMA was awarded the GCR Award for Enforcement Agency of the Year (Europe), in recognition of its work across various tools.

40-50% of component manufacturing, final assembly, warehousing, customer service and product development based outside their home country.<sup>139</sup>

- 1.234. A globalised economy has implications for the CMA's competition enforcement. Many competition investigations involve conduct or transactions that span borders. This means that companies and evidence relevant to the enforcement of competition law may be in other countries.
- 1.235. It is also vital for the success of British businesses that they can have confidence that other firms will compete fairly. Anticompetitive practices in other countries can make it harder for UK businesses to trade internationally. The growing cross-border nature of economic activity is reflected in the increasing number of competition law cases that have an international dimension. Since 1990, the number of cartel investigations involving international participants has increased 450% in the EU<sup>140</sup> and the number of M&A deals with a cross-border dimension increased 250-350%.<sup>141</sup> Such

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<sup>139</sup> [Globalisation and risks for business: Implications of an increasingly interconnected world](#)

<sup>140</sup> [Meeting of the OECD Council at Ministerial Level: International Co-operation in Competition Law Enforcement.](#)

<sup>141</sup> Capobianco, Antonio, Davies, John and Ennis, Sean F. (2014) '[Implication of Globalisation for Competition Policy: The Need for International Co-Operation in Merger and Cartel Enforcement](#)'.

deals and cartelised markets typically attract review by multiple competition authorities.

1.236. However, applying competition policy in global markets is not straightforward. In 1997, only 50 economies had domestic competition legislation. That figure has increased to around 135.<sup>142</sup> When firms have activities in multiple countries, or their deals are reviewed by multiple competition agencies, a level of consistency, transparency and certainty is important. Differing policies and outcomes can create uncertainty for business, over- or under-enforcement of competition law impacting the competitive process, or unnecessary costs to the taxpayer and businesses if multiple authorities investigate the same issue.

### **Figure 7: International mergers**

#### **The international nature of merger control**

An example of competition authorities working well together occurred in the 2018 Bayer-Monsanto merger. This merger deal was filed in 30 countries and involved joint working by competition authorities from the EU, US, China, Brazil, India, Australia, among others. The merger was cleared subject to a

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<sup>142</sup> WTO Working Paper (2018) '[Competition Policy, Trade and the Global Economy: Existing WTO elements, Commitments in regional trade agreements, current challenges and issues for reflection](#)'

‘remedy package’ involving divestments worth nearly US\$15 billion globally across multiple jurisdictions.

1.237. If competition authorities do not take consistent approaches, firms could seek to exploit differences leading to consumers in one market suffering disproportionate harm. Moreover, mergers that could lead to efficiencies or innovations should not be hampered by complex, divergent remedies being imposed in different jurisdictions, which could risk preventing mergers that ultimately would benefit consumers.

### **Opportunities for greater international cooperation**

1.238. Now that the UK has left the EU, it is important that the UK takes a leading role in global competition enforcement and competition policy.

1.239. The European Commission is no longer involved in assessing the impact of competition law infringements or mergers on UK markets. The CMA will now need to deal with a greater number of investigations in parallel to the European Commission. The CMA has, for example, estimated that this will lead to an increase in the number of UK merger investigations by up to 50%, and it is likely that these cases will be international in nature. The CMA already has a close working relationship with the European Commission and the individual Member States of the Union. The ability to cooperate, to share knowledge and insights and to

work together to solve competition problems is a valuable asset. Government and the CMA will work with the EU on cooperation arrangements for parallel merger and competition enforcement, building on the cooperation arrangements in the Trade and Cooperation Agreement.

1.240. The UK's exit from the EU also brings an opportunity to consider our wider networks of cooperation on competition matters. John Penrose's report recognised the value of effective international cooperation arrangements with the CMA's international counterparts, as does government. **Government is therefore working with the CMA to negotiate cooperation arrangements with a number of the CMA's international counterparts.**

1.241. Government also supports the recommendation in John Penrose's report that **the recent Multilateral Mutual Assistance and Cooperation Agreement (MMAC) framework can provide a model for the UK's future competition cooperation arrangements.**<sup>143</sup> To help deliver this, government intends to bring forward legislation when Parliamentary time allows to:

**a. update Part 9 of the Enterprise Act 2002 to provide for clearer and more flexible rules for information sharing between the UK's competition**

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<sup>143</sup> See section 2.5 of John Penrose's report. [Multilateral Mutual Assistance and Cooperation Framework between the CMA, ACCC, CBC, NZCCC, USDOJ and USFTC](#)

authorities and their overseas counterparts, in line with international best practice; and

**b.introduce new investigative assistance powers in civil competition and consumer enforcement investigations** to allow the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

1.242. Several of the UK's international partners (including Canada and the USA) already allow for investigative assistance in their competition laws and reciprocity is a relevant factor in deciding whether to offer such assistance. The absence of investigative assistance in the UK's competition law can limit the ability of the UK's competition authorities to take advantage of these arrangements. Once government's proposed reforms are implemented the UK will be able to deliver the types of enhanced cooperation envisaged by the MMAC framework.

1.243. To develop these reforms, government is seeking views on **the procedural requirements and conditions which the CMA should have to satisfy before it can obtain information on behalf of overseas authorities.**

1.244. For example, in some countries the competition authority needs approval from a designated decision maker before it can use its powers to

obtain information on behalf of a foreign authority. This might be the Chair of the competition authority. It might also be an external decision maker such as a central authority, or government minister.

1.245. It is common for the use of investigative assistance powers to be subject to conditions which might include a requirement that:

- similar assistance could be offered by the requesting authority on a reciprocal basis if required; or
- the conduct about which information is requested should be the same or similar to conduct which could be investigated under the law of the country receiving the request.

1.246. It is important that any conditions which apply to the use of these powers by the CMA balance both accountability and the CMA's operational independence and efficiency in carrying out its functions.

**Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?**

## **Other reforms to the UK's competition law**

1.247. The CMA's experience over the last seven years has highlighted several other technical

improvements that can be made to the UK's competition law system. Government believes these improvements could increase the effectiveness and consistency of the UK's competition law system, in part by remedying some of the inconsistencies that have developed from past reforms. Further detail on these improvements is set out below.

### Enhanced use of 'assisting offenders' in criminal cartel enforcement

1.248. Not all individual suspects will be eligible for 'no action letters' and immunity from prosecution under the CMA's leniency regime, as they may not be the first person to provide information to the CMA. However, they might still wish to help the CMA's investigation by becoming an "assisting offender", which might involve giving evidence against co-defendants. The use of assisting offenders is regulated under the Serious Organised Crime and Police Act 2005 (SOCPA) and the Sentencing Act 2020, in relation to England and Wales. The CMA is not a 'specified prosecutor' under SOCPA. As a result, neither the CMA nor the suspect can benefit from the increased safeguards and transparency this brings. **Government proposes to amend SOCPA so that the CMA is a 'specified prosecutor' and can use the SOCPA 'assisting offender' process to enhance its criminal cartel enforcement.** Designation of the CMA as specified prosecutor will not change the no-action letter

regime applicable to the criminal cartel offence, nor will SOCPA immunities be granted in respect of the criminal cartel offence.

A mechanism for the CMA to require repayment of discounts to penalties.

1.249. The CMA can reduce penalties for infringements of competition law, including on the basis of a businesses' future conduct. These discounts are separate to the CMA's process for accepting formal commitments from parties which resolve its competition concerns and separate to the CMA issuing legally binding directions at the conclusion of an investigation. Government considers that if a party fails to honour its promise, for which its penalty was discounted, it should no longer enjoy the benefit of the discount. **Government is seeking views on the merits of allowing the CMA to reclaim discounts to penalties if a party fails to carry out a promise for which a discount was granted.**

Enabling the CAT to issue declaratory judgments in private action cases

1.250. In private competition law claims, the CAT can make awards of damages and grant injunctions. However, it does not have the power issue declaratory relief – a legally binding statement from a court on the application of competition law to a set of facts, which could be a valuable remedy to settle

disputes relating to competition law. Empowering the CAT to grant declaratory relief would avoid the need for parties to formulate their competition law claims as damages claims, or applications for an injunction, when what would be most helpful is a declaration of how the law applies to the facts of the case. **Government proposes to extend the CAT's jurisdiction to grant declaratory relief.**

## Extended deadlines in public interest interventions in media mergers

1.251. Where the Secretary of State for Digital, Culture, Media & Sport issues a Public Interest Intervention Notice ('PIIN') in relation to a media merger, OFCOM will provide advice to the Secretary of State on the public interest aspects of the case. The advice takes OFCOM a minimum of 6 weeks to compile. For completed mergers, this process takes place in the context of an overarching four-month deadline for any referral to Phase 2, starting from the point the merger was completed.<sup>144</sup>

1.252. This four-month period may, in practice, be too short for a decision to be made on referral to Phase 2, given the need for the Secretary of State to receive and consider the advice from OFCOM. **Government proposed that where the Secretary**

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<sup>144</sup> If it was only after completion that the merger was made public or the CMA was told about it, then then the 4-month time period starts from the earlier of these events.

**of State has issued a PIIN in relation to a completed media merger, the Secretary of State should have the power to extend the deadline for referral to Phase 2 once, by a period of 28 days.**

1.253. It would remain the case that in relation to completed mergers, the Secretary of State must issue the PIIN within the four-month deadline.

## Chapter 2: Consumer rights

### **Maintaining strong consumer rights and business competitiveness**

- 2.1. A fair, free, competitive market works for both businesses and consumers. Government is committed to putting consumers and competition at the heart of the UK economy from ensuring competitive firms offer secure and well-paid jobs for British workers, to ensuring customers get the goods, services, and digital content they expect and have the confidence to choose how and where they spend.
- 2.2. The consumer protection legal framework is essential to achieving this ambition. For example, the Consumer Rights Act 2015 (CRA) consolidated in one place consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts, enabling consumers to buy and sell with confidence. It also gave the civil courts and public enforcers greater flexibility when dealing with breaches or potential breaches of consumer law. Overall, this legal framework is still working well: the UK has one of the world's strongest consumer protection regimes, with strong advocates for consumer interests and well-developed advice services working alongside a comprehensive package of statutory consumer rights.

2.3. Markets are, however, continually changing and adapting to new opportunities. Recent years have seen an increase in online transactions, particularly in those mediated by online platforms, with the internet overtaking all other forms of advertising media such as print and television in 2017.<sup>145</sup> The current global context of the COVID-19 pandemic has accelerated this further. In 2020, retailers saw the growing trend towards digital shopping, with Amazon reporting sales growth of 45%, which now account for almost a third of all ecommerce transactions, and Sony increasing their paying user count by over 18% to 45.9 million in a year.<sup>146</sup> <sup>147</sup> The Office for National Statistics reported a 47% increase in online sales from 2019 to 2020.<sup>148</sup> Consumer confidence will be critical to economic recovery across markets. It is therefore necessary to consider opportunities to strengthen and update consumer rights now, balancing this with proportionate requirements for businesses, who must continue to develop innovative products and services.

2.4. The increased online collection and use of consumer data has enabled companies to develop both personalised offers to individual consumers and a sophisticated understanding of wider patterns and

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<sup>145</sup> [www.ascentiaedge.com/ecommerce-press/edge-ascential-retail-insight-updates-forecasting-based-covid-19-impact](http://www.ascentiaedge.com/ecommerce-press/edge-ascential-retail-insight-updates-forecasting-based-covid-19-impact)

<sup>146</sup> [www.statista.com/statistics/1035592/net-sales-amazon-united-kingdom-uk/](http://www.statista.com/statistics/1035592/net-sales-amazon-united-kingdom-uk/)

<sup>147</sup> [www.pushsquare.com/news/2020/10/ps](http://www.pushsquare.com/news/2020/10/ps)

plus\_subscriber\_milestone\_closes\_on\_50\_million

<sup>148</sup> [www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/je2j](http://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/je2j)

trends in consumer behaviour. While these practices can benefit consumers, for example resulting in tailored advertising or an improved online shopping experience, studies show that more than 1 in 10 websites today are using insights into consumer behaviour to influence choice.<sup>149</sup> This may include guiding consumers' subconscious behaviour through exploiting "behavioural biases", for instance by presenting options in a way that leads consumers to make choices to their potential detriment.<sup>150</sup> This can be as simple as exploiting a consumer's over-confidence that they will remember to cancel a subscription, pre-selecting certain options to influence consumer behaviour, or commissioning reviews for a product.

2.5. Vulnerable consumers are especially sensitive to these potential harms, in part, because the processes created may be purposely difficult to navigate. The Money and Mental Health Policy Institute reported consumers with mental health problems have high levels of anxiety about their inability to regulate spending online.<sup>151</sup> In their crisis spending survey, 81% of respondents said they found it difficult to avoid spending more at online retailers while unwell.<sup>152</sup> Strategies such as "One-click" purchasing and

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<sup>149</sup> Mather et al., 2019: "Dark Patterns at Scale: Findings from a Crawl of 11k Shopping Websites": <https://webtransparency.cs.princeton.edu/dark-patterns/>

<sup>150</sup> <https://londoneconomics.co.uk/wp-content/uploads/2012/05/IFF-Conference-Hamburg-May-2012.pdf>

<sup>151</sup> [www.moneyandmentalhealth.org/wp-content/uploads/2016/07/In-Control.pdf](http://www.moneyandmentalhealth.org/wp-content/uploads/2016/07/In-Control.pdf)

<sup>152</sup> Ibid.

subscriptions, where users agree to a monthly or other regular payment have been identified as problematic for consumers trying to regulate their spending.

- 2.6. It is essential that consumers remain protected and confident in engaging with new services and ways of doing business, in light of this emerging evidence and the rapid development of new technologies and practices in the e-commerce environment. Government has identified particular concerns relating to subscription contracts, the commissioning of fake or misleading reviews and the exploitation of behavioural biases. This chapter seeks views on new policies designed to limit harm to consumers across these areas, while maintaining flexibility for businesses to grow and innovate.
- 2.7. These measures, combined with the changes to consumer law enforcement set out in the next chapter, seek to ensure that the UK builds on its high levels of consumer protection now that it has left the EU and to deliver the manifesto commitment to tackle rip offs and bad business practices. Our consumer rights framework must continue to support consumers into the future, allowing them to benefit from new technology and new business models, and feel empowered to make the best decisions available to them.

## Modernising consumer rights and subscription contracts.

2.8. The use of subscription contracts has accelerated across a range of sectors. This has been caused, in part, by the digitisation of markets and a desire amongst consumers for greater choice and convenience. The creation of apps and mobile commerce has helped to drive this, especially in sectors like media and entertainment, grocery shopping, beauty and well-being products, and gym membership. Mobile commerce has also allowed consumers the flexibility and easy access of signing up and purchasing online via their mobile.<sup>153</sup>

2.9. Consumer spending on subscription contracts is estimated between £28 billion and £34 billion per year across a range of sectors.<sup>154</sup> <sup>155</sup> Eight in ten UK consumers have at least one subscription.<sup>156</sup> One in ten retailers surveyed launched their first sign-up service during lockdown, with a fifth wanting to

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<sup>153</sup> <https://internetretailing.net/mobile-theme/mobile-theme/2020-sees-mcommerce-in-uk-grow-by-30-with-social-commerce-set-to-drive-growth-in-2021-22596>

<sup>154</sup> Internal calculations. TopCashback Forgotten Subscriptions Index survey 2019. Barclaycard 2020.

<sup>155</sup> <https://blog.fusebill.com/interesting-recent-statistics-on-the-subscription-business-model>

<sup>156</sup> [www.zuora.com/resource/nation-subscribed-2018-state-uk-subscription-economy/](http://www.zuora.com/resource/nation-subscribed-2018-state-uk-subscription-economy/)

develop a subscription service as restrictions eased.<sup>157</sup>

2.10. Subscription models can be beneficial to both consumers and businesses, offering competitive prices for their goods, services, and digital content and operating with more predictable revenue. In the specific case of news publishers, subscriptions are an increasingly important part of online business models, driving readership and revenues, and contributing to the sustainability of a sector. Consumers switching between products based on initial experiences can also boost competition between businesses and create incentives to lower prices or improve the quality of the services provided.

