EVERSHEDS SUTHERLAND

GOVERNMENT CONSULTATION ON REFORMING COMPETITION AND CONSUMER POLICY

EVERSHEDS SUTHERLAND'S RESPONSE

1. **Introduction**

1.1 Eversheds Sutherland (International) LLP ("**Eversheds Sutherland**") welcomes the opportunity to comment on the UK Government's consultation on reforming competition and consumer policy (the "**Consultation**"). Our comments are based on the experience of our Competition, EU and Trade team in advising on (i) the current UK merger control / public interest regime and similar screening regimes in other jurisdictions; (ii) market studies and investigations conducted by the CMA and other competition authorities in the UK; and (iii) anti-competitive conduct, regulatory compliance and litigation under the Competition Act 1998 and equivalent provisions in the EU treaties, as well as the experience of our Consumer Law team in advising businesses across various sectors.

1.2 This response has been informed by feedback and comments made by various members of our team, as well as our participation in numerous roundtable discussions with the Department for Business, Energy and Industrial Strategy ("**BEIS**") and our participation in the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law (the "**JWP**"). We are happy for our responses to be made public and for Eversheds Sutherland to be publicly named as a respondent to the Consultation. We have not sought the input of our clients in preparing our response to this consultation and the views contained herein are attributable to Eversheds Sutherland only and not the clients we represent.

Competition Policy

A. Responses to questions relating to the UK's competition law and the state of competition

2. **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?**

2.1 We oppose the proposal for the CMA to have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK. The CMA should rely on the evidence and general experience it gains in the course of its work to be able to give views and advice to government on the state of competition generally. New powers for intrusive evidence gathering do not appear to be justified on the basis of the government's consultation and will impose an unnecessary burden on businesses.

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

3.1 Under the government's proposal, its strategic steer to the CMA would remain non-binding on the CMA. However, the CMA would be required to explain its reasons for departing from it. As an independent non-ministerial department, we consider that such an obligation on the CMA would bring into question the CMA's independence.

3.2 We do not consider it to be necessary for the government to provide more regular strategic steers to the CMA. The government already makes recommendations to the CMA outside of the steering steer, in particular, in relation to market studies. For example, the government's recent recommendation that the CMA undertakes a market study into the economic impact of market power in the recorded music market.

3.3 Furthermore, more frequent strategic steers could impact the CMA's current cases, if the CMA has to shift its resource in line with the government's strategic steer(s).

3.4 In summary we believe the government should not provide more detailed or regular steers to the CMA as this would severely compromise the CMA's actual or at least perceived independence in circumstances where government is already able to make its views known to the CMA and make recommendations as to the CMA's work.

B. Responses to questions relating to more effective market inquiries

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

4.1 We recognise the criticism (at para 1.52 of the Consultation) that the end-to-end process for market studies and investigations can be very slow at around 3 years, and we support measures to reduce the overall timetable. However, we have a number of concerns about the proposal (at para 1.58) for the CMA Board to be able to impose remedies at the end of a market study (Proposal 1).

4.2 Ultimately our view is that the CMA Board should not be able impose remedies at the end of the market study process because (a) this would remove the important oversight/checks and balances role of the CMA Panel and (b) we think that it would be better and produce more efficiency if market studies were scrapped altogether. Our reasons for this are set out below.

4.3 The ability for the CMA Board to impose remedies at the end of a market study would remove the oversight/checks and balances role of the CMA Panel:

4.3.1 Basic principles of regulatory best practice and procedural fairness dictate that decisions to impose remedies in markets cases should be open to public scrutiny, and proposals should be subject to consultation. It would therefore be a particular concern if CMA Board decisions are made behind closed doors, without adequate consultation;

4.3.2 for the same reason we believe that parties likely to be affected by remedy proposals should have access to the decision maker before final decisions are taken; it is not clear to us how this could be accommodated if the CMA Board is to be the decision maker;

4.3.3 we expect that the CMA Board will have a natural desire to try and remedy market failures itself rather than opening a phase 2 market investigation; if the role of CMA panel members becomes marginalised, one of the vital checks and balances of the current system will be lost; and

4.3.4 even if the remedial powers of the CMA Board do not extend to 'structural remedies' we expect the CMA Board may well be able to design 'quasi-structural remedies' (e.g. mandating third party access) that come close to achieving the same purpose. Therefore, the panoply of other highly intrusive remedial measures will still be at the CMA Board's disposal.

4.4 Eversheds Sutherland’s counter-proposal - removing market studies altogether:

4.4.1 We consider that the markets regime could instead be made more efficient by:

4.4.1.1 scrapping the current market study phase and moving straight to a market investigation conducted by the CMA once the relevant evidential threshold (reasonable grounds to suspect that one or more features of a market are giving rise to an AEC) has been reached; and

4.4.1.2 the CMA Board being more directional in scoping the terms of reference to focus on key issues, instead of effectively giving the CMA panel a blank canvas. Para 1.62 of the Consultation suggests that the regime could be made more efficient if the CMA had greater flexibility to do this, but it seems to us that the CMA already has this flexibility. The question is: why is it not being used?

