INCA response to Government consultation on Reforming Competition and Consumer Policy

Prepared for

INCA

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1 Executive summary

1. INCA (INCA/we) is pleased to respond to this consultation and is grateful for the Government's efforts to ensure that competition policy keeps in step with market realities. INCA particularly welcomes the Government's proposals to enable the CMA to impose interim measures where that is presently not possible as well as proposals to make the competition investigation more dynamic, accessible and responsive to rapidly changing market conditions.
2. INCA is a trade association in the telecoms sector. Its members support, plan, build and operate sustainable, independent, and interconnected full fibre and wireless networks that advance the economic and social development of the communities they serve; they permit the provision of applications and services through open competition, innovation, and diversity.
3. This response is written to address the most significant issues faced by INCA's members in the telecoms sector, so it does not attempt to respond to all issues covered in the review.
4. In telecoms, Ofcom has concurrent competition powers with the CMA. INCA encourages Government to reconsider whether this approach is in fact working in the interest of competition and consumers.
5. Initiatives that reduce barriers to competition are welcomed by INCA and its members, including streamlining/shortening of processes and the ability for the CMA to impose interim remedies to prevent alleged transgressions for causing long term harm to competition and ultimately consumers.
6. INCA agrees that policy steer is essential for the CMA to be able to implement the Government's competition and industrial policies but believes that annual inputs could be disruptive. Government steer to the CMA every three years would seem a reasonable frequency
7. INCA believes that Government should use this policy review to reconsider how well the granting on concurrent competition powers is working. Ofcom has a very important

job to do and its resources are already spread across many different markets and sectors, we believe it may be appropriate for Ofcom to focus on ex-ante regulation only.

2 Introduction

8. INCA is a trade association in the telecoms sector. Its members are supporting, planning, building, and operating sustainable, independent, and interconnected full fibre and wireless networks that advance the economic and social development of the communities they serve and permit the provision of applications and services through open competition, innovation, and diversity. INCA's aims are to:

- support the development of sustainable independent networks through collaboration on the provision and procurement of products and services and adoption of common standards.
- support collaboration between members to create new, independent digital infrastructure that can be shared by operators and suppliers.
- support mutual trading between members.
- represent the interests of independent networks.
- promote the advantages and successes of independent networks.

9. INCA has more than 200 members, including: network owners, operators, and managers; access and middle mile networks; public sector organisations actively promoting the development of 21st century digital infrastructure; vendors, equipment suppliers, and providers of services that support the sector.

10. INCA's members are typically market entrants and market disrupters. They support, invest in, build, and operate competing telecoms infrastructure and are catalysts for change and innovation in the sector. The current rapid deployment of fibre across the UK is largely a result of alternative network operators (altnets) starting to deploy new modern full fibre and wireless networks and challenging BT/Openreach's market position to the extent that BT/Openreach itself has now committed to a rapid fibre deployment programme that would otherwise not have been in its commercial interests.

11. Our members are therefore more likely to be complainants than defendants in competition cases. At present, however, the costs of and time to complete competition investigations are prohibitive to most of our members so only a small number of the competition issues experienced in the market make it through to the CMA or Ofcom in the form of complaints.

3 The importance of competition policy to the telecoms sector

12. The telecoms sector is subject to regulation by Ofcom, which (in addition to its ex-ante regulatory powers) has concurrent competition powers with the CMA. This means that our sector is subject to the interventions of two competition authorities, it is therefore important that their powers and processes do not conflict or create arbitrage opportunities that can be exploited by either complainants or defendants. Although the issue of concurrent powers is not covered explicitly in the consultation, we believe it should be within the purview of the review.

13. There is good logic behind the principle of granting concurrent competition powers to the sector-specific regulator that has the detailed sector expertise and also, at least in principle, the relevant economic and legal skillset to perform the duties of a competition authority. In practice, though, experience has shown that Ofcom appears to have a bias in favour of applying ex-ante measures and its track record of finding for complainants in competition cases differs substantially from that of, for example, the CMA, with Ofcom having found for the complainant only once in a significant competition case.

14. We believe that, as part of this competition policy review, Government should reconsider the application of concurrent competition powers to sector-specific regulators. The uncertainty for complainants of whether the CMA will choose to refer a case to Ofcom (given Ofcom's track record in competition investigations) is a risk for complainants and we encourage Government to reconsider the appropriateness of applying concurrent competition powers to sector-specific regulators.