2.11. The use of subscription models by business is not always purely beneficial for consumers. The CMA's response to Citizen's Advice's super-complaint on the "loyalty penalty" highlighted the problems some consumers were experiencing with long-term contracts.<sup>158</sup> Particularly problematic were the contracts that automatically renew or rollover onto a new term and in some cases potentially lock-in consumers indefinitely (by virtue of an automatic renewal provision that repeatedly extends the contract period) or for example the price charged changes the goods, services or digital content upon renewal.

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<sup>157</sup> Barclaycard

<sup>158</sup> [www.gov.uk/cma-cases/loyalty-penalty-super-complaint#response-to-super-complaint](http://www.gov.uk/cma-cases/loyalty-penalty-super-complaint#response-to-super-complaint)

Misleading claims or advertising and unclear information buried in lengthy terms and conditions was also problematic.

2.12. In 2016, a survey found that 19.4% of those who had ordered a free trial later experienced one or more problems.<sup>159</sup> Citizens Advice found that more than half of respondents had lost between £50 and £100 each to subscription problems with some also experiencing non-financial detriment. Problems like these can take a significant amount of time and energy to be resolved.<sup>160</sup> And overall, consumers may be spending as much as £1.8 billion per year on subscriptions they do not think are good value for money.<sup>161</sup>

2.13. Addressing the problems identified by regulators, Citizens Advice, and other stakeholders, Government proposes taking action in three areas. (i) At the pre-contract stage, where important information about the subscription contract should be clear and prominent; (ii) contracts which continue and contain autorenewal features, should not auto-renew or rollover without the consumer's specific agreement and (iii) the process of exiting a contract should be clear and easy for consumers.

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<sup>159</sup> European Commission (2016): Misleading « free » trials and subscription traps for consumers in the EU. <https://publications.europa.eu/en/publication-detail/-/publication/bf621260-9441-11e7-b92d-01aa75ed71a1/language-en>

<sup>160</sup> Citizens Advice (2016): Locked in – Consumer issues with subscription traps.

<sup>161</sup> See Impact Assessment published alongside consultation document

## Action to date

2.14. Regulators have looked to intervene across a range of sectors. For example Ofcom has rules on prohibiting automatically renewable contracts in certain circumstances, rules requiring providers to send end of contract notifications and annual best tariff notifications as well as guidance on contract terminations.<sup>162</sup> <sup>163</sup> Ofcom also recently set out new rules which, from June 2022, will mean customers are given a short summary of key contract terms in writing, before they enter into a contract.<sup>164</sup> The Phone-paid Services Authority (PSA) has introduced new special conditions for subscription services which make recurring charges to a consumer's phone bill in exchange for digital content such as games, music streaming or videos<sup>165</sup> and has consulted on new rules that require consent for subscriptions to be obtained every 12 months.<sup>166</sup> The Financial Conduct Authority (FCA) has introduced new rules to address the home and motor insurance markets making it simpler for consumers to stop automatic renewals.<sup>167</sup>

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<sup>162</sup> [Automatically renewable contracts - Ofcom](#)

<sup>163</sup> [Ofcom's Guidance under General Condition C1 – contract requirements](#)

<sup>164</sup> [New contracts summary rules - Ofcom](#)

<sup>165</sup> <https://psauthority.org.uk/news/news/2019/august/new-special-conditions-for-subscription-services>

<sup>166</sup> Consultation on a new PSA Code of Practice (Code 15)

<sup>167</sup> [www.fca.org.uk/news/press-releases/fca-confirms-measures-protect-customers-loyalty-penalty-home-motor-insurance-markets](http://www.fca.org.uk/news/press-releases/fca-confirms-measures-protect-customers-loyalty-penalty-home-motor-insurance-markets),  
[www.fca.org.uk/publications/policy-statements/ps21-15-general-insurance-pricing-practices-market-study](http://www.fca.org.uk/publications/policy-statements/ps21-15-general-insurance-pricing-practices-market-study)

2.15. The CMA and other regulators have continued their work in relation to subscriptions, helping businesses understand their legal obligations and protecting consumers.<sup>168 169</sup> They have published guidance, provided business education, as well as taken enforcement action where necessary.<sup>170 171</sup>

## Figure 8: Subscription contracts

### What is a Subscription contract?

The term “subscription” is used in this consultation to mean a contract between a consumer and trader over a period of time for the **supply of goods** (magazines, beauty products, food boxes) **a service** (gym membership, online dating site membership, web hosting) or **digital content** (digital music, eBooks, computer games).

**Q30. Do you agree with the description of a subscription contract set out above? How could this description be improved?**

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<sup>168</sup> [www.gov.uk/cma-cases/online-console-video-gaming](http://www.gov.uk/cma-cases/online-console-video-gaming), [www.gov.uk/cma-cases/anti-virus-software](http://www.gov.uk/cma-cases/anti-virus-software)

<sup>169</sup> The Advertising Standards Authority published guidance for traders in 2017 on enrolling customers into ongoing subscription arrangements for “free trials” and other promotional offers. [www.asa.org.uk/resource/guidance-on-free-trial-or-other-promotional-offer-subscription-models.html](http://www.asa.org.uk/resource/guidance-on-free-trial-or-other-promotional-offer-subscription-models.html)

<sup>170</sup> ASA - misleading advertising action

<sup>171</sup> Guidance on compliance and subscription box marketing

## Giving consumers a clear choice on what they are signing up for

- 2.16. Ensuring clarity for both business and consumers is key. Government proposes to strengthen the law and make more explicit the need for certain information and choices to be provided, in a clear and prominent manner and just before the consumer enters into a subscription contract. Consumers should know up front the key terms and features of a subscription contract that they are signing up to.
- 2.17. We propose clarifying the law to expressly require traders to make the consumer aware, in a clear and prominent manner, of the subscription information at an early stage in the process and immediately before the consumer places their order, that their order or agreement is for a subscription contract and specific information on explaining or indicating the minimum contract terms and price per billing period; whether the contract will auto-renew or auto-extend at the end of the contract term; and any minimum notice period for cancellation.
- 2.18. Government proposes strengthening the law to expressly require any trader offering any subscription contract to consumers, that would contain terms on auto-renewal or rollover, that they offer the consumer the choice, at the pre-contract stage, to take the subscription without auto-renewal or rollover, i.e., for

a fixed initial commitment period only. The consumer must actively choose to take the contract with autorenewal or rollover (i.e., the consumer must not be required to, for example, to de-select a pre-ticked box in order to take the contract without auto-renewal or rollover).

**Q31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?**

**Q32. Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?**

**Q33. How would expressly requiring giving consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?**

Nudging consumers so they are aware of ongoing subscriptions

**Reminders when contracts auto-renew to a new term**

2.19. Research from the European Commission showed around two thirds of customers who bought a subscription through an online advert had not seen the length of the subscription in the fine print.<sup>172</sup> Moreover, busy lives can sometimes mean that even consumers who were aware of the terms can overlook

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<sup>172</sup> European Commission, [Misleading « free » trials and subscription traps for consumers in the EU](#), 2017.

any precise time by which they need to notify the trader that they wish to exit a subscription. In many cases, this results in consumers continuing to pay for subscription contracts for goods, services, and digital content that they no longer want.

2.20. Government is therefore seeking your views on strengthening the law by expressly requiring traders to remind consumers before the end of any commitment period that the contract will auto-renew unless cancelled. The purpose would be to provide maximum transparency to the consumer, so they are prompted and able to make informed choices about retaining subscription contracts.

2.21. This reminder would include:

- The date on which the contract will auto-renew or roll-over, and for how long.
- The current price of the contract and the price following renewal or roll-over.
- Any notice period for cancelling the auto-renewal or roll-over and details for how to cancel.

2.22. The reminder would need to be provided a reasonable time before the auto-renewal takes place and must be sent by the consumer's preferred method of communication.

**Q34. Should the reminder requirement apply in the circumstances where:**

- (i) the contract will auto-renew or roll-over, at the end of the minimum commitment period, *onto a new fixed term only*, or**
- (ii) the contract will auto-renew or roll-over at the end of the minimum commitment period**

**Q35. How would the reminder requirement impact traders?**

### **Reminders as free trials and introductory offers end**

2.23. Free trials and introductory offers are a helpful means of attracting new customers and allow individuals the chance to test a product or service before committing to a full price purchase. However, consumers will sometimes make use of free trials or introductory offers which, after a period of time, automatically roll over into an ongoing subscription contract. One or three months on from signing up to such a deal, a consumer may not remember the precise date at which the offer is to roll over into a full price contract. Research from Citizens Advice found over 80% of customers in subscription traps were not made aware they were buying a renewing contract at the outset.<sup>173</sup>

2.24. We are therefore seeking your views on:

- strengthening the law by expressly requiring traders to issue a reminder to consumers that a free trial or

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<sup>173</sup> Citizens Advice, [Locked In: Consumer issues with subscription traps](#), 2016.

low-cost introductory offer is coming to an end, the terms of the auto-renewal, and details for how to cancel if they so wish; or as an alternative

- requiring traders to obtain the consent of the consumer before extending the contract to a full price term.

**Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (i) provide consumers with a reminder that a “full or higher price” ongoing contract is about to begin or (ii) obtain the consumer’s explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?**

### Long-term inactive subscriptions

2.25. Inactive subscriptions can go unnoticed over a long period of time. This may be because the consumer has forgotten about the subscription, or they have lost interest but are willing to let the subscription continue. In other instances, deceased individuals continue to be charged subscriptions while the trader is uninformed of their passing. This is a distressing scenario for the family of the deceased to resolve upon discovery. Government is therefore seeking views on the extent of this scenario, and whether traders should be required after a reasonably long period of time where there is evidence of inactivity (for example through electronic records or streaming activity) to give notice of suspension of

service and to stop charging money for the consumption or use of goods, services, and digital content under a subscription contract.

**Q37. What would be the impact of proposals regarding long-term inactive subscriptions have on traders' business models?**

**Q38. What do you consider would be a reasonable timeframe of inactivity to give notice of suspension?**

Making it as easy for consumers to exit a contract as enter it

2.26. Traders are required to tell consumers the conditions, time limit and procedures for exercising the right to cancel before the consumer enters into the contract.<sup>174</sup> Current consumer law rules also prohibit unfair commercial practices, including aggressive commercial practices which cause or are likely to cause the average consumer to take a different decision.<sup>175</sup>

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<sup>174</sup> Under current consumer protection rules, consumers can in general cancel a distance or off premises (for example online or phone) contract within 14 days without giving a reason - See Regs 27-38 of the CCRs. Failure to inform the consumer of the right to cancel, in relation to an off premises contract, is a criminal offence (Reg 19) . The trader should be able (but is not required) to give the consumer the option of filling in a web-based withdrawal form to cancel the contract. Alternatively, the consumer can withdraw by making a clear statement to the trader to that effect.

<sup>175</sup> For example, see Reg 7(2)(e) of the Consumer Protection from Unfair Trading Regulations.

2.27. Despite these protections, Citizens Advice found that 44% of survey respondents who had attempted to cancel a subscription found this harder than signing up.<sup>176</sup> Consumers' experiences of company practices include requirements to contact the company by phone or in writing including call centres which have restricted opening times.<sup>177</sup>

2.28. We are therefore seeking your views on the impact of legislating to require traders to provide consumers with a mechanism to cancel a subscription contract that is straightforward, cost-effective, and timely. This would mean the process itself should be:

- Automated;
- Require the consumer to input only the information essential to process their refund (assuming payment has already been taken);
- Simple and straightforward - with the minimum number of clicks; and
- Easy to find.

**Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?**

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<sup>176</sup> Citizens Advice, 2018

<sup>177</sup> CMA Loyalty Penalty Report - Section 7

**Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?**

## Scope and exclusions

2.29. Our intention is that the rules proposed above would apply to subscription contracts for goods, services, and digital content in general across the economy but certain types of contracts and/or sectors would be exempt from the rules. Our policy aims to minimise consumer harm and detriment. Government does not intend for the requirements proposed to potentially interfere with the health or welfare of consumers. Government proposes to exclude any contracts for goods, services, and digital content from the proposals, where an interruption in supply could result in serious harm to consumer welfare in principle. For example, we anticipate that this would involve excluding contracts for the supply of medicines or contracts for certain financial services such as insurance.

**Q41. Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?**

## Fake reviews

2.30. Genuine consumer reviews are made by consumers who have used a good or a service, without pressure or incentive to provide a particular perspective. Reviews are very useful to the business and to other prospective consumers as they weigh up making a purchase. A fake review, on the other hand, is one that does not reflect an actual consumer's genuine experience of a good or service.

2.31. Digitisation of consumer reviews and the ease of posting these have created a growing 'industry' that thrives on creating and selling fake reviews, misleading consumers.<sup>178 179</sup> This is a concern both for businesses and consumers; bona fide UK businesses will suffer lost sales and reputational damage from dishonest competitors duping customers.<sup>180</sup> Such activities distort the market by undermining competition and by giving an unfair advantage to traders commissioning fake reviews.

2.32. The CMA's ongoing enforcement work on fake online reviews has demonstrated that this is a serious problem undermining consumer trust in markets. For example, online reviews play a key role when

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<sup>178</sup> [How a thriving fake review industry is gaming Amazon marketplace](#); consumer watchdog Which? Feb. 2021

<sup>179</sup> [CMA's work on fake and misleading review identified the trade of fake and misleading reviews](#)

<sup>180</sup> [EC Consumer Conditions Scoreboard 2019](#): "Writing fake reviews which are in fact hidden adverts or hidden attacks on competitors"

customers buy goods, services, and digital content with an estimated £23 billion of purchases a year potentially influenced by online reviews.<sup>181</sup> In 2019 the EC Consumer Conditions scoreboard showed that 26% of UK retailers encountered positive fake reviews by their competitors or negative fake reviews on themselves.

2.33. Commissioned reviews are not necessarily all fake. For example, there could be instances where technical experts or online ‘influencers’ may be commissioned by traders to provide reviews of goods, services, and digital content offered to consumers. Furthermore, there may be limited circumstances where consumers themselves are provided with incentives (such as a free product) to submit reviews. We consider that such reviews will not be “fake” if they reflect the expert’s, influencer’s or consumer’s genuine experience or impartial opinion of the good or service (for example, where a consumer reviewer is not specifically asked to write a certain type of review as a condition of accepting the incentive). A new small business might be hard pressed to find or obtain reviews of their goods, services, or digital content unless they incentivise a consumer to write a review; in such cases, it should of course be disclosed that the consumer was incentivised to write the review so as not to mislead consumers.

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<sup>181</sup> CMA (2015) Online reviews and endorsements

2.34. Small businesses in particular may benefit from consumer reviews because they do not have large advertisement budgets to promote their business. Disparaging fake reviews may have a disproportionate impact on a small business. Therefore, it is crucial that this market operates fairly.

2.35. There are existing legal requirements in relation to fake and misleading reviews. In particular:

- The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibit unfair commercial practices which (broadly) cause or are likely to cause the average consumer to take a different transactional decision. Schedule 1 to the Regulations sets out 31 commercial practices which are unfair in all circumstances.
- The commissioning, submission and/or publication of fake and misleading reviews is at risk of being considered to contravene professional diligence or to amount to a misleading action or misleading omission unfair commercial practice where, broadly, this causes or is likely to cause the average consumer to take a different decision.
- Such conduct can also amount to falsely representing oneself as a consumer, which is an unfair commercial practice in all circumstances under the CPRs (Schedule 1).

2.36. In light of the adverse consequences of fake reviews, government is considering whether to explicitly prohibit the commercial practice of

commissioning consumer reviews - in all circumstances - or a narrower prohibition on the commercial practice of commissioning fake consumer reviews.

2.37. Government believes the issues here are complex and need a carefully balanced approach. A new business may commission a consumer to write a review on its goods, services, or digital content to gain entry into a market. Such consumer reviews need not be fake if the review sets out the consumer's genuine opinion, based on using the good or service and if proper disclosures (that the review was commissioned) are made. Government therefore wishes to take account of all circumstances relating to such reviews to ensure that practices which help businesses while not misleading consumers are not automatically considered unlawful in all circumstances.

2.38. Therefore, government is considering amending the CPRs to add to the list of unfair practices set out in Schedule 1 either:

- **Option 1:** Commissioning a person to write and/or submit fake consumer reviews of goods, services, or digital content.
- **Option 2:** Commissioning or incentivising a person to write and/or submit a fake consumer review of goods or services.