4.5 Overall we believe it is important to note that, in the context of both market studies and market investigations, no one has broken any laws and yet the outcomes of these studies

can be intrusive, long lasting, extensive and expensive. It is often hard for businesses to understand the necessity for these studies and investigations to take place in circumstances where no law has been broken, meaning due process and an independent consideration of the issues is incredibly important. An extensive and carefully managed process where people have confidence in the system is what needs to be implemented moving forward.

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

5.1 We do not support the proposal (at para 1.63 of the Consultation) to replace the current regime with a new single market inquiry tool in the form described in Proposal 2.

5.2 In particular, we are concerned by the suggestion that CMA panel members would only be brought in at the Provisional Findings stage if binding remedies are under consideration.

5.3 It is unrealistic to expect CMA panel members to be able to scrutinise the evidence in any detail and get fully up to speed with a complex case in the final months of a market investigation from a standing start. In practice, we expect CMA panel members will have to rely heavily on summaries and advice from CMA staff members, undermining the ability of panel members to play a truly independent hands-on role.

5.4 Furthermore, as noted above in response to Question 4 our view is that market studies should be scrapped altogether, and so we would not support a proposal to simply merge market studies and market investigations together as this appears to us to remove the important role of the CMA Panel.

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

6.1 In a meeting with BEIS officials in December 2019, reservations were raised about giving the CMA the power to impose interim remedies in the early stages of a market investigation (or still worse, at the market study phase).

6.2 Examples were given of cases where apparent competition concerns identified in the early stages of a market investigation subsequently turned out on closer analysis not to give rise to justifiable concerns, and we noted the risk of poorly targeted interventions and over-enforcement if the imposition of remedies is based on those early-stage concerns prior to robust and detailed evidence-gathering and analysis having been undertaken.

6.2.1 In Energy, the phase 1 'State of the Market' study carried out by the OFT, CMA and Ofgem identified concerns about vertical integration and tacit coordination among the Big 6 energy suppliers. Indicators of tacit coordination were said to be the clustering of price announcements and the phenomenon of 'rocket and feather' pricing. But mid-way through phase 2, the CMA dropped both these issues. Had the CMA imposed interim remedies to deal with these apparent concerns, this would have resulted in unjustified over-enforcement. In discussions with the CMA in 2019, the very clear impression was that Energy is precisely the sort of case where the CMA might have intervened early, had it been legally able to do so.

6.2.2 In Motor Insurance, until mid-way through phase 2, the CMA had concerns that repair costs were too high as a result of the separation of cost liability and cost control, and that too many accident repairs were not being carried out to the required standard (under-provision of repair services). But on closer analysis, the CMA accepted that the evidence did not support those concerns and the issues were subsequently dropped. Had the CMA imposed interim remedies to deal with these apparent concerns this would again have resulted in unjustified over-enforcement.

6.3 We also noted that allowing the CMA to impose interim remedies in a market study raises important issues of fairness. The market study process lacks the same level of formality or transparency as a full market investigation: even though submissions from all parties are now routinely posted on the CMA case page, one often has no real idea how the CMA's thinking is developing until the interim report stage; there are no formal hearings; and there is often very little (if any) access to the decision maker.

6.4 The concerns that were identified in 2019 remain relevant today and we are, therefore, strongly opposed to the CMA having the ability to impose interim measures from the beginning of a market inquiry.

6.5 The independence of the CMA panel is crucial in providing opinions, identifying the theories of harm in market investigations and any appropriate remedies. The proposal would ignore that function, especially when coupled with the power to impose interim measures, which the CMA has notably failed to use in relation to competition cases, and when thinking of the market investigations where controls/remedies were requested many of which turned out to be wrong.

6.6 A further issue is whether these proposals would filter down to other regulators with competition powers. If the CMA Board were to be the decision maker, that could mean other regulators e.g. Ofwat/Ofgem would then be able to be decision makers and be given substantially greater powers. Whilst this is technically not part of the Consultation, it has been brought up as a concern. Whilst CMA market investigations will just be CMA investigations, the expectation would be that other sectorial regulators would use their regulatory powers in a similar way. We would favour clarification as to whether the concurrent competition regulators would have conferred on them the equivalent ability to conduct market investigations in the same way as the CMA does.

6.7 Crucially, we would want to ensure that the legal standard applied would effectively be a phase 2 market investigation standard rather than a weak phase 1 type standard. We consider that clarity is needed on due process and the impartiality of decision making.

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

7.1 We see the logic in allowing the CMA to accept binding commitments at any stage in the inquiry process to shorten the length of the process and make it more efficient. The CMA should consult on any such commitments before adopting them to ensure due process.

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

8.1 We favour giving the CMA more flexibility to design and review remedies, and we see merit in requiring businesses to participate in implementation trials, provided these are kept within reasonable bounds and do not impose unnecessary costs on firms involved (e.g. in terms of new systems) (paras 1.81-1.83).