15. For example, in instances where Ofcom may have performed its ex-ante competition analyses and reached specific conclusions, there may be valid cases for separate competition investigations, but our experience is that Ofcom views such issues through

the eye of their preceding ex-ante analysis rather than taking a fresh ex-post investigation perspective.

16. Our concerns about Ofcom's concurrent competition powers also apply to the Government's consideration of granting concurrent powers to Ofcom in relation to the proposed new Digital Markets Unit.

4 The role of Government steer for the CMA

17. Government industrial and competition policy should form the backdrop for how all competition and sector-specific regulatory authorities in the UK discharge their duties. Regulators need clarity of purpose and freedom to operate within the given policy and operational framework.

18. INCA supports the Government in wanting to ensure that the CMA (and any other regulator with concurrent powers) operate to implement Government policy. It is also important, however, that the relevant authorities have a stable and consistent basis for discharging their duties. As such we believe that an annual policy steer may be too frequent and potentially disruptive to the work of the authority. Many cases run for periods exceeding one year (which in itself represents a problem) and potentially conflicting policy steers during a case could be problematic, as could the authority's ability to deliver on expectations of transparent and predictable outcomes of cases referred to it.

19. Inevitably, resources would need to be devoted to analysis and interpretation of a new Government policy steer, so annual policy steers could lead to inefficient use of resources for the relevant authorities. In our view, a policy steer every three years would be appropriate and should still enable the government to ensure that its priorities are reflected in analyses and decision by relevant competition authorities.

5 Responses to specific questions

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?

20. Yes, INCA supports the ability of the CMA to collect relevant evidence and to monitor and advise Government on the state of competition in the UK. As always, such powers must be subject to the principles of proportionality, and we urge Government to keep in mind the already considerable costs of regulation imposed on small businesses across the country and for telecoms companies in particular.

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

21. We believe policy steer is important but recommend that this is done every three years.

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

22. Yes, one issue that causes potential complainants to not bring competition issues to the relevant authorities is that, even if successful, the effect of the transgression will have happened by the time the case has been concluded and the complainant may by then have gone out of business due to those effects.

23. Although this question is specifically concerned with imposing remedies at the end of market study stage, INCA wholeheartedly supports the principle of enabling the authority to impose remedies as soon as it considers that harm is likely to result from identified behaviour.

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?

24. Yes, as mentioned earlier in this response, INCA's members are typically market entrants and market disrupters and therefore frequently the target of anticompetitive behaviour of dominant players that feel threatened by the change resulting from such entry and disruption.

25. If remedies can only be applied after a lengthy process then the purpose of the case may be defeated as the effects of the anticompetitive behaviour identified may have already caused the complainant to exit the market or have caused the complainant irreparable harm.

26. Whilst it is necessary to ensure that interim remedies are not applied unnecessarily, we urge the Government to not make the hurdle for the imposition of interim remedies such that it becomes almost impossible for the authority to actually use that power. It is our view that the prospect of interim remedies would be a deterrent to dominant players who today may consider that a potential fine at the end of a lengthy process may be worthwhile if it has in the meantime managed to cause significant harm to its new and prospective competitors.

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?

27. In general, INCA supports the reduction of regulatory liabilities for smaller businesses.

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?

28. INCA understands the Government's rationale for the proposed changes to the CMA panel, and it is likely that benefits could result from a group of potentially full-time panel members.

29. We also believe it is important that the CMA panel can draw on a wide range of diverse expertise and experience and as such it may be that a reduced number of full-time panel members could limit the CMA's ability to ensure that panel members have the optimal mix of skills and experience.

30. We believe it may be worthwhile for the Government to consider a mix of the current and the proposed approach, whereby a smaller group panel members for whom CMA panel work is their primary occupation could be mixed by a wider group of subject

matter experts in diverse fields. This may deliver increased continuity across different CMA panels and reduce the uncertainty of being able to populate panels without losing the access to the diverse skills and experience offered by the current system.

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?

31. In general, INCA supports the reduction of regulatory liabilities for smaller businesses.

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?

32. INCA believes that option (a) is preferable as it helps the CMA make swift and effective decision on interim measures. We also believe that there may be benefits in changing the hurdle the CMA needs to satisfy in order to justify the imposition of interim measures. Irreparable harm is a subjective measure and whilst it is important that interim measures are not imposed where the effects of the alleged transgression are immaterial, INCA believes it would be appropriate for the CMA have a higher degree of discretion to determine the appropriateness of interim measures on a case-by-case basis.

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?