2.39. The word “commission” in **Option 1** is used here to mean the commercial practice of making a request (which need not be in any particular form, nor in writing) in exchange for a payment (monetary or non-monetary) or reward.

2.40. The word “incentivise” in **Option 2** is used here to mean an offer of payment, reward or any other form of incentive or inducement to encourage a person (to write and/or submit a fake consumer review of goods, services, or digital content).

2.41. Government also proposes to amend the CPRs to add to Schedule 1:

- Hosting consumer reviews of a good or service without taking reasonable and proportionate steps to ensure that they originate from consumers who have actually used or purchased that good or service.

2.42. The significance of adding these commercial practices to Schedule 1 is that carrying out these practices will be automatically unfair in all circumstances. There would be no need for the practice (for example, hosting consumer reviews without taking reasonable and proportionate steps to ensure that these are genuine) to cause or be likely to cause the average consumer to take a different transactional decision for it to be unlawful. Such clarity will make it easier for regulators like the CMA to enforce the law. This will ensure competition is on

an even footing by restraining the ‘industry’ that thrives on creating and selling fake reviews, as well as protecting consumers from being misled.<sup>182</sup><sup>183</sup>

2.43. We would also welcome views on whether to add a third banned practice to Schedule 1 of the CPRs to prohibit the commercial practice of traders offering or advertising to submit, commission or facilitate fake reviews. Such practices were investigated by CMA in its recent enforcement work in relation to fake and misleading reviews.<sup>184</sup> A recent investigation by the consumer watchdog Which? also found evidence of online businesses who offer “review plans” – varying numbers of consumer reviews in return for varying levels of payment.<sup>185</sup>

**Q42. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?**

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<sup>182</sup> [How a thriving fake review industry is gaming Amazon marketplace](#)

<sup>183</sup> [CMA’s work on fake and misleading review identified the trade of fake and misleading reviews](#)

<sup>184</sup> [www.gov.uk/cma-cases/fake-and-misleading-online-reviews](http://www.gov.uk/cma-cases/fake-and-misleading-online-reviews)

<sup>185</sup> [www.which.co.uk/news/2021/02/how-a-thriving-fake-review-industry-is-gaming-amazon-marketplace/](http://www.which.co.uk/news/2021/02/how-a-thriving-fake-review-industry-is-gaming-amazon-marketplace/)

- Q43. What impact would the reforms mentioned in Q42 have on a) small and micro businesses, both offline and online b) large online businesses and c) consumers?**
- Q44. What ‘reasonable and proportionate’ steps should be taken by businesses to ensure consumer reviews hosted on their sites are ‘genuine’? What would be the cost of such steps for businesses?**
- Q45. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?**

## **Preventing online exploitation of consumer behaviour**

2.44. Online businesses may do things without the knowledge of the consumer or nudge them towards decisions that they would not have normally taken without the nudge or before they could change their mind. As more information becomes available to businesses, some have utilised it in a way that distorts free choice resulting in unfair competition. The CMA’s market study into online platforms and digital advertising found evidence of the use of defaults and of deceptive or manipulative practices called ‘dark patterns’ which exploit consumer behaviour to

influence choice.<sup>186</sup> In many cases, firms may design their systems in ways which benefit consumers' interests. However, firms can also manipulate the way in which options are presented to nudge or push consumers towards certain choices which benefit the firm rather than the consumer.<sup>187</sup> John Penrose's report suggested, "CMA should undertake a market investigation to assess how we should recognise and measure sludge (negative nudges) in future, and identify what consumer protection rules and analytical techniques will be needed to protect consumers from it as digital technologies evolve and develop over time."

2.45. Government believes that consumers should be able to exercise effective choice and that this is important for competition. There is growing evidence of the negative impact of exploitative online choice architecture practices<sup>188</sup>. Research by Princeton University analysed 53,000 product pages from 11,000 shopping websites on the internet. It found a number of harmful developments online<sup>189</sup> that exploit consumer behavioural patterns and influence consumer choices by coercing, steering, or deceiving users of web-based services into making unintended and potentially harmful decisions. We also welcome

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<sup>186</sup> "Digital Markets and Online Advertising Market" study, CMA, July 2019

<sup>187</sup> Digital Task Force report

<sup>188</sup> "Protecting America's Consumers: [Bringing Dark patterns to Light](#)", Federal Trade Commission

<sup>189</sup> "Dark Patterns at Scale: Findings from 11,000 Shopping Websites", Princeton University, September 2019

the work of the CMA, the Behavioural Insights Team, and others to date in this area, but much is still not known about the scale and prevalence of harm. This presents a valuable opportunity to carry out substantive research which sets such practices into the wider context of markets, for example exploring the influence of major players and commerce platforms. Such research could provide further evidence for BEIS, the CMA and other consumer protection enforcers to take action to reduce the impact of these harmful practices, for example by providing greater clarity to businesses by adding to the list in Schedule 1 of the CPRs of practices which should always be considered unfair.

**Q46. Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?**

2.46. In particular, government is considering strengthening the law so that it is easier for enforcement agencies such as the CMA to take action against particular exploitative designs that feature on some websites. Government will also champion ‘fairness by design’ principles with businesses on how online transactions are presented.

2.47. ‘Drip pricing’ refers to a situation where a consumer is advertised a price for goods, services, or digital content, but then finds that additional fees and charges have been added to the price before the

transaction can be completed (i.e., once he or she proceeds to the online ‘basket’ to complete the transaction). When these additional fees and charges are not optional and the sale cannot proceed without their addition, these are required under the CPRs to be signalled to the consumer from the outset, so that they can make an informed decision before attempting the transaction.

2.48. Similarly, search results on a trader’s website that are influenced by third parties paying to have their goods, services, or digital content feature more prominently should be clearly identified to the consumer as advertisements where this is the case. This is to provide transparency to the consumer over where rankings are paid for. Government is seeking evidence on whether either or both of these practices are problematic and whether there is a role for government and regulators to address them.

**Q47. Do you think government or regulators should do more to address (a) ‘drip pricing’ and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?**

## **Balancing burdens on businesses**

2.49. It is right to strengthen and update consumer rights for the digital age. However, Government is mindful that the proposals above may introduce some

further compliance costs for businesses. Furthermore, while we propose to modernise consumer law in the ways outlined above, there may also be historic parts of the consumer law framework that are now out of date and redundant. Effective consumer rights should benefit businesses as well as consumers. Therefore, government is seeking your views on areas where we may want to change the rules (with or without legislation) to remove red tape for business whilst still maintaining consumer protections.

2.50. The questions below seek views on the UK's existing consumer protection legal framework, comprising of the Consumer Rights Act 2015, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, and the Consumer Protection from Unfair Trading Regulations 2008.

**Q48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?**

**Q49. Are there perverse incentives or unintended consequences from our existing consumer law?**

**Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately**

**compared to the benefits they bring to consumers?**

## **Tackling non-compliance on refunds**

2.51. The pandemic has resulted in a swathe of cancellations as consumers have been unable to attend planned events from travel, holidays, concerts, and weddings through to gym memberships, childcare and use of nursery services.

2.52. The CMA set up a COVID-19 Task Force on 20 March 2020. This included a complaint mailbox to for consumers to seek support on issues arising because of the pandemic, such as price gouging and refunds for cancelled events. Since launching the Task Force, the CMA has received around 100,000 complaints relating to refunds and has produced general guidance on the impact of lockdown rules and government guidance on consumer contracts for the benefit of consumers and businesses, as well as more specific information in the following sectors:<sup>190</sup>

- Package travel.
- Accommodation lettings.
- Nurseries and Childcare.
- Weddings and events.

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<sup>190</sup> [www.gov.uk/government/publications/cma-to-investigate-concerns-about-cancellation-policies-during-the-coronavirus-covid-19-pandemic/the-coronavirus-covid-19-pandemic-consumer-contracts-cancellation-and-refunds](https://www.gov.uk/government/publications/cma-to-investigate-concerns-about-cancellation-policies-during-the-coronavirus-covid-19-pandemic/the-coronavirus-covid-19-pandemic-consumer-contracts-cancellation-and-refunds)

2.53. The CMA has also issued open letters to businesses in some of these sectors and is acting to enforce the law and ensure that consumers who are entitled to refunds receive them in a reasonable time frame. It has received undertakings to repay from multiple high-profile businesses.<sup>191</sup> In response to the various concerns that have been raised, CMA has secured formal commitments from a number of major package holiday providers (LoveHolidays, Lastminute.com, Virgin Holidays, TUI UK) to provide refunds without undue delay to customers whose holidays were cancelled as a result of coronavirus restrictions. These firms have refunded or committed to refund customers more than £200m. The CMA has acted robustly to ensure these commitments are upheld.<sup>192</sup> For example, following a warning from the CMA in February 2021 that it planned to take court action, Lastminute.com has now paid back a further £1 million in outstanding refunds to thousands of customers, in line with its commitments.<sup>193</sup>

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<sup>191</sup> [www.gov.uk/cma-cases/cancellations-holiday-accommodation](https://www.gov.uk/cma-cases/cancellations-holiday-accommodation)

<sup>192</sup> [www.gov.uk/government/publications/update-on-work-of-the-cma-during-the-coronavirus-pandemic-15-march-2021/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cma](https://www.gov.uk/government/publications/update-on-work-of-the-cma-during-the-coronavirus-pandemic-15-march-2021/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cma)

<sup>193</sup> [www.gov.uk/government/news/lastminute-com-faces-legal-action-unless-it-pays-outstanding-refunds](https://www.gov.uk/government/news/lastminute-com-faces-legal-action-unless-it-pays-outstanding-refunds)

## **Strengthening prepayment protections for consumers**

2.54. The Law Commission's prepayment work recommended that government create a power for the Secretary of State to protect certain categories of consumers making prepayments.<sup>194</sup> Those paying in advance of receiving goods, services, or digital content face risks should the provider become insolvent, as they simply become another creditor with no preferential treatment. Most consumers will be unaware of the risks when entering into such agreements. The Law Commission highlighted the particular example of the Christmas Savings Club market and suggested government put in place statutory protections for this vulnerable group of consumers whilst recognising that powers need to be proportionate in their application.

2.55. Currently, Christmas savings clubs and similar savings schemes are not regulated as financial institutions by the Financial Conduct Authority. They do not provide the same protections as other savings schemes such as bank accounts which are covered by the official Financial Services Compensation Scheme in the event of insolvency. This leaves those that have money with them at risk in advance of the

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<sup>194</sup> [www.gov.uk/government/publications/consumer-prepayments-on-retailer-insolvency-government-response-to-the-law-commission-report](http://www.gov.uk/government/publications/consumer-prepayments-on-retailer-insolvency-government-response-to-the-law-commission-report)

delivery of funds or promised goods as happened when Farepak collapsed in 2006.<sup>195</sup>

2.56. Schemes promoted as methods of saving should have associated protections so that consumer money is safe in a similar way to other sectors such as property rental deposits. Government proposes to increase consumer protections in this area, by amending the Consumer Rights Act 2015 to provide necessary legislative powers to mandate that consumer prepayment schemes like Christmas savings clubs have means to safeguard customers' money through insurance or trust accounts. As advance payment becomes more common with online ordering it is necessary for this to be a flexible and clearly crafted power so that government is able to respond quickly to changing circumstances that mean that a product or service subject to prepayment is exposing consumers to new and particular risk of hardship and loss. Secondary legislation can then be brought forward to address the specific issues such as those of Christmas savings clubs.

**Q51. Do you agree that these powers should be used to protect those using “savings” clubs**

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<sup>195</sup> Farepak was a Christmas savings club which went into administration in October 2006 and was unable to deliver vouchers and products to the 114,000 consumers who had prepaid during that year. At the time of its collapse, it held over £38 million in consumer prepayments. Consumers had saved an average of £400 each.

**that are not currently within scope of financial protection laws and regulators?**

**Q52. What other sectors might new powers regarding prepayment protections be usefully applied to?**

## Contract formation and transfer of ownership

2.57. As part of its work on Consumer Prepayments the Law Commission recommended that new rules should be introduced to clarify at what stage in a transaction a buyer acquires ownership of goods i.e., when does ownership transfer. Government requested that the Law Commission undertake further work on the practicalities and wider impacts of updating the rules.

2.58. The Law Commission report was published on 23 April 2021 and government will consider the recommendations alongside responses to the questions above on consumer prepayments.<sup>196</sup> Whilst undertaking this work, the Law Commission became aware of a widespread practice among online retailers of using terms and conditions to delay the formation of consumer sales contracts until the goods are dispatched to the consumer.

2.59. Although in some cases payment is not taken until dispatch, in others, retailers charge the consumer's card immediately when the consumer

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<sup>196</sup> [www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/](http://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/)

places their order, but the terms and conditions state that no contract forms until dispatch of the goods. Should the business become insolvent before the goods are despatched then the consumer joins the list of unsecured creditors and there is no contractual basis for them to claim the goods ordered. It may be the case that this is common practice among retailers who manufacture or procure goods to order, where the payment will provide working capital to fund the manufacture or purchase. However, the Law Commission found that the practice is not restricted to particular retail sectors and is employed by well-known retailers, suggesting that a large number of consumers will find their orders are subject to these arrangements. The Law Commission view is that in some cases terms that state that the contract is only formed when the goods are dispatched are likely to fail the fairness test under section 62(4) of the Consumer Rights Act 2015 (CRA) which describes an unfair term as a term which is “contrary to the requirement of good faith, it causes a significant imbalance in the party’s rights and obligations under the contract to the detriment of the consumer”.

### **Figure 9: Terms and conditions delaying formation**

#### **How do terms and conditions purport to delay formation?**

In an online sales transaction, the retailer typically asks the consumer to agree to a set of terms and

conditions before the consumer places their order. The consumer might be asked to tick a box to indicate their agreement to the terms and conditions.

Alternatively, a statement such as the following may appear next to the “place order” button: “By placing your order you agree to our terms and conditions of sale”. The words “terms and conditions” will typically be hyperlinked to a separate webpage containing the full text of the terms and conditions. The terms and conditions often contain statements regarding the formation of the sales contract. These statements purport to prescribe the time at which the retailer will accept the consumer’s offer.

The Law Commission found that typically, the terms and conditions state that the consumer’s offer is not accepted by the retailer until the goods are dispatched.

2.60. Terms and conditions delaying contract formation could also have an impact upon the effectiveness of certain existing consumer protections, such as the obligation on a retailer to deliver goods within 30 days of the contract being formed under section 28 of the CRA 2015 and the ability of consumers to claim a refund under section 75 of the Consumer Credit Act 1974 if they have paid for goods but not received them.

**Q53. How common is the practice of using terms and conditions to delay the formation of a sales contract?**

**Q54. Does the practice of using terms and conditions to delay the formation of a sales contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?**

## Chapter 3: Consumer Law Enforcement

### The value of strong enforcement

#### What enforcement does

- 3.1. Consumers in the UK have a strong set of rights enshrined in law, but they need to be backed by fair, effective and proportionate enforcement systems capable of tackling harmful practices.
- 3.2. Effective enforcement provides justice for both parties and makes sure that those who may be tempted to test and exceed the boundaries of the law fear they will be challenged and, if warranted, punished. It helps achieve a level playing field for business, ensuring that the vast majority of firms that play by the rules are not undercut by those few who do not. This is essential to consumer confidence and economic growth and incentivises businesses to innovate and deliver the high quality of goods, services, and digital content demanded by consumers.

#### Current achievements

- 3.3. Our current system has achieved some notable successes:
  - From 2014 to 2020, the **CMA delivered direct benefits to consumers worth £587 million** by stopping unlawful practices or intervening to

increase transparency and more informed consumer decisions. This includes over £200 million returned to consumers through COVID-19 cancellations and refunds action.<sup>197</sup>

- Over the past six years, over 2.5 million private consumer disputes with traders were settled through dispute resolution services. BEIS research shows that eight in ten users say their problem would not have been resolved without the use of Alternative Dispute Resolution.<sup>198</sup>
- Between 2014 and 2020, National Trading Standards tackled over £1 billion in detriment, including a landmark case jailing secondary ticket touts, representing £12.64 impact for every £1 spent.<sup>199</sup> In the same time Trading Standards Scotland tackled £70 million in detriment, representing £9 impact for every £1 spent.<sup>200</sup>

3.4. The value of the current system has recently been recognised and highlighted by John Penrose's report. However, he points out that our regime has a good reputation but not a great one. Consumers too often feel that they are being ripped off, so the system needs to be updated, improved, and refreshed. Unlocking the potential of consumer

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<sup>197</sup> CMA published and internal estimates.