8.2 Similarly, we think there is a case for allowing the CMA to review remedies without needing to undertake a further market investigation provided appropriate safeguards are put in place, such as cooling-off periods to prevent perpetual reviews (paras 1.84-1.87).

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

9.1 We would also suggest clarity on the timing issue because investigations need to be conducted more swiftly. When evidence is gathered a lot of it will already be historic. Regarding the market review and the pattern of evidence gathering, in dynamic markets in particular, the data will quickly be outdated. Conducting analysis and basing findings on outdated materials would be impossible unless it is a swift process to ensure the findings and remedies are current and relevant.

C. Responses to questions relating to rebalanced merger control

10. **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?**

10.1 We welcome the increase in the target turnover threshold from £70 million to £100 million in test 'A', and the proposed new de minimis exception. We do not, however, consider that these changes will have a significant impact on the number of transactions falling within the CMA's jurisdiction. In our view, it is quite rare for the CMA to investigate a merger between companies where both parties have worldwide turnover of less £10 million.

10.2 Furthermore, the increase in the turnover threshold is inconsequential, as the proposed new test 'C' would expand the CMA's jurisdictional remit as:

10.2.1 it potentially applies to the acquirer as well as the target;

10.2.2 it does not require an increment (albeit turnover of that party has to be more than £100 million in the UK). This could be considered as a reduction in the jurisdictional thresholds of transactions that could be caught.

10.3 We consider that the proposed test 'C' will make it more difficult for companies to assess whether to make a voluntary merger filing in the UK, as a result of the share of supply test. In our experience, businesses based outside of the UK find the UK merger control thresholds unclear compared with those in other jurisdictions such as in Germany. In the UK there has been a number of global deals which have been caught after the event by the application of the UK jurisdictional thresholds. The proposed test 'C' is likely to add to that uncertainty.

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

11.1 If the requirement for "hold-separate" undertakings and/or orders remain, the government should consider moving to a mandatory merger control regime in the UK, due to the complexity of the CMA's current process which can be difficult for companies to navigate and causes considerable uncertainty.

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

12.1 In looking at Proposal 3 (allowing the CMA to agree binding commitments earlier during Phase 2) it is crucial that there are realistic discussions about remedies other than in Phase 2 and there is no need to wait for the whole process to play out. This proposal, along with the proposal to limit the scope of a Phase 2 inquiry to the issues identified at Phase 1, would help clients with their strategic decision making about how to proceed at the end of Phase 1 should the CMA have reached a decision to refer a transaction to Phase 2.

12.2 We are supportive of a new fast track process, as well as having the flexibility to extend so there is no need to rush and impose unnecessary deadlines.

12.3 The government should consider introducing a new 'short form' merger review procedure, particularly if the new test 'C' is introduced, in order to deliver more effective and efficient merger investigations. The outcome of such a procedure should be a binding decision to provide certainty to the parties (unlike the current informal briefing paper process).

D. Responses to questions relating to streamlining CMA Panel decision-making

13. **Q13: Should the CMA Panel be retained, but reformed as proposed [in the government's consultation paper]? Are there other reforms which should be made to the panel process?**

13.1 It is crucial that the role of CMA panel members, as independent decision makers, is preserved. This is particularly important given the intrusive nature of the remedies available to the CMA in a market investigation (e.g. breaking up firms, imposing price controls, mandating third party access), and the fact that they can be imposed even where the firms involved have not broken any laws. Institutional checks and balances therefore play a vital role in the markets regime and the role of CMA panels in providing a fresh pair of eyes, and bringing their own professional experience to bear, should not be under-estimated.

E. Responses to questions relating to stronger and faster enforcement against illegal anticompetitive conduct

14. **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?**

14.1 Given the international scope of many businesses (and cartels), it seems prudent to align the territorial scope of the chapter I prohibition with that in other competition law regimes so that the prohibitions also apply where conduct has direct, substantial and foreseeable effects within the UK (etc.), albeit that given that the prohibitions can be applied to conduct implemented within the UK it may be that, in practice, any such change has a marginal effect. Further guidance on what would constitute "direct, substantial and foreseeable effects" would be needed.

14.2 Paragraph 1.148 notes that the EU's competition regulator considers conduct occurring outside its jurisdiction, but which nonetheless has an impact on its markets and consumers. This is correct, however Article 102 of the TFEU only concerns abuses of dominance within the internal market or in a substantial part of it. Accordingly the EU does not consider abusive conduct where the position of dominance is held outside the internal market. Conversely the UK is considering significantly expanding its jurisdiction to cover 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.

14.3 Paragraph 1.149 states that the 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. However the proposal in respect of abuse of dominance goes much further than its international partners and is in our view unnecessary.

14.4 We agree with the proposed extension to the chapter 1 prohibition which brings the UK position in line with other regulators.

15. **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?**

15.1 We see no basis for revision of the current thresholds.

16. **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?

16.1 If the immunity thresholds are revised, we are in support of option (a), being that the immunity should apply where any business which is party to an agreement has an annual turnover of less than £10 million.

17. **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?**

Leniency Applications

17.1 While we accept that there is an interest in incentivising more leniency applications, we are not convinced that there is evidence to suggest that the existence of damages actions in the UK disincentivises applications for leniency particularly in the context of conduct which goes beyond the territorial scope of the UK. We therefore question the justification for full-scale immunity from both antitrust fines and damages actions. The existing regime already provides certain incentives for leniency applicants, both in terms of antitrust fines and in relation to damages actions.

17.2 Article 11(3) of the Damages Directive already makes provision for immunity recipients, limiting their liability to their direct or indirect purchasers or providers; and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. Similarly, paragraph 5 of the same Article provides that the amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

17.3 As the liability of immunity recipients is already quite limited, to remove it fully might in practice undermine individuals' rights to compensation, in particular in circumstances where the other infringers cannot pay damages.

17.4 In addition, providing complete immunity from damages and fines in the UK only might not create the envisaged incentives for leniency applicants where cartels extend beyond the UK: an infringer would not blow the whistle on a cartel if there is a risk that the authorities of e.g. EU Member States find out about the infringement when it is made public by the CMA – in such a scenario, their immunity could extend to fines (if they cooperated with the authorities of Member States), but they would still be susceptible to damages actions.

17.5 Finally, we consider that by providing leniency applications with immunity from damages actions would actually deter potential claimants from bringing damages actions in the UK. From an international perspective we also note that the German Competition Authority considered such a proposal during a recent reform, but ultimately pulled back, with the head of the Bundeskartellamt reportedly stating that cancelling the right of third parties to sue a leniency applicant for compensation is a "difficult question from a legal point of view" (though we note that he has also been reported as stating that "…the topic remains on the agenda, one way or another, if in the future we want to see successful cartel enforcement.")

Whistle-blowers

17.6 In our view, the withholding of the identify of whistle-blowers would limit the ability to challenge the evidence and the quality of that evidence provided to the CMA, particularly as para. 1.164 of the Consultation states that, "provided the whistle-blowers evidence can be corroborated, this will allow the CMA to offer the whistle-blower an assurance that their identity will not be disclosed during the investigation" and that the courts would also need to have regard to the importance of protection.

17.7 Furthermore, it seems unclear how the CMA could guarantee such protection in respect of anti-competitive conduct which extends beyond the UK.

18. **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?**

18.1 We have not seen any evidence to support the conclusion that the CMA's failure to use its interim measures powers is related to either the rules relating to access to file or the standard of review if a decision is appealed. Interim measures are by definition taken at a very early stage of proceedings where the evidence may be untested or partial. Equally the consequences of such measures may be substantial and give rise to serious effects for the businesses concerned. In those circumstances and in the absence of any evidence which establishes a connection between the non-use of interim measures and the rules in question, we see no justification for amending the existing arrangements in relation to access to evidence or the appeal process.

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

19.1 One difficulty with the proposals set out in the consultation is that raids at domestic premises risk seizing/sifting documents and data belonging to people in the house who are not the 'target' of the raid.

19.2 Although we recognise the CMA's need to gather evidence in the context of a Competition Act investigation, we consider that acquiring a power enabling the CMA to compel third parties to being interviewed is disproportionate and risks discriminating against smaller businesses who may not have access to legal resources to advice employees in these circumstances. Employees of companies that are under investigation are more likely to have legal representation and to have been given some background to competition law. We consider that the CMA should be able to rely on its other powers of investigation including section 26 Notices to gather information from third parties.

19.3 It also seems to us that the prohibition not to destroy evidence would also apply to third parties. If this is correct, we would question how would this prohibition fit in with company document retention policies. More guidance would be needed on the application of the proposed test in para. 1.173 (i.e. that 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). It is also the case the scope of cartel investigations changes over time and as such it may not always be clear what evidence is relevant and so the scope of the legal preservation obligation could be uncertain or indeed change during the course of an investigation.

20. **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?**

20.1 On the proposal to introduce "short form decisions": short-form decisions risk depriving victims of anti-competitive conduct of important material to help them establish their claims. It looks like the CMA is trying to replicate the Commission's short-form decisions, which are usually very light on detail and lead to arguments in follow-on litigation about what is binding on the addressees (and, indeed, what is meant by the limited findings which are made). On the other hand, we can see the advantages from a public enforcer's perspective of not having to devote the level of resource to cases which long-form decisions require, at least where all parties agree to settle.

20.2 We would welcome further clarification from BEIS on what changes it proposes to make to streamline the settlement process.

20.3 We also note that it seems unfair that a dominant business would not have to admit an infringement of competition law under the proposed Early Resolution Agreement, but leniency applicants do (as do parties to the CMA's settlement process).

20.4 Finally, there are no proposals in the consultation to enable the CMA to offer a reduction in fine if a company cooperates with the CMA in relation to anti-competitive restrictions in vertical agreements. In our view this is something the government should consider (see for example the Guess decision).