<sup>198</sup> [‘Resolving consumer disputes: alternative dispute resolution and the courts system’](#), Department of Business, Energy & Industrial Strategy (2018)

<sup>199</sup> National Trading Standards, Annual Report 2019-20.

<sup>200</sup> Trading Standards Scotland, Infographic 2020.

enforcement, he says, is key to improving productivity through more competitive and effective markets.

### Achieving more

#### **Enforcing the law quicker and better**

3.5. At the national level, the CMA and other enforcers face significant delays when enforcing consumer protection law because a requirement to go to court may arise at all stages of an investigation.<sup>201</sup> These stages include gathering evidence by requesting information, having to take legal action when negotiated agreements (also known as undertakings) have been breached, seeking an order in court to end infringements, or even to enforce an order that has been granted by the court. Taking civil cases to court is lengthy, complex, and costly and even if they are successful there are no financial sanctions for civil breaches of consumer protection law and few civil sanctions for frustrating the enforcement process. This leaves the

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<sup>201</sup> As of 1 January 2021 there are three categories - not mutually exclusive - of enforcer under Part 8: (i) general enforcers, such as the CMA and every local Weights and Measures authority in Great Britain (i.e. Local Authority Trading Standards); (ii) designated enforcers, such as the Civil Aviation Authority, the Director General of Electricity Supply for Northern Ireland, the Director General of Gas for Northern Ireland, Financial Conduct Authority, Ofcom, Ofwat, Ofgem, the Information Commissioner's Office, the Office of Rail and Road and the Consumer's Association (Which?); and Schedule 13 enforcers, such as the Maritime and Coastguard Agency, the Secretary of State for Health..

CMA and other enforcers without the necessary powers to deter and punish non-compliance.

- 3.6. Government must also consider whether the system of Local Authority Trading Standards Services being supported in the largest most complex cases by National Trading Standards and Trading Standards Scotland is operating well.

### **Helping individuals solve their problems**

- 3.7. In most situations consumers have to enforce their rights independently. However, they are often unable to find the right information about available enforcement routes and what they involve. Taking a trader to court is an option that some dismiss as too expensive or daunting to consider. Alternatives to the courts exist, but are sporadic in availability, type, and quality. This is demoralising and confusing, so consumers too often give up trying.
- 3.8. This chapter sets out proposals to strengthen the enforcement of consumers' rights, whether that is through state enforcement or through empowering consumers to enforce their own rights.

## **Strengthening enforcement by the Competition and Markets Authority and other enforcers**

### The Competition and Markets Authority

3.9. A healthier competition regime, discussed in Chapter 1, with a strong and effective CMA at its helm, will go a long way to deliver good deals for consumers through greater choice, lower prices, and better-quality goods, services, and digital content. To make use of the choices made available by well-functioning competitive markets, consumers also need to know that protections are in place and can be enforced swiftly when necessary to prevent them from being mistreated or misled, particularly in circumstances where a trader can take advantage of a consumer's relatively weaker bargaining power.

3.10. Government believes that the CMA is well placed to champion consumers alongside promoting competition.<sup>202</sup> It already delivers for consumers, focusing its enforcement on market-wide problems which affect consumers' ability to make choices. It maximises its impact across the economy, using negotiated agreements with, or court action against, specific traders to encourage other industry participants to change their practices. It has taken robust action in multiple sectors. For example, it has

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<sup>202</sup> See government's strategic steer to the Competition and Markets Authority.

secured more than £2 million in compensation for care home residents who were unfairly charged large upfront fees and has taken action to ensure that hotel booking and car hire sites give clear and accurate information to consumers when researching holiday options.

**Figure 10: CMA consumer enforcement: the story so far**

 <b>16</b>	 <b>17</b>	 <b>131</b>	 <b>£587 million</b>
Sectors, such as package travel, care homes, secondary tickets, online hotel bookings, car hire, and online gambling etc., in which the CMA has taken action	Consumer protection cases concluded by the CMA since 2014	Parties that have given commitments (undertakings) to comply with consumer protection law following CMA action.	Direct benefits to consumers since 2014, including over £200 million returned to consumers through COVID-19 cancellations and refunds action.

16	17	131	£587 million
to gain compliance and protect consumers and competitive businesses.			

3.11. Government wants to see the CMA build on this track record of tackling markets with patterns of unlawful, exploitative conduct by using its consumer enforcement powers to their fullest potential to stop and rectify harm where consumers and law-abiding businesses are losing out.

**Figure 11: The CMA’s consumer enforcement powers**

The CMA has powers to enforce certain consumer protection legislation<sup>1</sup>:

**Civil powers** under Part 8 of the Enterprise Act 2002 (EA 02) to stop infringements of certain consumer laws. The CMA may seek an enforcement order from a civil court against traders that breach these laws. The main legislation they enforce is the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) which prohibit unfair commercial practices,

and the Consumer Rights Act 2015 (CRA), Part 2 of which protects consumers from traders that use unfair contract terms or notices.

**Criminal powers** to prosecute traders that engage in most unfair commercial practices under the CPRs.

The CMA uses its consumer protection powers to address market wide consumer problems or issues that affect consumers' choices. It is more likely to take civil enforcement cases, but it will, where appropriate, additionally, or alternatively use its criminal powers to prosecute offenders.

Other organisations with consumer enforcement powers include Local Authority Trading Standards Services and sector regulators such as Ofgem and Ofcom. The CMA works closely with these enforcers to avoid duplication in effort and maximise the impact of interventions for consumers.

<sup>1</sup>. A full description of the CMA's consumer enforcement powers can be found in Annex A to the CMA's Consumer protection: enforcement guidance, August 2016.

3.12. Currently, this is a challenge. Government considers that slow action and weak sanctions available to the CMA and the courts charged with ruling on consumer protection law breaches mean

businesses can get away with rip-offs. This has also been highlighted by Lord Tyrie and John Penrose<sup>203</sup>

3.13. A court can order firms that have or are likely to break the law to stop their practices and pay compensation but, because currently there are no civil fines for breaches, consumer rip-offs can go unpunished, thereby undermining trust in the system.

**Figure 12: Case study of a lengthy process for consumer protection enforcement under the current regime<sup>204</sup>**

In **2015**, four secondary ticketing platforms formally agreed with the CMA to give improved information to buyers about the tickets listed on their sites.

In **2016**, the CMA reviewed whether these four platforms were providing adequate information to consumers, in line with the agreements earlier reached with the CMA, and their legal obligations.

In **November 2017**, the CMA decided to take enforcement action against several of these

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<sup>203</sup> Lord Andrew Tyrie, then Chair of the Competition and Markets Authority (CMA), wrote to the Secretary of State for Business, Energy and Industrial Strategy on 21 February 2019, outlining proposals for reform of the competition and consumer protection regimes of the CMA.

<sup>204</sup> Source: (i) CMA secondary ticketing case page: [www.gov.uk/cma-cases/secondary-ticketing-websites](http://www.gov.uk/cma-cases/secondary-ticketing-websites), (ii) order of 29.11.18 in CMA v Viagogo AG available under the “court order” heading on the CMA’s case page, (iii) Viagogo AG v CMA [2019] EWHC 1706.

platforms, on the basis of suspected breaches of consumer protection law.

In **April 2018**, three of the secondary ticketing platforms agreed to change their practices as considered necessary by the CMA. The fourth platform did not agree to make the changes sought by the CMA.

In **August 2018**, the CMA began court proceedings under Part 8 of the Enterprise Act 2002, for suspected breaches of consumer protection law, against the fourth platform.

In **November 2018**, the court made an enforcement order under Part 8 requiring the platform to change its practices.

In **January 2019**, having carried out a review of the practices of the fourth platform, the CMA considered that these practices were not fully compliant with the court order. The CMA raised these concerns with the platform.

In **March 2019**, the CMA warned the platform that, although some improvements had been made, that in the CMA's view the platform's practices were still not fully compliant with the court order.

In **July 2019**, the court declared, on application from the platform, that some but not all of the platform's practices were compliant with the court order.

In **September 2019**, the CMA suspended its preparations for contempt of court proceedings against the platform after the platform addressed the CMA's remaining outstanding concerns, nearly 4 years after the formal agreements with secondary ticketing platforms were reached with the CMA.

3.14. With stronger powers, including fines for frustrating enforcement procedures or breaking the law which can be deployed without a series of lengthy court actions, the CMA could shorten enforcement by many months or years, stopping harm to consumers far sooner.

### Empowering the Competition and Markets Authority to enforce consumer law directly

3.15. Government believes that empowering the CMA to enforce consumer law directly rather than through the civil courts, similar to the way it currently enforces antitrust cases under the Competition Act 1998 (CA98), would strengthen the CMA's ability to protect consumers and the great majority of businesses that respect consumer protection law.

3.16. Government is therefore seeking views on reforming the CMA's civil consumer enforcement powers under Part 8 of the EA 02 to allow for enforcement through an administrative model.

3.17. Broadly, this move, recommended by John Penrose's report, means that the CMA would have the power to:

- decide whether a business is, has or is likely to infringe certain consumer laws,
- if so, decide whether to direct the business to bring infringements to an end or to stop future infringements, and where appropriate, order compensation or other redress for the victims of the breach<sup>205</sup>, and
- where appropriate, order the business to pay a financial penalty (see section below on penalties).

3.18. An administrative enforcement regime where the CMA can control the timetable for investigations and conclude cases faster would bring infringements to an end sooner and secure redress for consumers more promptly. It would also be more efficient and could free up resources for better enforcement outcomes. At the same time, government is clear that fair, transparent and open processes are needed to secure the confidence of business in an administrative model.

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<sup>205</sup> The Consumer Rights Act 2015 amended the Enterprise Act 2002 to widen the scope of the measures that an enforcer can apply for in the civil courts. Enhanced consumer measures (ECMs) allow enforcers to seek an order for a business to pay consumer redress, change their practices to stop a repeat of the breach and/or put measures in place to increase consumer choice.

3.19. The sections below set out how government proposes the administrative model could work.

**Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?**

### **Scope of an administrative model**

3.20. Part 8 of the EA 02 currently sets out a court-based, civil enforcement process for a broad range of legal rules, from those that apply across the economy to those specific to certain sectors, both aimed at protecting the economic interests of consumers. The legislation in scope of Part 8 of the EA 02 is listed below in the Annex.

3.21. The CMA can currently apply to court to enforce all Part 8 legislation, although in practice it primarily acts where breaches of the law point to systemic failures in a market.<sup>206</sup> Other enforcers exercise lead responsibilities to enforce specific laws, in coordination with the CMA.

3.22. Where an enforcement case involves suspected infringements of multiple different legal rules, the CMA's ability to enforce general and sectoral consumer law has meant it can flexibly respond to unexpected consumer harms, for example as it has done recently in the package holiday sector.

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<sup>206</sup> CMA58: Consumer protection enforcement guidance, 2016.

Government is considering whether the CMA should have the same or similar enforcement scope under an administrative model while maintaining effective coordination with other enforcers, to ensure they can continue to exercise their sectoral or other relevant expertise.

**Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?**

### **Decision-making process**

3.23. Government believes that administrative enforcement should operate within a clear institutional framework for taking action, making decisions and ordering redress for suspected breaches by traders. The right processes should therefore principally aim to ensure fairness and consistency in the decisions taken, with appropriate procedural protections for businesses subject to enforcement action.

### **Figure 13: A possible model for the CMA's administrative decision-making process**

**Broadly, government considers that the decision-making process could be as follows:**

**Gathering information** – the CMA constitutes a case team and requires information in order, for example, to exercise or consider exercising its administrative enforcement functions.

**Opening an investigation** – the CMA considers the routes available for enforcement action, whether to approach businesses where it suspects an infringement of consumer protection law has occurred or is likely to occur, and whether to formally open a case.

**Provisional decision** – if the CMA forms a provisional view that the conduct under investigation amounts to an actual or likely infringement, the CMA issues a provisional decision which gives the business under investigation an opportunity to know the full case against it, have access to the investigation file and to respond to the case by means of written and oral representations to the CMA.

**Final decision and outcome** – after issuing a provisional decision and considering representations, the CMA decides on whether an infringement has occurred and determines the consequences if it has.

**Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?**

## Right to appeal

3.24. Under an administrative model, in general, the CMA would be the primary decision-maker and an independent court or tribunal would play a role only on appeal. Government considers that ensuring appropriate scope and powers of the scrutiny exercised by the courts would give consumers and businesses confidence in the fairness of the administrative system. At the same time, it is important that careful consideration is given to the design of the appeals framework to ensure it can provide a swift, efficient, and proportionate procedure for resolving cases.

3.25. Most decisions taken by public authorities are subject to review by a court or tribunal in accordance with the ordinary principles of judicial review. This is also the case for many of the CMA's functions including decisions taken by the CMA in relation to its merger control, market study and market investigation functions. By contrast, the Competition Act 1998 provides that for many of the decisions taken by the CMA in relation to its Competition Act investigations, the CAT must determine the appeal "on the merits".<sup>207</sup> While these other regimes provide an important point of reference, several factors need to be considered in determining the appropriate

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<sup>207</sup> Paragraph 3(1) of Part 1 of Schedule 8 to the Competition Act 1998.

scope and powers of judicial scrutiny, reflecting the nature of consumer enforcement decisions.

3.26. Firstly, many consumer protection laws within the scope of Part 8 of the EA 02 apply economy-wide, to all aspects of a business, not just to particular sectors or practices. In addition, some of the conduct prohibited under these laws may equally amount to criminal offences (for example, conduct amounting to almost all of the commercial practices that are automatically unfair under Schedule 1 to the Consumer Protection from Unfair Trading Regulations 2008). Finally, infringing consumer protection laws would, as is proposed further in this chapter, incur significant penalties.

3.27. On this basis, government considers that the scope and powers of judicial scrutiny exercised by the courts should ensure that:

- the appeals framework respects the procedural rights of businesses and provides an effective oversight of the administrative decision making process.
- the courts provide robust quality assurance of the CMA's interpretation of consumer protection law.
- the consumer law enforcement system functions efficiently, minimising delays to the final resolution of cases and ultimately tackling consumer harms.

3.28. Therefore, government is seeking views on what scope and powers of judicial scrutiny should be granted to the appeal body for use in appeals from CMA administrative consumer enforcement decisions to best meet the objectives set out above.

3.29. While government has not reached a decision, it invites views on the extent to which the scope and powers of judicial scrutiny listed below, which apply variously in other enforcement and regulatory regimes, would be relevant and desirable in relation to decisions by the CMA in consumer enforcement investigations under an administrative model. These include:

- The ability for the appeal body to review issues of law relevant to the appeal before it,
- The ability for the appeal body to review issues of fact relevant to the appeal before it,
- The ability for the appeal body to admit fresh evidence (not before the CMA) on appeal,
- The ability of the appeal body to quash decisions of the CMA on legal and factual issues relevant to the appeal before it,
- The ability of the appeal body to substitute its own decision for that of the CMA or to take any other step that the CMA could have taken.

**Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?**

**Appeal body for the CMA's administrative enforcement decisions**

3.30. Government is also seeking views on what court or tribunal would hear any appeals from first instance decisions taken by the CMA.

3.31. Government considers that the appeal body needs to meet the following key objectives:

- the judges or decision makers should have a sufficient depth of expertise in, or could develop sufficient experience in litigation involving, consumer protection law to be able to scrutinise effectively first instance decisions by the CMA. This is important given that consumer protection law is broad in scope and the appeal body may be called upon to hear and decide appeals involving legislation of cross-cutting application.
- the appeal process should work effectively with the existing system for public enforcement and private litigation of consumer protection law, in particular with the jurisdiction of the county courts or High Court in England and Wales and the Court of Session or the Sheriff in Scotland that will continue to decide civil consumer protection cases instigated

by other enforcers under Part 8 of the EA 02 who would not themselves enforce the law directly (either initially or at all, see next section).