21. **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?**

21.1 It is difficult to know for certain whether these proposals will encourage the use of voluntary redress schemes. If such a proposal were to be adopted, it should be done in a way which respects the rights of third parties to compensation for harm suffered by anti-competitive conduct. Insofar as a voluntary redress scheme does not compensate either in full or in part the victim of anti-competitive conduct, access to the documents establishing the scheme should be available to parties who are able to show that they have not received either full or any compensation.

22. **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?**

22.1 We do not envisage that the reforms will have significant consequences for the speed of the access to file process. More generally, whilst we recognize that the use of confidentiality rings is relatively commonplace in both regulatory investigations and litigation and seeks to balance both a party's right to access to evidence against another party's confidentiality concerns, the designation of information as confidential and subject to confidentiality ring protection can on occasions mean that it is difficult to take full and appropriate instructions from clients on the allegations made against it. For that reason, it is important that the use of confidentiality rings is restricted to those circumstances where it is absolutely necessary and that the restrictive terms are kept to the minimum required to protect properly designated confidential information. In the event that a prescribed confidentiality ring template was to be prepared, we consider that it can only be drafted and adopted after full and widespread consultation with the legal profession is undertaken in relation to the relevant terms. There should also be sufficient flexibility in the arrangements to enable departure from their terms where circumstances justify departure.

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

23.1 No. In our view the government should not remove these requirements, as they play an important role in helping to avoid confirmation bias and ensuring a rigorous decision making process.

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

24.1 We do not support any changes to the current appeal system in relation to Competition Act infringements. A 'full merits' appeal is appropriate and in the interests of justice in circumstances where the consequences of a finding of a competition law infringement is quasi-criminal in nature and where the CMA has effectively acted as prosecutor and judge in relation to the decision (albeit with the internal safeguards of the appointment of a Case Decision Group).

24.2 In any event, no evidence has been provided to support the suggestion that the current appeal system incentivises parties to litigate save for anecdote and hearsay. Given the potentially significant costs consequences of an unsuccessful appeal as well as the financial and commercial direct and indirect costs involved in bringing an appeal, our view is that there is little, if any, incentive to bring unmeritorious appeals. Lastly, we

have not seen any compelling or robust evidence to support the contention that that an appeal conducted on a judicial review basis will necessarily be significantly shorter than an appeal conducted on an 'on the merits' basis.

25. **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?**

25.1 We see no evidence to support a change in the existing rules.

26. **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?**

26.1 We have no comments in relation to Question 26.

F. Responses to questions relating to stronger investigative and enforcement powers across competition tools

27. **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?**

27.1 We acknowledge that the imposition of fines for obstructing cases would correspond with the powers of international bodies such as the European Commission.

27.2 In line with what the JWP wrote in its letter to Lord Tyrie dated 26 September 2019 we are also of the view that the threat of prosecution of individuals in appropriate cases remains a meaningful deterrent for the most serious competition law infringements. As the JWP noted, "*Director disqualification is also a powerful deterrent tool, which the CMA is now using successfully after an initial period when this power was not used.*" We agree with the JWP that the threat of disqualification has a significant deterrent effect.

27.3 However, we also agree with the JWP's view that caution should be exercised when considering the introduction of financial penalties against individuals. As the JWP noted, "*It is the responsibility of directors to determine the overall commercial strategy of businesses and… the vast majority of the most important actions taken by businesses are sanctioned ultimately by the directors, who bear the greatest responsibility and receive the greatest rewards. These people are adequately exposed to the risk of personal financial consequences for breaching competition law through director disqualification, which arguably can have long term effects on remuneration and employment prospects that are significantly greater than a one-off fine.*"

27.4 The JWP further observed that "*the imposition of individual fines may have the effect of targeting middle managers (who are not subject to the threat of disqualification), even though such employees are not the ultimate decision-makers in a business, may merely be acting on instructions, and can find it difficult to challenge directors who have ultimate control.*"

27.5 We agree with the JWP's support of the introduction of turnover-based fines for non-compliance with competition law enforcement investigations, "*provided that the CMA gives respondents a reasonable timeframe in which to respond to the requests*", as well as the group's support of the introduction of civil fines for the provision of false or misleading information with a lower threshold than under the current criminal offence.

27.6 We further agree with the JWP's position of supporting the CMA having an explicit statutory obligation to conduct its investigations "swiftly" while requiring any deadlines imposed on companies to provide information to be reasonable (including "*taking account of any public holidays*"). The JWP's rational for this requirement is that to do otherwise would result in a risk of companies being penalised for non-compliance simply because

they had insufficient time to respond to the information request, a position we agree with.

27.7 Finally, further clarification on the scope of the circumstances of personal accountability is needed – for example, clarity would be welcome for circumstances such as where, if a company were to appoint a law firm to undertake a document search, whether the director of that company could still be held personally accountable for the provision of such evidence.

28. **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?**

28.1 In line with what the JWP wrote in its letter to Lord Tyrie, we are of the view that "*the most effective means of ensuring compliance with competition law is to focus on ensuring that companies have a rigorous culture of compliance. In order for that culture to permeate the whole organisation, it must be set from the top and underpinned by clear accountability at board level.*"

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

29.1 We would welcome further clarification on what powers/laws would apply when conducting the investigation if the CMA provides investigative assistance on behalf of overseas authorities. For example, when assisting the Commission in the UK, the EU's legal privilege rules applied instead of the UK's.

Consumer Policy

A. Responses to questions relating to subscription contracts

30. **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?**

30.1 We agree that "subscription contract" needs to be clearly defined.

30.2 The description of "subscription contract" is slightly unclear, and we would suggest that it could perhaps be further developed to ensure clarity - for example:

30.2.1 it is currently unclear whether the intention is for "subscription service" to be limited to those goods, services and digital content listed in the description, or whether these are intended to be examples only;

30.2.2 we query whether the phrase "over a period of time" needs to be more definitively defined, as in particular most services contracts are delivered over a "period of time". It may be preferential to specify that subscription contracts are provided for an ongoing and/or specified period and includes an auto-renewal or auto-extending term mechanism (some illustrative examples would be helpful, e.g. to include a rolling monthly subscription or 12 month term). It may be useful to consider whether any more prescriptive regulatory rules governing subscription contracts should only apply to contracts of a minimum duration (taking into account any potential extensions permitted under the terms, whether by way of agreement by the trader or consumer); and

30.2.3 we have some immediate concerns that the description may inadvertently capture contractual arrangements which would not ordinarily fall within the normal meaning of a "subscription contract". This is on the basis that some traders enter into overarching framework agreement type arrangements which permit consumers to purchase goods, services or digital content at will during the term of the contractual relationship - is the intention for this to fall within the scope of the description? It may be useful to consider whether reference

to "a commitment to purchase/receive" is built into the description to ensure only those contracts intended to be described as subscription contracts fall within the intended scope.

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

31.1 In our experience, the proposals are likely to have potentially significant impacts on some categories of traders within certain sectors. Potential impacts could include:

31.1.1 tighter regulation could result in certain products becoming commercially unviable for businesses - this is likely to be most relevant in relation to any requirement to offer subscription options without the choice of automatic renewal;

31.1.2 traders can often struggle to ensure strict compliance with the current process driven requirements included in the Consumer Contracts (Information, Cancellation and Additional Charges Regulations 2013 ("CCRs")) - additional regulation could create further compliance hurdles for businesses, which may impact on trader engagement to ensure compliance with the rules;

31.1.3 in our experience, compliance with the detailed provisions regarding pre-contract information in the CCRs can give rise to significant technical challenges (both in relation to existing products and development of new customer onboarding processes) to ensure the timing of certain information is correct, and the requisite consents/acknowledgements can be obtained; and

31.1.4 given the evolving nature of subscription type products, the same practical challenges of the current "one size fits all" framework to evolving technologies etc. could give rise to risks.

31.2 It is currently unclear whether the proposed information requirements to be complied "at an early stage of the process" would relate solely to the customer journey (e.g. product pages on a website) or to include promotional materials/focused advertising.

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

32.1 The overall burden of additional regulation is likely to be determined by a number of factors, including the nature of the products being sold on a subscription basis, the sophistication of the trader, the technical infrastructure supporting their customer journeys, and the demographic of their customer base.

32.2 The proposals are also likely to have practical and financial implications for traders (i.e. website re-designs, team training, T&Cs changes, changes to advertising etc.) which may be costly.

33. **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?**

33.1 It can be assumed that a large percentage of consumers, given the choice as to whether they enter into a subscription contract would rather not commit financially to a subscription, so providing consumers with this choice will likely have a financial impact on traders.

33.2 Given these commercial risks, traders may seek to explore different ways to address potential reduction in customer numbers/revenue. In turn, there could be a risk of wider competition law issues will arise (e.g. price fixing) and/or the development and adoption of certain unfair commercial practices in breach of the Consumer Protection from Unfair Trading Regulations 2008. Such steps would be to the detriment of consumers, meaning that more regulation and/or intervention from regulators would be required.

33.3 However, this proposal could drive up competition in certain sectors, and could lead to more innovative products being developed to the benefit of consumers.

33.4 Improving transparency and empowering consumers by giving them more choice may actually improve traders' relationships with consumers as consumers may have more confidence and trust in the trader and the product / service.

33.5 Traders may need to develop two sets of terms and conditions, one for where the consumer opts for auto-renew and one for where they do not. It may be practically difficult for traders to adopt two different sets of terms and conditions into their online customer journey from a technical perspective, and keep clear records of its consumer contracts. This will be another cost for traders.

33.6 Alternatively, the current harm to consumers could be prevented by requiring traders to give consumers sufficient notice of the end of their subscription term and providing an easy way to cancel should the customer elect to do so. Provided this mechanism is consistently applied, the option for a non-subscription contract may not be necessary.