3.32. On this basis, appeals of administrative decisions by the CMA could be heard by:

- the High Court – a generalist, senior court which has a very broad jurisdiction and decides cases involving a very broad range of civil matters. If the High Court is designated, it will decide consumer cases brought by enforcers against traders under Part 8 EA 02 (either at first instance, or where relevant, on appeal from the county courts) as well as appeals brought by traders against CMA first instance decisions under the new model proposed in this consultation. In principle, this could facilitate consistency in the interpretation of consumer protection law, giving certainty to consumers and industry about how the rules apply. A possible refinement of this option would be for consumer cases under Part 8 of the EA 02, at first instance and on appeal, to be heard by a specialised chamber, akin to the specialist competition list within the Business and Property Courts of the High Court; or
- a specialised consumer tribunal that could bring cross-disciplinary expertise in law, economics, business, and other fields which could enhance the expertise of the appeal court in consumer-specific matters, akin to the Competition Appeal Tribunal that currently hears appeals of (administrative)

competition decisions by the CMA and regulatory decisions by some sector regulators.

**Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?**

Empowering the sector regulators to enforce consumer law directly

3.33. The sector regulators with consumer enforcement powers under Part 8 of the EA 02 include the Civil Aviation Authority, the Financial Conduct Authority, Ofcom, Ofwat, Ofgem, the Information Commissioner's Office, the Office of Rail and Road, and the Northern Ireland Utility Regulator.<sup>208</sup> In general, sector regulators currently use their court-based consumer enforcement powers to a much more limited extent than their sectoral powers. This is partly because the sectoral regulatory sanctions for wrongful behaviour, where available, are currently stronger, but it is also because use of the sectoral powers do not generally require recourse to the courts.

3.34. Where the conduct of non-regulated firms cannot be addressed under sector-specific regulation, consumers may be left with less protection if regulators consider taking court action

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<sup>208</sup> See also paragraph 3.5 above.

too cumbersome. Therefore, administrative enforcement could enhance regulators' incentives to use the full range of their enforcement powers. As for the CMA, an administrative enforcement regime for sector regulators would need appropriate safeguards including a robust appeals process as well as close consideration to determine which regulator is best placed to take action, to avoid duplication of proceedings from different regulators.

3.35. The utility of administrative enforcement may vary for different regulators depending on how comprehensive their existing powers are to deliver positive outcomes for consumers using sectoral consumer protection rules. Therefore, government is using this consultation to gather further views on what approach would best serve different sector regulators and will consider administrative arrangements for specific regulators in light of these responses.

**Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?**

### Strengthening sanctions for breaking the rules

3.36. Government is also seeking views on making additional civil sanctions available to the CMA and other enforcers. Regardless of whether enforcers

operate administratively or through the courts, the ability to seek and impose proportionate sanctions would make enforcement more effective by delivering better deterrence and real consequences for those that fail to do the right thing for consumers.

3.37. These sanctions will broadly align the consumer enforcement regime with existing powers or proposed reforms in competition enforcement, as recommended by John Penrose's report, and will include sanctions for:

- non-compliance with information gathering powers.
- breaches of undertakings.
- breaches of consumer protection law.

3.38. Government expects that the proposed fines would be imposed sparingly, as in most cases the threat of a fine (coupled with injunctive relief or consumer redress powers) should provide a greater incentive to comply with the law, have a deterrent effect on others, and prevent businesses from benefiting from breaking the law. Government would also expect enforcers to engage with businesses at an early, informal stage to secure compliance before resorting to formal, punitive action.

### **Non-compliance with information gathering powers**

3.39. The CMA and other enforcers have a range of powers to gather evidence and information when exercising, or considering whether to exercise, their

enforcement functions and investigating potential breaches of consumer law. These include powers to send statutory notices to parties to require them to provide information specified in the notice under Part 3 of Schedule 5 of the Consumer Rights Act 2015.<sup>209</sup>

3.40. Enforcers rely on being provided with timely and accurate information to carry out, or consider whether to carry out, their functions effectively. However, when businesses fail to provide the requested information on time or at all or provide misleading information, there are currently no direct civil fines available to punish and deter such behaviour.

3.41. At present, enforcers can apply for a court order requiring businesses to comply. If the court makes an order, and the firm subsequently does not comply with the court order, the enforcer will then need to bring contempt of court proceedings, potentially resulting in imprisonment and an unlimited fine. However, by that point consumers and rule-abiding competitors may have suffered significant harm from firms that drag out the compliance enforcement process. For example, in March 2021 the CMA began legal action against a leading anti-virus firm in relation to information it considered outstanding. The CMA considered that the firm had not provided certain information some 6 months after the CMA

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<sup>209</sup> Paragraph 14 of Part 3 of Schedule 5 to the CRA 2015 sets out the power to require the production of information.

used its legal powers to request it for an investigation into auto-renewing contracts.<sup>210</sup>

3.42. Government therefore proposes to introduce civil penalties where a firm fails to comply with information gathering powers. Fines will be based on the trader's turnover, in line with international practice and John Penrose's report recommendations, to a maximum level of 1% of a business' annual turnover, with an additional daily penalty of up to 5% of daily turnover while non-compliance continues.

3.43. It is further proposed that the Secretary of State should have the power to set out, in secondary legislation, how turnover should be calculated, and statutory guidance will be published setting out the relevant criteria for imposing and calculating penalties.

3.44. Government intends for the CMA, and possibly sector regulators in future, to be able to impose these fines directly under their administrative model for consumer enforcement. Any other enforcers would have to apply through the civil courts under Part 8 of the EA 02.

3.45. These civil penalties could be imposed where enforcers find that a trader has:

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<sup>210</sup> CMA press release, "CMA takes Norton to court for withholding information", 23 March 2021.

- failed to comply with an information request or other investigative notice, and lacks a reasonable excuse for this non-compliance
- provided false or misleading information

3.46. As is usual in other civil fining regimes, a transparent procedure should govern the imposition of any financial penalty. Government proposes this to include: <sup>211</sup>

- a notice of intent before a civil penalty is imposed, stating the reason that the enforcement authority proposes to impose a penalty, i.e., setting out the alleged non-compliance with the information notice, the amount of the penalty, the circumstances in which the enforcer may not impose a penalty, and information about making representations within a specified time
- once representations have been considered, a final notice with details about the grounds for imposing the penalty, how to pay it, the period within which it must be paid, the consequences of failing to pay it, and relevant appeal rights

3.47. As John Penrose's report highlights, turnover-based penalties "are far more effective getting firms to comply with investigations, and fairer too because larger companies have to take enforcement action

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<sup>211</sup> See for example, Communications Act 2003, Regulatory Enforcement and Sanctions Act 2008 etc.

just as seriously as smaller ones”.<sup>212</sup> Nevertheless, government recognises that turnover-based penalties can be significant sanctions for a business and therefore these penalties must be imposed to a level commensurate with the severity of a breach and must be appealable by the trader affected.

**Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?**

### **Breaches of undertakings**

3.48. It is possible for the CMA and other enforcers to accept undertakings instead of taking court proceedings under Part 8 of the EA 02.<sup>213</sup> Enforcement action may be concluded, or not commenced, if a business gives and adheres to a satisfactory agreement in relation to conduct giving rise to concern.

3.49. Undertakings are an attractive enforcement tool. These agreements, given voluntarily, are usually a quicker way to secure compliance with consumer protection law and redress for injured parties.

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<sup>212</sup>

See section 2.3 of John Penrose’s report.

<sup>213</sup> See s.219 EA 02.

Undertakings can also circumvent full investigation and court procedures, which can last for a long time and be expensive for enforcers and businesses alike.

3.50. If firms subsequently breach these undertakings, in whole or in part, this undermines the value of early resolution and reduces confidence in the enforcement process. Government therefore wants to ensure that businesses have the right incentives to enter into agreement with the serious intent to end, or not to carry out, harmful practices.

3.51. Currently, there is no requirement that undertakings agreed between a regulator and a trader should contain an admission of liability by the firm. Typically, a breach of an undertaking is liable to result in enforcement action by the enforcer applying for a court order. However, a court cannot directly adjudicate under Part 8 of the EA 02 on whether the trader has complied with an undertaking, order compliance or sanction such a breach. In general, the first issue the court will consider is whether the trader has committed an infringement of consumer protection law and only if that is found to be the case, will the court then consider if an undertaking has been breached when deciding whether to make an enforcement order.<sup>214</sup> Even when a court makes an order, currently it cannot impose any financial

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<sup>214</sup> See s.217(4) EA 02.

penalty for breaching either the law or the undertaking.

3.52. Knowing that undertakings cannot be directly enforced, and sanctions are a weak or faraway prospect, there is a risk that some traders may agree undertakings as a delaying tactic to avoid court proceedings and end up minimally worse off for later breaking their commitments.

3.53. Government is seeking views on what approach would best enhance the enforceability of undertakings. In government's view, this should deliver more direct, readily deployable sanctions that raise the perceived certainty of consequences for breaches of undertakings themselves.

***Option 1: Treating breaches of undertakings as aggravating factors in penalising breaches of consumer protection law***

3.54. As set out in the next section, government plans to introduce new fining powers for administrative enforcers and the civil courts where firms are found to have broken consumer protection law. To further discourage breaches of undertakings, failing to comply with an undertaking could be specified as an aggravating factor when determining the level of any such fine following on from a finding that the law has been breached, potentially attracting a penalty uplift. This could be modelled on, for example, how recidivism, i.e., where a business continues or

repeats the same or a similar infringement, is an aggravating factor in imposing penalties for competition infringements.<sup>215</sup>

3.55. While this option could result in significant financial consequences for firms that renege on their commitments, the enforcer would still need to prove an actual or likely breach of the law in addition to proving breach of the undertaking.

### ***Option 2: Making undertakings enforceable in their own right***

3.56. As discussed above, enforcers cannot currently apply to the court for an order to enforce undertakings without the need to prove the underlying breach of consumer protection law. This contrasts with, for example, CA98 “commitments”, the equivalent of undertakings in competition enforcement cases, where if a business fails without reasonable excuse to adhere to the commitments the regulator may apply to the court for an order requiring them, broadly, to comply within a specified time. Such an order may also require the business to pay the costs of the application. Non-compliance would leave the business potentially facing punishment through contempt of court proceedings and other enforcement action should they violate the terms of the order.

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<sup>215</sup> See CMA73: CMA’s guidance as to the appropriate amount of a penalty.

3.57. Therefore, undertakings could be made enforceable in and of themselves. This would mean that where an enforcer considers an undertaking has been breached without reasonable excuse, the enforcer can apply to the court to decide whether the undertaking has been complied with, and to order the enforcement subject to comply and pay the costs of the application. This would enable a direct and prompt response where an undertaking has not been complied with.

***Option 2A: Introducing monetary penalties for breaches of undertakings***

3.58. Ensuring businesses honour undertakings relies on non-compliance costing business significantly more than compliance but there are currently no direct court penalties should that trader breach them. An effective way therefore may be to give the court bespoke fining powers where undertakings are breached without a reasonable excuse, in addition to the power to make orders set out in Option 2, to act as a deterrent or punishment, subject to appropriate safeguards.

3.59. Under this option, government would seek to set a maximum fine at a level that acts to dissuade traders from exploiting undertakings at the expense of consumers and competitors. Government would welcome views on what the right level for statutory maximum penalties might be, including whether a turnover-based approach might be suitable for these

finer. Should government pursue this option, it proposes that guidance should be published detailing how the level of penalty will be determined. These penalties, and their level, will be appealable by the business affected.

3.60. Government considers that for enforcers operating an administrative model, the enforcer would be able to adjudicate directly (instead of going to court) on whether an undertaking has been complied with and order compliance (as in Option 2) as well as impose a penalty fine for non-compliance (as in Option 2A).

**Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?**

3.61. While undertakings that do not contain an explicit admission of fault by the firm can be a flexible and attractive enforcement tool for enforcers and businesses alike, negotiated agreements could also include an admission of liability. For example:

- In enforcement cases under the CA98, ‘settlement’ is the process whereby a business under investigation is prepared to admit that it has breached competition law and the CMA (as an administrative enforcer) can accept a business’s admission and direct it to take specific actions. By doing so, the enforcement subject can benefit from a

streamlined CMA administrative process, resulting in an infringement decision and a reduction in the level of penalty fine for the breach of the law.

- Internationally, the Australian Competition and Consumer Commission’s guidance sets out that it will seek to obtain an admission of liability in an undertaking.<sup>216</sup>

3.62. Admissions of an actual or likely breach by a business have the potential to help other businesses understand their legal obligations under consumer protection law, and such effects could be of potentially significant deterrence benefit at a systemic level.

3.63. Therefore, government is interested in whether such undertakings that include an admission of liability should become a more frequently deployed tool of consumer protection enforcement. This could be achieved through the introduction of a process akin to the CA98 settlement process, potentially tailoring procedural features to ensure businesses are appropriately incentivised to “settle”. This would mean that an administrative enforcer or a civil court would be able to make an infringement decision based on a combination of reaching its own evidenced view as well as accepting the trader’s admission that consumer protection law has been

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<sup>216</sup> Page 5 of section 87B of the Competition and Consumer Act Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission, April 2014.

breached or is likely to be breached. Upon receiving an infringement decision, the trader would become liable for a penalty for their breach of the law (see next section) but would be given a reduction of the fine to reflect their willingness to settle.

3.64. If this is pursued, government needs to determine what the appropriate sanctions would be if these undertakings are breached. In principle, government considers that breaches could attract, at a minimum, the cancellation of any pre-existing penalty discount. It could also include a penalty uplift to reflect any financial advantage gained from the continuing breach, for example a competitive advantage gained over other traders who agreed their own undertakings with an admission of liability on similar terms and who played by the rules.

**Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?**

**Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?**

### **Fines for breaches of consumer protection law**

3.65. Government announced in the Consumer Green Paper that the CMA and other regulators using the

process set out in Part 8 of the EA 02 will be able to ask the court to impose fines on firms of up to 10% of global turnover for consumer law breaches.<sup>217</sup> The CMA can already impose fines of up to 10% of global turnover when enforcing antitrust law, as can many of the sector regulators when using their sectoral powers.<sup>218 219</sup>

3.66. Further details on how government sees these fines working in practice are set out below:

- The CMA, and possibly sector regulators, would be able to impose these fines directly under their administrative model. Any other enforcers would have to apply through the civil courts under Part 8 of the EA 02.
- The Secretary of State should have the power to set out, in secondary legislation, how global turnover should be calculated.
- Statutory guidance will be published setting out the relevant criteria for calculating penalties to ensure consistency across the courts, the CMA, and other enforcers.

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<sup>217</sup> “Modernising Consumer Markets” Green Paper, published in April 2018.

<sup>218</sup> Section 36(1),(8), Competition Act 1998.

<sup>219</sup> For example, see Section 300 Gas Act 1986 or Section 44 Civil Aviation Act 2012.

- The CMA, and possibly sector regulators, would have to follow a transparent procedure for the imposition of a penalty as set out above.
- Fines will be calculated by reference to the severity of the breach, including loss or risk of loss to consumers, as well as aggravating or mitigating steps taken by the business responsible.
- In relevant circumstances, an enforcer may agree that a trader makes a voluntary redress payment or other redress instead of, or in addition to, a financial penalty.
- These penalties, and their level, will be appealable by the company affected.

## **Supporting consumers enforcing their rights independently**

### Improving Alternative Dispute Resolution

3.67. The proposals above concern public enforcement, which may be necessary when firms engage in unfair trading affecting a number of consumers. However, most complaints are individual in nature and consumers need knowledge and support to pursue them for themselves. If competition is working well, most consumers who make an unsatisfactory purchase can expect to fix any problems quickly with the trader: seven in ten UK consumers resolve their problem directly with the

business.<sup>220</sup> However, when consumers cannot reach agreement with the trader, they need to understand their redress options, which may include Alternative Dispute Resolution (ADR) processes.

3.68. Government has already indicated that it intends to examine radical new ways to mainstream ADR for all types of disputes<sup>221</sup>, including consumer disputes, so it is no longer viewed as an “alternative” to court but operates as an integrated part of the justice system. In the meantime, as proposals for this wide-ranging and fundamental reform are developed, government wants to examine more immediate plans to increase the rate of individual consumer disputes being satisfactorily resolved by strengthening and expanding the scope of ADR.