34. **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**

34.1 The consultation states that the purpose of the reminder is to 'provide maximum transparency' to the consumer so it would appear sensible to conclude that scenario (b) would seek to achieve this purpose to the greatest extent.

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

35.1 The reminder requirement could increase competition and productivity between traders and force traders to stay / become flexible with pricing. Traders will need to be prepared to re-engage / prioritise existing customers and this requirement will continue to address the 'loyalty penalty' (as investigated by the CMA) issue.

35.2 As above, it will have significant impact on traders with business models that rely on subscriptions as consumers are more likely to exit if explicitly reminded by traders.

35.3 Additional costs will be incurred as a result of developing/evolving existing customer service processes to facilitate any requirements around auto-renewals/roll-overs.

36. **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?**

36.1 Both options seem to increase consumer protection, however needing to obtain the consumer's explicit consent to continuing the subscription seems more restrictive and onerous on traders (giving rise to the commercial and financial challenges we have outlined above). In our opinion, providing sufficient notice and giving consumers an easy way to cancel the contract would serve to avoid the identified consumer harm in these cases without over burdening traders.

36.2 Traders would need to carefully consider their business models, especially in relation to the requesting and retention of payment details against such new requirements.

36.3 We are aware that many media subscriptions provide customers with free trial periods, including where additional "add on" services are automatically applied to these trial periods. It has come to our attention that in many cases, add on services are not terminated automatically when the main subject matter contract is terminated, resulting in consumers continuing to pay for services that they cannot actually receive. One example is where access to sport or movie channels is purchased, with an HD add on.

However, the HD add on must be cancelled separately. The practical impact of this is that the customer is not able to receive these services as access to the sports/movie subscription has been terminated. It is our view that any such add-ons should automatically terminate when the customer cancels the main subscription.

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

37.1 This could have a negative impact financially for traders where their business model is reliant (at least to some degree) around subscriptions as plans and revenue projections are based on the long term revenue gained. We would anticipate that such requirements are likely to adversely impact small to medium sized businesses, rather than the larger providers in the market who hold a higher customer base share.

37.2 The proposals could drive more focus by traders on customer engagement, which could in turn feed into the development of their products and services.

37.3 The way that "long term" is to be defined could impact on business models - for example, if "long term" is determined by reference to an initial commitment period, then the initial commitment periods could be extended (which is unlikely to be a favourable approach for consumers).

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

38.1 What is considered a "reasonable timeframe" is likely to be determined by a number of factors, including the nature of the products being sold on a subscription basis, the length of the initial commitment period, the subscription costs being charged, and the demographic of the relevant customer base.

38.2 In our experience, we often see larger businesses adopting an approach whereby a 12 - 24 months of inactivity will trigger termination/suspension (these will often be low-mid value type subscription contracts).

38.3 We would recommend consideration around how "inactivity" will be defined. For digital content/services it may be easier to define, perhaps from the date the consumer last streamed content, however other services may be harder define, e.g. supply of goods such as food or magazines and/or services such as dating websites.

38.4 In practice, whether "inactivity" can be tracked and/or monitored will be a question of fact, and the requirement to track such inactivity may result in significant technological change and/or cost to traders.

38.5 In our opinion this requirement would need to be considered more carefully before implementing as it may have significant consequences for a number of business models.

39. **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)?**

39.1 This will be largely dependent on the processes adopted by a trader, including their use of payment service providers (as consumers will often use these, making onboarding processes more straightforward).

39.2 In our view, many media subscription arrangements do make it very difficult for customers to cancel their subscriptions, and require customers to continue to confirm that they wish to cancel over multiple pages as they try and convince the consumer to remain with their subscription. This approach can result in the customer not cancelling when they thought they had. It is our opinion that the legislation should state that customers should be able to cancel using a "one-click" option.

40. **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?**

40.1 The easy exiting proposal would appear to address many difficulties faced by consumers as this should improve overall transparency and improve the customer experience.

40.2 Difficulties may arise in terms of traders who will need to develop technical solutions and/or revise their customer processes to comply with any detailed/prescriptive requirements. This could adversely impact smaller to medium sized businesses.

40.3 In our experience, traders will often have in place clear processes for exiting, both to ensure customer satisfaction/limit reputational damage, and to ensure compliance with their obligations not to adopt misleading and/or aggressive unfair commercial practices in breach of the Consumer Protection from Unfair Trading Regulations 2008.

40.4 Some online streaming services with 'one click' options to sign-up have equally quick processes to exit. However, in comparison, in our experience, we often see more challenges arising in circumstances where subscriptions are set up by post, over the phone or in person, as often these businesses have more limited technical platforms in use and/or their customer demographic often don't engage in this way.

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

41.1 The consultation paper already suggests that subscription contracts for the supply of medicines / certain financial services (i.e. insurance) should be exempt from the rules proposed on the basis of potentially interfering with the health / welfare of consumers. This seems sensible especially in respect of the proposed auto - renewal provision as, for example, a consumer who requires monthly medicine may not be in the position to keep up with communications to confirm continuing their subscription. However other rules proposed such as the easy exiting proposal and the requirement to clarify pre-contract information could apply to all types of subscriptions as these primarily seek to further protect the consumer.