3.69. Many consumer disputes could benefit from ADR because it can be less confrontational in nature than a court process and more easily allows for mediated settlements. It is also generally lower in cost to traders than the courts and free for consumers. Over 2.5 million disputes were resolved through ADR in the past six years and 80% of consumers who used ADR thought their problem would not have been resolved without it.<sup>222</sup>

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<sup>220</sup> The Public Attitude Tracker – Wave 30, 2019

<sup>221</sup> [www.gov.uk/government/speeches/lord-chancellors-speech-london-international-disputes-week](http://www.gov.uk/government/speeches/lord-chancellors-speech-london-international-disputes-week)

## Figure 14: Alternative Dispute Resolution

### What is Alternative Dispute Resolution (ADR)?

ADR is a process that enables disputes between a consumer and business to be settled by an independent mechanism outside the court system that is generally funded by business and free to the consumer.

All ADR providers are independent third parties who provide dispute resolution to remedy a complaint between a consumer and trader. It can take several forms from informal mediation or conciliation to binding arbitration. Several private sector businesses offer ADR in both the regulated and non-regulated sectors. Some are certified providers whose performance is monitored but others are not.

Many trade associations or similar bodies offer simple and effective ADR by taking complaints about their members and, with a view to resolving any dispute, contacting those members on behalf of the consumer. Generally, such bodies will not deal with complaints about non-members.

Ombudsman schemes are a form of ADR, and some are established by legislation. Non-statutory ombudsmen must be certified ADR providers and hold ombudsman-level membership of the Ombudsman Association. Statutory ombudsmen typically have binding powers to enforce their

decisions. Ombudsmen generally have a wider role beyond solving disputes, as they support consumers, provide advice to businesses, and share information with regulators and consumer organisations to highlight systemic issues in a sector.

In most regulated sectors such as financial services and energy, the use of ADR is mandatory for business if a consumer cannot solve a dispute with a business directly. This is usually delivered through an ombudsman or a regulator-approved ADR body. In the non-regulated sector, business use of ADR is voluntary.

Most forms of ADR will require the consumer to have attempted to resolve the dispute, directly with the trader, before accessing the ADR process.

3.70. John Penrose's report highlighted the importance of consumers having easier, cheaper, and more digital ways to enforce their rights, whether through ADR or the courts. He saw it as important so that poorly performing firms face more pressure, and consumers know they can trust the system to be on their side if they need it. ADR is an important avenue to redress for consumers outside of the civil courts process, which is often more costly and time intensive. It can also help reduce the burden on the civil courts, which is facing an increasing caseload and resourcing pressures following the COVID-19 pandemic.

3.71. Government believes a well-functioning ADR system can make markets work more effectively and drive economic growth, as it increases consumers' confidence in spending and generates higher trader compliance with the law. However, responses to the Consumer Green Paper suggest that a number of improvements need to be made to improve the quality and scope of ADR so that it delivers for more consumers and businesses in all markets. In this chapter, government is seeking views on three specific improvements that were highlighted by respondents:

- **Improving consumer awareness and signposting** – the current landscape for accessing redress is confusing and the process varies across markets. This is dissuading consumers from seeking private redress and enforcing their consumer rights.
- **Increasing the quality and oversight of ADR** – the quality of ADR services, including the time to access ADR, and oversight of ADR bodies varies across both regulated and non-regulated markets.
- **Improving the take-up of ADR by businesses in non-regulated markets** – Business participation in ADR is particularly low in non-regulated sectors with a high number of SMEs and microbusinesses. This is concerning if those sectors are also ones where consumers are experiencing high levels of harm.

## **Improving consumer awareness and signposting**

- 3.72. Most businesses try hard to resolve consumer complaints. However, when consumers and businesses cannot agree, it should be easier and simpler for consumers to understand their rights and choose to pursue the best redress option.
- 3.73. Consumers currently have access to a variety of public and privately funded advice providers including Citizens Advice, Advice Direct Scotland, Which? and MoneySavingExpert. All these services collectively ensure consumers have access to clear, practical, and impartial advice through a variety of channels.
- 3.74. Both Citizens Advice and Advice Direct Scotland provide support to consumers through a variety of free consumer services. This support includes publishing content to signpost consumers to the court system and to relevant ADR schemes that are available.
- 3.75. Furthermore, as highlighted in John Penrose's report, there are a variety of digital platforms and tools that help consumers understand their rights and guide them through the redress process. These include, for example, Resolver and the ADR case management platforms provided by the Dispute Resolution Ombudsman (rail and home improvements sectors) and Ombudsman Services (energy and telecommunications).

3.76. Despite these advice and support services, responses to the Consumer Green Paper said that consumers still find it difficult to understand their redress options, make the right choice for them and navigate the routes to resolving their problem, particularly if they are vulnerable. This includes finding out whether ADR is available, how it works and what other options are available.

3.77. In response to this, Citizens Advice and Advice Direct Scotland are considering how they can further support consumers to access and navigate the routes to redress, including the use of ADR. For vulnerable consumers, this includes new features such as direct referrals and data transfers to ADR providers as well as a potential casework function.

3.78. Government will continue to work with established advice providers, including Citizen's Advice, to understand how it can help improve consumers understanding their rights, access relevant advice, and find relevant redress.

**Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?**

**Speeding up access to ADR**

3.79. In regulated markets, the majority of disputes are resolved within four weeks, but most regulators have typically set an upper limit of eight weeks for

businesses to resolve complaints before consumers are entitled to take a dispute to ADR.

3.80. Businesses should have sufficient time to resolve disputes informally before involving a third party, but many respondents to the Consumer Green Paper argued that this lengthy period was no longer justified in an era of e-mail and social media. Those respondents felt that it did not reflect consumers' changing expectations of engaging with business and led to consumers abandoning complaints. MoneySavingExpert's 'Sharper teeth: the consumer need for ombudsman reform' report highlighted that this rule was created in a non-digital age and should be shortened to a minimum of 4 weeks.<sup>223</sup> The All-Party Parliamentary Group (APPG) on Consumer Protection's 2019 Ombudsman Report also concluded that the upper limit of eight weeks should be shortened.<sup>224</sup>

3.81. Maintaining an upper limit of eight weeks has the potential to harm both consumers and businesses if active steps are not being taken to resolve the complaint. Evidence from the Consumer Green Paper suggested that protracted disputes can cause consumers stress and financial hardship and may

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<sup>223</sup> [https://images6.moneysavingexpert.com/images/documents/MSE-Sharper teeth interactive.pdf? ga=2.216598932.36631854.1615384565-55247174.1614176969](https://images6.moneysavingexpert.com/images/documents/MSE-Sharper%20teeth%20interactive.pdf?ga=2.216598932.36631854.1615384565-55247174.1614176969)

<sup>224</sup>

<https://images6.moneysavingexpert.com/images/documents/Ombudsman%20report.pdf>

harm businesses too by eroding trust and reducing satisfaction with business complaint handling, affecting customer retention.

3.82. Government therefore considers there is a good case for halving the upper threshold of eight weeks in markets where ADR is mandatory so that businesses are incentivised to settle problems promptly and, if necessary, consumers can take complaints to ADR more quickly. Many regulators already support a significant reduction in this threshold and see the business and consumer benefits of doing so. The Office of Rail and Road (ORR) has set an upper limit of 40 days in the rail sector and intends to formally consult this year on reducing it. Similarly, some businesses in sectors such as energy have already reduced the time to access ADR voluntarily.

3.83. However, government recognises that there are some complaints that are complex and may take businesses longer to resolve and that referring a complex case into the ADR process prematurely before the facts are established could introduce delay later in the process. It is also important that cases are fully investigated by businesses before a third party intervenes, especially in markets where a single ADR body is investigating complaints in a large market or in markets in which disputes tend to be more complex. In these instances, there may be value in the business having more time to resolve

the complaint, provided there is constructive engagement.

3.84. Government would welcome views on whether regulators should aim to set a significantly lower threshold for consumers to exercise their right to access ADR and if so whether exceptions could or should be made to allow more time to resolve complex cases.

**Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?**

### **Quality and oversight of ADR services**

3.85. Government also intends to improve the quality and consistency of ADR services in consumer markets, to further increase business and consumer confidence in ADR.

3.86. The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the regulations) were introduced to promote high-quality consumer ADR schemes through the creation of an accreditation and reporting framework and regular monitoring against this by a competent authority.<sup>225</sup> The regulations provide a basic set of approval

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<sup>225</sup> [www.legislation.gov.uk/uksi/2015/542/contents/made](http://www.legislation.gov.uk/uksi/2015/542/contents/made)

processes and monitoring requirements to ensure these standards are maintained.

3.87. However, responses to the Consumer Green Paper identified consistency of quality standards, transparency of process, speed of case resolution, and enforceability of decisions as areas where improvements could be made to the ADR system in the UK. Any dispute resolution process or body that interprets and rules on issues relating to legal rights and obligations should have a clear set of standards that can be relied on by all parties involved and policed effectively by a neutral arbiter. Government therefore agrees with the APPG on Consumer Protection's 2019 Ombudsman Report that there should be a more demanding and consistent minimum set of standards for approval as an accredited ADR provider and adherence to a code of practice.<sup>226</sup>

3.88. Firstly, government proposes to require that all providers of consumer ADR are assessed and approved for their ability to provide an ADR service. Currently there are numerous non-accredited and unsupervised providers that offer dispute resolution on an informal basis alongside accredited providers. Mandatory approval by the Competent Authority would mean that all providers operate to a common

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<sup>226</sup>All-Party Parliamentary Group on Consumer Protection: Report from the Ombudsman Inquiry.

set of quality standards and oversight.<sup>227</sup> This would level the playing field and drive consistency across the sector through the application of a common legal framework around expertise, independence and impartiality, transparency, fairness, and annual reporting.

3.89. Secondly, **government intends to strengthen the minimum service expectations of all ADR providers**, focusing on four key principles to improve the quality of ADR – neutrality, efficiency, accessibility, and transparency. This would focus on the areas of key concern raised by respondents to the Consumer Green Paper such as setting clear expectations of the ADR process, improving communications on case progression, dealing with straightforward cases as promptly as possible and reporting publicly on outcomes.

3.90. **Government proposes to do this by amending the ADR regulations**, building on its existing framework to incorporate additional requirements for ADR providers, both as part of their initial accreditation and as part of their service provision to consumers and businesses. These would include strengthening the accreditation process through the introduction of a ‘fit and proper

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<sup>227</sup>Under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, accredited bodies are approved by a Competent Authority. Schedule 1 of the regulations outline the relevant ‘Competent Authorities’ in the regulated markets. The Secretary of State is the ‘Competent Authority’ for all non-regulated markets.

persons' test for key personnel to ensure that businesses owners, officers and senior management are suitable people to undertake those roles. These amendments will also focus on the consumer and business experience of the ADR process by embedding in the regulations additional criteria around the neutrality, efficiency, accessibility, and transparency of service provision to ensure a common set of standards are applied and that providers can be monitored against and held accountable to these by the Competent Authority.

3.91. Government believes these changes will help deliver a trustworthy, timely, and fair service that consumers and businesses can trust to resolve disputes amicably with improved oversight to monitor service standards.

**Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?**

**Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?**

**Improving the take-up of ADR by businesses in non-regulated markets**

3.92. In the regulated sectors, it is generally mandatory for traders to participate in ADR schemes. For sectors where participation is

voluntary, there is little engagement, particularly amongst SMEs. Evidence suggests that participation rates could be as low as 3% in some sectors.<sup>228</sup> The low participation rates are driven by a range of factors. These include businesses' confidence in their own dispute resolution processes and ability to maintain close relationships with their customers, their perception that there are few intractable disputes, and the cost of ADR participation.<sup>229</sup>

3.93. Several responses to the Consumer Green Paper provided strong support **for requiring business participation in sectors where the volume and value of consumer detriment is demonstrably high**. Government has developed a set of criteria to assess where the level of consumer detriment is high and show where mandatory business participation in ADR could be beneficial.

3.94. Using these criteria, our analysis shows that most of the sectors with poor scores are regulated and already have mandatory ADR in place. **Of those that do not, house and garden maintenance services, vehicle maintenance and repair services, and used cars are the highest**

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<sup>228</sup> We have spoken to ADR providers in high-detriment sectors to obtain sign-up levels and have compared these to the estimated number of businesses operating in a sector according to the Interdepartmental Business Register (IDBR). See Impact Assessment for further details.

<sup>229</sup> [www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system](http://www.gov.uk/government/publications/resolving-consumer-disputes-alternative-dispute-resolution-and-the-court-system)

**detriment sectors.**<sup>230</sup> Unresolved problems in these markets can have a significant impact given their cost and importance, particularly for vulnerable consumers. For example, faulty home renovations may have significant importance for a disabled person looking to increase the accessibility of their home. A reliable car is vital for someone who has to travel for work.

### Figure 15: Mandatory ADR criteria

#### Criteria for assessing extension of mandatory ADR provision

Government considers that a number of factors are relevant in assessing whether to extend mandatory business participation in ADR to new sectors. These include the volume or value of consumer problems, the overall consumer experience, and the structure of the market. In some markets mandatory participation might be justified because there is a high incidence of high value disputes combined with one off purchases, such as we see in the motor vehicles and home improvements sectors. In other markets, it might be justified even where transaction values are lower because of a high level of complaints affecting

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<sup>230</sup> The low ranking of regulated sectors may reflect to an extent structural market features such as concentration and choice – which in turn are driven by large minimum efficient scales and natural monopolies.

vulnerable consumers, as we see in the retail energy market.

We have built on work by Which? and used the following core set of criteria to aid in identifying sectors where extending mandatory ADR could benefit consumers:

- a. **nature of consumers:** vulnerability, importance (for example essential or high cost)
- b. **nature of the purchase:** complexity, value, incidence, competitiveness
- c. **consumer experience:** consumer confidence/trust, level of complaints
- d. **alternative routes:** availability and effectiveness of other types of consumer protection/enforcement

3.95. The figure below shows the result of ranking consumer sectors against the comparability of offers, trust in businesses to respect consumer protection rules, the extent to which markets live up to consumer expectations, choice of retailers/suppliers, and the degree to which problems experienced in the market cause detriment. This evidence was gathered from the European Consumer Scoreboard, the detriment survey, Citizens Advice Consumer Scoreboard, and the components on household expenditure.<sup>231</sup>

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<sup>231</sup> See the Impact Assessment published alongside this consultation

Figure 16: Problems, consumer detriment, and access to ADR across consumer sectors

Sector	Compound score	Difference from average	Comparability	Trust	Probl & detr.	Expectations	Choice
Real estate services	6.9	-0.8	---	---	---	---	---
House and garden maintenance services	6.9	-0.7	---	---	---	---	---
Water supply	7.0	-0.6	---	---	---	---	---
Communication services	7.1	-0.6	---	---	---	---	---
Public transport	7.1	-0.6	---	---	---	---	---
Energy and gas services	7.1	-0.5	---	---	---	---	---
Vehicle maintenance and repair services	7.2	-0.5	---	---	---	---	---
Postal Services	7.2	-0.4	---	---	---	---	---
Second hand cars	7.3	-0.4	---	---	---	---	---
Banking, credit and financial services	7.4	-0.3	---	---	---	---	---
Legal and accountancy services	7.5	-0.2	---	---	---	---	---
Vehicle rental services	7.6	-0.1	---	---	---	---	---
Gambling	7.7	0.0	---	---	---	---	---
Airline services	7.7	0.1	---	---	---	---	---
Cafés, bars and restaurants	7.8	0.1	---	---	---	---	---
New cars	7.8	0.1	---	---	---	---	---
Insurance	7.8	0.1	---	---	---	---	---
Clothing and footwear	7.8	0.2	---	---	---	---	---
Cultural and entertainment services	7.8	0.2	---	---	---	---	---
Packaged holidays and tours	7.9	0.3	---	---	---	---	---
Furniture and furnishings	8.0	0.3	---	---	---	---	---
Electrical and electronic appliances	8.0	0.3	---	---	---	---	---
Holiday accommodation	8.1	0.5	---	---	---	---	---
House and garden maintenance products	8.2	0.5	---	---	---	---	---
Food and drink	8.2	0.5	---	---	---	---	---
Health and personal care products	8.2	0.6	---	---	---	---	---
Fuel for vehicles	8.3	0.6	---	---	---	---	---
Books, magazines and newspapers	8.3	0.7	---	---	---	---	---
Entertainment goods	8.4	0.8	---	---	---	---	---
<b>Average across all sectors</b>	<b>7.7</b>						

3.96. In response to the Consumer Green Paper and the challenges raised in these specific sectors, government has considered whether incentivising businesses and consumers to use ADR on a voluntary basis to solve complaints would improve consumer outcomes. Our initial assessment, based on responses to the Consumer Green Paper and further stakeholder engagement, shows that mandating ADR in these sectors would be significantly more effective than voluntary measures in ensuring access to affordable redress.<sup>232</sup>

However, increasing voluntary take-up of ADR by businesses through relationships with trade associations and industry representatives will be an important step to improving access to private redress alongside any legislative changes.

3.97. Government is therefore, seeking views on whether to make business participation mandatory in the motor vehicles sector (to include the supply of new and used vehicles and servicing and repair) and in the home improvements market (such as roofing, glazing, plumbing work, or the fitting of flooring, kitchens, or bathrooms).

3.98. In practice, this would mean if a consumer had a dispute that they cannot solve directly with the trader within eight weeks in these sectors, they would be able to ask the trader to enter into an ADR process. The business would then be under a legal duty

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<sup>232</sup> See the Impact Assessment published alongside this consultation.

to choose an approved ADR provider and pay for the mediation and/or arbitration process.

3.99. On average, one ADR case costs a business between £250 and over £1,000, depending on case complexity – lower than the estimated £1,000 - £1,900 costs of a court case. A mediation or early resolution process will often cost the business less than a more complex arbitration case. When mediation is currently used by businesses signed up to an ADR provider in these sectors, it has a high success rate (over 90%).<sup>233</sup> In addition to the case costs, where the ADR process finds in favour of the consumer, the business may be required to pay to put matters right and rectify breaches of consumer law. This is estimated on average at between £2,200 - £7,400 given the high value of consumer detriment in these sectors. The cost for any specific business will depend on how many ADR cases its customers raise and how ADR fees will be charged.

3.100. Government is considering a default position **of requiring businesses in these sectors to pay for ADR on a pay per use basis**. However, government recognises that some businesses might find it more cost effective to pay an ADR provider on a subscription basis so businesses should be able to follow this alternative model if they choose.

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<sup>233</sup> Figures from 'The Furniture and Home Improvements Ombudsman' (99% between 2016 and 2018) and 'National Conciliation Service (95%)

3.101. Many businesses will be concerned that if ADR is completely cost free for consumers, they might refuse to settle within the eight-week period, holding out for ADR to increase their leverage, or that the cost of ADR might outweigh the value of a claim by a consumer. To address these concerns and deter frivolous or low value complaints, government is seeking views on whether ADR providers should be able to implement a lower limit on the value of claims. This would be balanced to ensure only higher value claims are in scope but not to significantly restrict consumers' access to ADR. This approach is consistent with powers already available to ADR providers through the ADR regulations.

3.102. Government is also seeking views on whether ADR providers should be able to charge a nominal fee of £10-20 to consumers, with this being recoverable from the business if their case is upheld. This would differ from the approach taken in most other regulated markets where ADR is mandatory and completely free to the consumers but there is a precedent on the use of a nominal fee in the aviation sector. A charge at this level would be lower than the cost of using the small claims court but would serve to deter frivolous cases.

3.103. Enforcement can be a challenge in markets with a high number of SMEs and microbusinesses. In response, Government is considering a range of

options that will incentivise compliance and encourage businesses to use ADR. Government will also explore options that will disadvantage businesses that refuse to engage in an ADR process if the consumer eventually needs to take them to court.

3.104. The compensation paid would be the main benefit for the consumer and the policy more broadly. A consumer incurs around £260 in costs during an ADR case, most of which represents the value of their time. This is lower than the £770 of a court case. Thus, resolving a dispute through ADR rather than courts would cost less in case handling costs for both business and consumers. There are potentially broader long-term benefits in these sectors including increased turnover from higher consumer confidence and higher productivity, but these are unquantified. It is estimated that most activity and cost will be incurred by businesses that are not currently engaging in a court or ADR process for unresolved disputes with consumers. Further aggregate costs and benefits are outlined in our Impact Assessment.<sup>234</sup>

**Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a ‘per case’**

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<sup>234</sup> See the Impact Assessment published alongside this consultation.

**basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?**

**Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?**

**Q71. How can government best encourage businesses to comply with these changes?**

## Collective redress

3.105. The purpose of collective redress is to provide compensation for weaknesses in the system of individual redress and encourage efficient compliance with the law. The UK has an established regime for addressing collective consumer harm and enabling consumers to gain collective redress when consumer law has been broken. This covers both public collective redress procedures, whereby regulators and the CMA can seek redress on behalf of consumers under Part 8 EA 02, and, to a certain extent, private collective redress, for example through Group Litigation Orders. However, the UK fundamentally has a civil enforcement regime whereby enforcers, such as the CMA, seek compliance with consumer law rather than taking representative legal action on behalf of consumers.

3.106. Avenues for public enforcers to seek collective redress were strengthened in the

Consumer Rights Act 2015 and government would expect one benefit of the reforms to the civil enforcement regime proposed above to make it easier and quicker for them to obtain redress on behalf of consumers. However, there will be cases where public bodies are unable to act because of finite resources and inevitable prioritisation decisions. Government is therefore keen to explore whether there is a case for strengthening the UK's collective redress regime, to make it easier to gather many individual claims together into a single lawsuit that can support the cost of litigation. The impact of a strengthened collective redress regime may make direct access to remedies for infringements of consumer law, through collective representative actions, more accessible to consumers in general. In particular, it would be unlikely that individual consumers would have to bear the costs of collective redress that may currently arise from private representative proceedings.

3.107. Government is interested in views on opening up further routes to collective consumer redress, including allowing a wider range of organisations to bring actions on behalf of consumers.

**Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?**

**Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?**

## **Trading Standards Enforcement**

3.108. Where a rogue trader breaches consumer law in a way that affects consumers collectively, Local Authority Trading Standards Services (LATSS) can take enforcement action. They tend to focus almost entirely on enforcement against criminal behaviour.<sup>235</sup>

3.109. LATSS are funded by local authorities and act primarily in the interests of their local residents. They pursue traders breaching the law that are based in their area or affecting consumers within their local boundaries. However, as more consumers shop online or from traders selling across local boundaries, tackling consumer harm increasingly needs a nationally coordinated response. This is why National Trading Standards (NTS) and Trading Standards Scotland (TSS) were established in 2012 to improve local authorities' capacity to respond to regionally and nationally important consumer detriment and fund larger enforcement cases. These

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<sup>235</sup> CTSI Workforce Survey highlighted in 2018/19 LATSS pursued 1100 criminal enforcement cases, compared to 30 civil enforcement cases.

organisations are embedded in the local enforcement system, reinforcing local capability, and reflect frontline assessment of enforcement priorities.

3.110. NTS and TSS have delivered substantial benefits. They have added resource and capacity to tackle regional and national problems and added specialist expertise in priority areas such as ecrime and scams to the enforcement system. The National Audit Office (NAO) has highlighted successes such as introducing an intelligence-led enforcement approach, a framework to measure impacts and outcomes across LATSS, and a good case coordination approach.<sup>236</sup>

3.111. NTS or TSS are embedded as an additional resource in the local enforcement system. They do not take direct enforcement action themselves, but rather work with others in the enforcement landscape for the benefit of consumers. This creates strong working relationships between local enforcement partners and national enforcement, enabled in part by regional teams helping with intelligence and investigations.

3.112. The reason neither takes direct enforcement action themselves is because neither has the legal

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<sup>236</sup> National Audit Office. 2016. *Protecting consumers from scams, unfair trading, and unsafe goods*.

status to be given enforcement powers, so their responsibility is to support others in taking cases.

## Figure 17: National enforcement

### Enforcing a national case

**National Trading Standards** support criminal enforcement by commissioning a case to a LATSS. NTS will fund them to host the legal proceedings including investigation and prosecution. Civil actions could be pursued, but LATSS in England and Wales focus almost entirely on criminal enforcement.

**Trading Standards Scotland** will support criminal enforcement action by working in partnership with a lead local authority and preparing cases for the Procurator Fiscal to prosecute where it is believed criminal activity has taken place. To support civil action, they will partner with a Scottish LATSS, generally where the most consumer harm has occurred. TSS will do the evidence gathering and investigation process but if court action is required that will be done by the local authority. TSS will provide funding for the court process if required.

3.113. In general, this works well to deliver substantial benefits. Both bodies are able to act in partnership to tackle significant amounts of consumer harm.

3.114. However, the largest cases of consumer harm can present challenges to local authorities working with national enforcement agencies. Larger cases often run over several years and can place significant financial and legal risk on the relevant local authority, having several impacts such as increasing insurance costs. Many LATSS are small, and they are increasingly unable or reluctant to take on these risks in the national interest. The NAO has highlighted that the current enforcement system is struggling to keep up with changing markets and is suffering a downturn in enforcement activity and expertise. We therefore want to strengthen national enforcement capabilities against rogue traders in regional and national cases to make it easier to continue pursuing the biggest cases.

3.115. We are therefore seeking views on how to create a system best equipped to tackle national level criminal offences with respect to consumer law.

**Q74. How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?**

## **Giving businesses the right support to comply with consumer protection law**

3.116. When businesses trade fairly, they are more likely to earn the trust of consumers who reward

them by returning for repeat business. This is more likely to happen when businesses understand what they need to do to comply with consumer protection law. Therefore, effectively communicating guidance helps businesses abide by the rules. This should enable public enforcers to focus on investigations and preparations for injunctive or, as is proposed, punitive actions to uphold consumer rights against the minority of traders who deliberately seek to cheat consumers and undercut competitors.

3.117. The responsibility for publishing guidance on consumer protection law lies with the Chartered Trading Standards Institute (CTSI). This includes sector specific guidance as well as information targeted at smaller businesses through the *Business Companion* website. In addition, the CMA has a leadership role on unfair contract terms which includes responsibility for producing guidance to help businesses make sure their contract terms are fair and clear to consumers. Businesses and trade associations can also form a legally recognised partnership with one or more local authority – the “Primary Authority” – in order to receive tailored support in relation to one or more specific areas of law. These different channels for delivering business guidance reflect the challenge of providing a wide range of materials in a variety of specialist areas, some of which are highly technical regulatory matters.

3.118. While tens of thousands of businesses use some or all of these sources of support, their effectiveness in promoting compliance relies in large part on how accessible, timely and well targeted guidance is for the traders it applies to. The proposed introduction of a new administrative enforcement model for the CMA, and potentially other enforcers, further highlights the importance of providing businesses with clarity on the law.

3.119. Government therefore is seeking views on whether businesses are getting the right level of support to meet their obligations to consumers. In light of consultation responses, government intends to work with guidance providers, including taking the views of business representatives, to ensure they maximise the reach and effectiveness of their support for businesses to comply with consumer protection law.

**Q75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?**

## **Ensuring our international trade is a success for consumer rights**

- 3.120. Now that we have left the EU, there is an opportunity to put in place a new set of cooperation arrangements compatible with our new global perspective to improve our ability to cooperate on consumer protection matters with our international partners. Government has made a good start with the inclusion of a consumer protection Article in the Comprehensive Economic Partnership Agreement with Japan.
- 3.121. To facilitate international cooperation, government proposes, when Parliamentary time allows, to improve the statutory powers available to UK enforcement bodies to cooperate with their counterparts in other countries in the investigation and enforcement of infringements of consumer protection laws. In particular, government will consider suitable amendments of Part 9 of the Enterprise Act 2002 to improve the ability of enforcers such as the CMA to use their information gathering powers to investigate cross-border infringements and to disclose that information to their international partners and will discuss these changes with the relevant enforcers. Similar flexibilities are being sought for enforcers of competition regulations who will also need to cooperate with partners around the world.

3.122. Together these changes will enable an overarching approach that is common for all our international relationships with clear legal parameters that enable cooperation to the benefit of consumers.

## Consultation questions

### Competition

- 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?**
- 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?**
- Q3. Should government provide more detailed and regular strategic steers to the CMA?**
- Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?**
- Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?**
- Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?**
- Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?**

- Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?**
- Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?**
- 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?**
- Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?**
- Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?**
- Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?**
- 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?**

- 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?**
- 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?**
- 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?**
- 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?**

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

- Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?**
- 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?**
- 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?**
- 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?**
- 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?**
- Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?**

## **Consumer Rights**

- Q30. Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?**
- Q31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?**
- Q32. Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?**
- Q33. How would expressly requiring consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?**
- Q34. Should the reminder requirement apply where (a) the contract will auto-renew or roll-over, at the end of the minimum commitment period, onto a new fixed term only, or (b) the contract will auto-renew or roll-over at the end of the minimum commitment period**
- Q35. How would the reminder requirement impact traders?**
- Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with**

**a reminder that a “full or higher price” ongoing contract is about to begin or (b) obtain the consumer’s explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?**

- Q37. What would be the impact of proposals regarding long-term inactive subscriptions have on traders’ business models?**
- Q38. What do you consider would be a reasonable timeframe of inactivity to give notice of suspension?**
- Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?**
- Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?**
- Q41. Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?**
- Q42. Should government add to the list of automatically unfair practices in Schedule 1 of**

**the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?**

**Q43. What impact would the reforms mentioned in Q42 have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?**

**Q44. What ‘reasonable and proportionate’ steps should be taken by businesses to ensure consumer reviews hosted on their sites are ‘genuine’? What would be the cost of such steps for businesses?**

**Q45. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?**

**Q46. Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?**

**Q47. Do you think government or regulators should do more to address (a) ‘drip pricing’ and (b) paid-for search results that are not labelled**

**accordingly, as practices likely to be breached under the CPRs?**

- Q48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?**
- Q49. Are there perverse incentives or unintended consequences from our existing consumer law?**
- Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?**
- Q51. Do you agree that these powers should be used to protect those using “savings” clubs that are not currently within scope of financial protection laws and regulators?**
- Q52. What other sectors might new powers regarding prepayment protections be usefully applied to?**
- Q53. How common is the practice of using terms and conditions to delay the formation of a sales contract?**
- Q54. Does the practice of using terms and conditions to delay the formation of a sales**

**contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?**

## **Consumer Law Enforcement**

- Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?**
- Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?**
- Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?**
- Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?**
- Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?**

- Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?**
- Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?**
- Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?**
- Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?**
- Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?**
- Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?**

- Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?**
- Q67. What changes could be made to the role of the ‘Competent Authority’ to improve overall ADR standards and provide sufficient oversight of ADR bodies?**
- Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?**
- Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a ‘per case’ basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?**
- Q70. How would a ‘nominal fee’ to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?**
- Q71. How can government best encourage businesses to comply with these changes?**
- Q72. To what extent do you consider it necessary to open up further routes to collective consumer**

**redress in the UK to help consumers resolve disputes?**

- Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?**
- Q74. How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?**
- Q75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?**

## Annex: Legislation in scope of Part 8 of the Enterprise Act 2002

### **Domestic infringements - the laws listed in orders made under s.211(2) EA 02<sup>237</sup>**

Accommodation Agencies Act 1953;

Section 40 of the Administration of Justice Act 1970;

Articles 131 to 135 and 168 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985;

*[Business Names (Northern Ireland) Order 1986<sup>238</sup>];*

Sections 4, 5 and 7 of the Cancer Act 1939;

Sections 60, 61 and 63 of the Charities Act 1992;

Section 7(1) and (2) of the Children and Young Persons Act 1933;

*[Section 18(1) and (2) of the Children and Young Persons (Scotland) Act 1937<sup>239</sup>];*

Section 4 of the Children and Young Persons (Protection from Tobacco) Act 1991;

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<sup>237</sup> Orders made under s211(2):

Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003/1593, art. 2

Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2013/761, art. 2

Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015/1727, art. 2

<sup>238</sup> Repealed on 1<sup>st</sup> October 2009 by the Companies Act 2006 ss. 1287(2), 1295, 1300(2), and Schedule 16

<sup>239</sup> Repealed by the Tobacco and Primary Medical Services (Scotland) Act 2010 as of 24<sup>th</sup> October 2010 for the purposes of prescribing under section 4(4)(c), otherwise 1<sup>st</sup> April 2011, subject to savings specified in the Tobacco and Primary Medical Services (Scotland) Act 2010 (Commencement No. 1, Consequential and Saving Provisions) Amendment Order 2011 and as specified in the Tobacco and Primary Medical Services (Scotland) Act 2010 (Ancillary Provisions) Order 2010.

Article 5 of the Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991;  
Part 41 of the Companies Act 2006;  
*[Articles 356, 357 and 359 of the Companies (Northern Ireland) Order 1986<sup>240</sup>];*  
Part 6 of the Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 and any other provisions of those Regulations having effect for the purpose of Part 6;  
Consumer Credit Act 1974;  
Parts 1 and 2 and Chapter 5 of Part 3 of the Consumer Rights Act 2015<sup>241</sup>;  
Sections 107, 198 and 297A of the Copyright, Designs and Patents Act 1988;  
Estate Agents Act 1979;  
Regulation 11(1) Explosives (Fireworks) Regulations (Northern Ireland) 1999;  
Hallmarking Act 1973;  
Articles 3 and 4 of the Health and Personal Social Services (Northern Ireland) Order 1978;  
Intoxicating Substances (Supply) Act 1985;

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<sup>240</sup> Repealed on 1<sup>st</sup> October 2008 by Companies Act 2006.

<sup>241</sup> Added by S.I. 2017/1727.

*[Part 1 and section 14 of the Lotteries and Amusements Act 1976<sup>242</sup>;*

Malicious Communications Act 1988;

Malicious Communications (Northern Ireland) Order 1988;

*[Misrepresentation Act 1967<sup>243</sup>;*

Misrepresentation Act (Northern Ireland) 1967;

Sections 13 and 16 of the National Lottery Act 1993;

Section 4 of the Prices Act 1974;

Protection from Harassment Act 1997;

Protection from Harassment (Northern Ireland Order) 1997;

*[Regulation 15 of the Pyrotechnic Articles (Safety) Regulations 2010<sup>244</sup>;*

Sections 75 and 76 of the Road Traffic Act 1988;

Articles 83 and 84 of the Road Traffic (Northern Ireland) Order 1995;

*[Sale of Goods Act 1979<sup>245</sup>;*

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<sup>242</sup> Repealed on 1<sup>st</sup> September 2007 by the Gambling Act 2005 ss. 356(3), 358(1), and Schedule 17, subject to transitional provisions and savings specified in the Gambling Act 2005 (Transitional Provisions)(No. 2) Order 2006 and the Gambling Act 2005 (Commencement No. 6 and Transitional Provisions) Order 2006.

<sup>243</sup> Section 3 of this Act will not apply to consumer contracts from 1<sup>st</sup> October 2015 - see paragraph 1 of Schedule 4 to the Consumer Rights Act 2015, and article 6(1) of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (S.I.2015/1630).

<sup>244</sup> Revoked on 17<sup>th</sup> August 2015 by the Pyrotechnic Articles (Safety) Regulations 2015 subject to savings in regulation 75.

<sup>245</sup> Sections 11(4), 12, 13, 14, 15, 15B(1), 20, 29(3), 30, 31, 32, 33, 35, 35A, 36, Part 5A, Sections 51, 52, 53, 53A, 54, 55(1) and 58 of this Act will not apply to business to consumer contracts from 1<sup>st</sup> October 2015. I.e., for business to consumer contracts, the Sale of Goods

*[Supply of Goods (Implied Terms) Act 1973<sup>246</sup>];*

*[Supply of Goods and Services Act 1982<sup>247</sup>];*

Tobacco Advertising and Promotion Act 2002;

Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002;

Section 12 of the Torts (Interference with Goods) Act 1977;

Trade Descriptions Act 1968;

Section 92 of the Trade Marks Act 1994;

*[Unfair Contract Terms Act 1977<sup>248</sup>];*

Sections 21 to 23, 25, 28, 30, 31, 32, 50(5) and (6) of the Weights and Measures Act 1985;

Articles 19(1) to (6), 20, 22, 25(2) [*and 32(5)*] of the Weights and Measures (Northern Ireland) Order 1981.<sup>249</sup>

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Act 1979 has been **mainly** replaced by the Consumer Rights Act 2015, but some provisions of the SGA still apply, for example rules which are applicable to all contracts of sale of goods (as defined by that Act – essentially sales of goods for money) regarding matters such as when property in goods passes. See paras 8 – 36 of Schedule 1 to the Consumer Rights Act 2015 and article 6(1) of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.

<sup>246</sup> This Act does **not** apply to trader to consumer contracts from 1<sup>st</sup> October 2015, see paras 1 – 7 and Schedule 1 to the Consumer Rights Act 2015 and article 6(1) of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.

<sup>247</sup> This Act does **not** apply to consumer contracts from 1<sup>st</sup> October 2015, see paras 37 – 52 of Schedule 1 to the Consumer Rights Act 2015 and article 6(1) of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.

<sup>248</sup> As provided for by paras 2 – 27 of Schedule 4 to the Consumer Rights Act 2015 and article 6(1) of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 this Act does not apply to consumer contracts from 1<sup>st</sup> October 2015.

<sup>249</sup> Article 32 was repealed on 1<sup>st</sup> November 2011 by the Weights and Measures (Packaged Goods) Regulations (Northern Ireland) 2011, subject to the transitional provisions in regulation 21.

An act done or omission made in breach of contract for the supply of goods or services to a consumer.

An act done or omission made in breach of a duty of care owed to a consumer under the law of tort or delict of negligence.

## Community Infringements (prior to 1 Jan 2021)

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers	Price Marking Order 2004
Directive 2011/83/EU of the European Parliament and of the Council of 25th October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council	The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

<p><b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b></p>	<p><b>Implementing UK Legislation</b></p>
<p>Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council</p> <p>Paragraphs 4 and 5 and the second sentence of paragraph 3 of Article 62 of Directive 2015/2366/EU of the European Parliament and of the Council of 25th November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No. 1093/2010, and</p>	

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
repealing Directive 2007/64/EC	
[Council Directive 85/577/EEC of 20th December 1985 to protect the consumer in respect of contracts negotiated away from business premises]	[Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 <sup>250</sup> ]
Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive	Package Travel and Linked Travel Arrangements Regulations 2018

<sup>250</sup> Repealed by Reg 2(b) of the CCRs, but continue to apply to contracts within their scope made before 13 June 2014.

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC	
Council Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts	Unfair Terms in Consumer Contracts Regulations 1999
Directive 97/7/EC of the European Parliament and of the Council of 20th May 1997 on the protection of consumers in respect of distance contracts (except article 10)	Consumer Protection (Distance Selling) Regulations 2000 <sup>251</sup>

<sup>251</sup> Repealed by Reg 2(b) of the CCRs, but continue to apply to contracts within their scope made before 13 June 2014.

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
Article 10 of the above Directive	Regulations 19 to 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 in their application to consumers (use of telecommunications services for direct marketing purposes)
Directive 1999/44/EC of the European Parliament and of the Council of 25th May 1999 on certain aspects of the sale of consumer goods and associated guarantees	(i) Sections 9 to 11 of the Supply of Goods (Implied Terms) Act 1973 <sup>252</sup> , sections 13 to 15 and 15B of the Sale of Goods Act 1979, sections 3 to 5, 11C to 11E and 13 of the Supply of Goods and Services Act 1982, and any

<sup>252</sup> With the exception of section 11(4) (when condition to be treated as a warranty).

<p><b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b></p>	<p><b>Implementing UK Legislation</b></p>
	<p>rule of law in Scotland which provides comparable protection to section 13 of the Supply of Goods and Services Act 1982 (implied terms as to quality and fitness);</p> <p>(ii) Sections 20 and 32 of the Sale of Goods Act 1979 (passing of risk and delivery of goods);</p> <p>(iii) Sections 48A to 48F of the Sale of Goods Act 1979, and sections 11M, 11N and 11P to 11S of the Supply of Goods and Services Act 1982 (additional remedies for consumers);</p> <p>(iv) Regulation 15 of the Sale and Supply of Goods</p>

<p><b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b></p>	<p><b>Implementing UK Legislation</b></p>
	<p>to Consumers Regulations 2002</p> <p>(v) Sections 6(2), 7(1), 7(2), 20(2), 21 and 27(2) of the Unfair Contract Terms Act 1977 and article 3 of the Consumer Transactions (Restrictions on Statements) Order 1976 (anti-avoidance measures)</p> <p>(vi) Sections 2, 3, 9 to 11, 13 to 15, 19, 23, 24, 30 to 32, 58 and 59 of the Consumer Rights Act 2015</p>
<p>Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society</p>	<p>Regulations 6, 7, 8, 9 and 11 of the Electronic Commerce (EC Directive) Regulations 2002 (requirements as to information and orders)</p>

<p><b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b></p>	<p><b>Implementing UK Legislation</b></p>
<p>services, in particular electronic commerce, in the internal market (“Directive on electronic commerce”)</p>	
<p>Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.</p>	<p>Financial Services (Distance Marketing) Regulations 2004; rules corresponding to any provisions of those Regulations made by the Financial Conduct Authority or a designated professional body within the meaning of section 326(2) of the Financial Services and Markets Act 2000</p>

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
[Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market	Consumer Protection from Unfair Trading Regulations 2008
Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers and repealing Council Directive 87/102/EEC	Consumer Credit Act 1974 and secondary legislation made thereunder (not including consumer hire agreements).
Directive 2008/122/EC of the European Parliament and of the Council of 14	Timeshare, Holiday Products, Resale and

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
<p>January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale, and exchange contracts</p>	<p>Exchange Contracts Regulations 2010</p>
<p>Articles 10 to 21 of Council Directive 89/552/EEC of 3rd October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities as amended by Directive 97/36/EC</p>	<p>The provisions of the Broadcasting Acts 1990 and 1996, and codes and rules made by the Independent Television Commission thereunder, in particular sections 6(1) (in relation to advertising), 8, 9, 60 and 79(4) of the Broadcasting Act 1990 (regulations as to advertising) and sections 18(5), 25(5) and 30(5) of the Broadcasting Act 1996,</p>

<p><b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b></p>	<p><b>Implementing UK Legislation</b></p>
	<p>in so far as they apply sections 6 to 12 of the Broadcasting Act 1990 to digital programme services, digital additional services and qualifying teletext services</p>
<p>Articles 86 to 100 of Directive 2001/83/EC of the European Parliament and of the Council of 6th November 2001 on the Community code relating to medicinal products for human use</p>	<p>Chapters 1 and 2 of Part 14 (advertising) of the Human Medicines Regulations 2012</p>
<p>Article 13 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal</p>	<p>Regulations 19 to 26 and 30 and 32 of the Privacy and Electronic Communications (EC Directive) Regulations 2003</p>

<p><b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b></p>	<p><b>Implementing UK Legislation</b></p>
<p>data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)</p>	
<p>[Article 13 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC</p>	<p>Regulation 19(1) and (2) of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015</p>
<p>Article 14 of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21</p>	<p>Regulation 19A(1) to (4) of the Alternative Dispute Resolution for Consumer Disputes (Competent</p>

<b>Listed Directives (EU Directives specified, in whole or in part, in Schedule 13 EA 02)</b>	<b>Implementing UK Legislation</b>
May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC	Authorities and Information) Regulations 2015

<b>Listed Regulations (EU Regulations specified, in whole or in part, in Schedule 13)</b>	<b>Implementing UK Legislation</b>
Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to air	Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005

passengers in the event of denied boarding and of cancellation or long delay of flights	
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## **Schedule 13 Infringements (from 1 Jan 2021)**

Sections 9 to 11 of the Supply of Goods (Implied Terms) Act 1973.

The Consumer Credit Act 1974 and secondary legislation made under that Act excluding requirements relating to consumer hire agreements.

Sections 6(2), 7(1), 7(2), 20(2), 21 and 27(2) of the Unfair Contract Terms Act 1977, to the extent that those sections remain in force, or continue to apply to a consumer contract by virtue of the saving made, in connection with their repeal or disapplication by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.<sup>253</sup>

Sections 13 to 15, 15B, 20 and 32 of the Sale of Goods Act 1979, to the extent that those sections continue to apply to a contract for a trader to supply goods to a consumer by virtue of the saving made, in connection

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<sup>253</sup> I.e., a contract to which parts 1 and 2 of the CRA 2015 would otherwise apply and was entered into before, or a notice which would otherwise constitute a consumer notice and be covered by Part 2 of the CRA 2015 and was provided or communicated before, 1 October 2015.

with their amendment by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.<sup>254</sup>

Sections 48A to 48F of the Sale of Goods Act 1979, to the extent that those sections remain in force by virtue of the saving made, in connection with their repeal by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.<sup>255</sup>

Sections 3 to 5, 11C to 11E and 13 of the Supply of Goods and Services Act 1982, and any rule of law in Scotland which provides comparable protection to section 13, to the extent that those sections continue to apply to a contract for a trader to supply goods or, in the case of section 13, a contract for a trader to supply a service, to a consumer by virtue of the saving made, in connection with their amendment by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions,

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<sup>254</sup> See footnote above.

<sup>255</sup> See footnote above.

Savings and Consequential Amendments) Order 2015.<sup>256</sup>

Sections 11M to 11S of the Supply of Goods and Services Act 1982 to the extent that those sections remain in force by virtue of the saving made, in connection with their repeal by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.<sup>257</sup>

The Package Travel, Package Holidays and Package Tours Regulations 1992, to the extent that those Regulations remain in force by virtue of the saving made, in connection with their revocation, by regulation 37(2) of the Package Travel and Linked Travel Arrangements Regulations 2018 (to contracts concluded under the 1992 regulations before the commencement date of 1<sup>st</sup> July 2018).

The Unfair Terms in Consumer Contracts Regulations 1999, to the extent that those Regulations remain in force by virtue of the saving made, in connection with

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<sup>256</sup> See footnote above.

<sup>257</sup> See footnote above.

their revocation by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.<sup>258</sup>

The Consumer Protection (Distance Selling) Regulations 2000, to the extent that those Regulations remain in force for contracts entered into prior to their disapplication by virtue of regulation 2(a) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.<sup>259</sup>

Regulations 6, 7, 8, 9 and 11 of the Electronic Commerce (EC Directive) Regulations 2002. Regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002, to the extent that regulation 15 remains in force by virtue of the saving made, in connection with its revocation by the Consumer Rights Act 2015, by article 6 of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015.<sup>260</sup>

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<sup>258</sup> See footnote above. Where provided or communicated before 1st October 2015. See article 6(4) of S.I. 2015/1630.

<sup>259</sup> I.e., contracts entered into before 13th June 2014.

<sup>260</sup> See footnote above. See article 6(3) of S.I. 2015/1630.

Regulations 19 to 26, 30 and 32 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

The Price Marking Order 2004.

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights.

The Financial Services (Distance Marketing) Regulations 2004 and rules corresponding to any provisions of those Regulations made by the Financial Conduct Authority or a designated professional body within the meaning of section 326(2) of the Financial Services and Markets Act 2000.

The Price Marking Order (Northern Ireland) 2004.

The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005.

The Consumer Protection from Unfair Trading Regulations 2008.

The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, to the extent that those Regulations remain in force for contracts entered into prior to their disapplication by regulation 2(b) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.<sup>261</sup>

The Provision of Services Regulations 2009.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.

Chapters 1 and 2 of Part 14 of the Human Medicines Regulations 2012.

Regulations 4 and 6A to 10 of the Consumer Rights (Payment Surcharges) Regulations 2012.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

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<sup>261</sup> I.e., in respect of contracts entered into before 13th June 2014.

Regulation 19(1) and (2) of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.

Sections 2, 3, 5, 9 to 15, 19, 23, 24, 28 to 32, 36(3) and (4), 37, 38, 42, 50, 54, 58, 59, 61 to 64, 67 to 70, 72 to 74 of, and Schedules 2 and 3 and Part 3 of Schedule 5 to, the Consumer Rights Act 2015.

Article 10(4) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.

The Package Travel and Linked Travel Arrangements Regulations 2018.



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