B. Responses to questions relating to fake reviews

42. **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?**

42.1 As discussed in the consultation paper (Part 2, para 2.33 - 2.37), commissioning reviews is not always a negative practice. For example, in recent years, the 'influencer' culture has exploded. Advertising regulation/codes of practice have been developed in response to this to ensure marketing is obviously identifiable so the customer is able to understand the context in which posts/reviews etc. are provided.

42.2 Therefore it seems too restrictive to include (a) as an automatically unfair practice.

42.3 Whilst this does not affect our responses above, there can also be issues with traders offering bribes to request that consumers remove genuine negative reviews, so this may also be an area the government may wish to consider further.

43. **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?**

43.1 Small / micro businesses: If proposal (a) in Q42 was followed, we would anticipate this having a noticeable negative impact on smaller businesses who use commissioning

reviews as part of their marketing & advertising plan to help build their profiles / brand in their respective markets.

43.2 Large online businesses: This is likely to be dependent on the extent to which they are currently impacted by fake reviews and/or their sector experiences issues relating to fake reviews.

43.3 Consumers: It's worth noting that consumers in today's society are more savvy and alive to the fact that reviews posted, especially online, aren't always fully accurate. However it's doubtful that the average consumer would be aware of the currently growing market that exists for selling and buying fake reviews so the proposed reforms will most likely positively impact consumers and again, empower them not only be more aware of fake reviews but to not be misled by them.

44. **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?**

44.1 Options could include:

44.1.1 Businesses being required to make the process to post a review more robust. For example, by taking away any option for the consumer to post anonymously (the post could be made visible under an account name so the consumer could protect their identity to the wider public) but the businesses would have their name and contact details.

44.1.2 Requiring reviewers to provide certain information and potentially pictures of the goods / service before a review can be posted.

44.1.3 Using technical means to verify the identity of the person posting a review, for example requesting information to verify that the individual has actually used or purchased the product.

44.1.4 Including "report" buttons and developing robust complaints processes to assist businesses with identifying fake reviews.

44.1.5 Using sophisticated software to identify and remove potentially fake reviews.

44.1.6 Reviewing reviews against some form of framework or guidelines and if it is a suspected fake, the consumer could be contacted.

44.2 The difficulty with providing a universal definition of "reasonable and proportionate" is that this is likely to mean something different to businesses of different size and technical sophistication.

45. **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?**

45.1 As the government are proposing to add, in some form, the commissioning of fake reviews to Schedule 1, then it seems reasonable that traders offering a platform to facilitate the creation and publishing of fake reviews should come under the same rules.

C. Responses to questions relating to preventing online exploitation of consumer behaviour

46. **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?**

46.1 Whilst consumers are likely to be aware of marketing and advertising techniques adopted to try and influence certain purchasing behaviour i.e. placement or certain items in the

supermarket or using celebrities in adverts, it is doubtful that the average consumer is aware of many deceptive or manipulative practices and/or the potential scale of their use to heavily influence consumer choice, especially when online shopping.

46.2 For greater transparency, consumers arguably would want these practices to be researched and addressed, even something as simple as requiring businesses to make clear declarations where certain types of recognised harmful and specific practices are being used could be helpful.

47. **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?**

47.1 Drip pricing could already be considered an unfair practice under regs 5 & 6 of CPRs - we question whether regulating against this specifically would provide any more protection to consumers.

47.2 Again, failure to disclose paid for search results and therefore potentially mislead consumers could already be considered an unfair commercial practice under the CPRs. This, together with relevant advertising rules/codes/regulation, would in our view appear to be sufficient regulation in this area.

D. Responses to questions relating to balancing burdens on businesses

48. **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?**

48.1 Covid-19 has significantly impacted a number of different sectors and as discussed in the consultation, traders' approaches to issuing refunds has varied. Although the CMA has provided guidance on how traders should approach providing refunds, providing greater clarity on issuing refunds for the provision of goods and services affected by an event outside of the trader's control in the legislation itself would not only provide greater protection for consumers but could also simplify the law for traders. This may lead to less regulatory action by learning from the events of the past 18 months and would also lead to traders needing to spend less money on legal advice to understand their obligations.

48.2 In our experience, traders often find the prescriptive nature of the CCRs difficult to navigate and comply with. This is often exacerbated by the "one size fits all" framework which seeks to apply to an array of different goods, services and digital content consumer contracts, which are often constantly developing. Given the UKs exit from the EU, we query whether there may now be more scope to make them more accessible to consumers and traders alike (albeit we acknowledge that for UK businesses working across the EU, alignment of e-commerce regulation is likely to be a more favourable position to adopt). In addition, clarity around the application of the CCRs to free services/digital content/goods would be recommended.

49. **Q49: Are there perverse incentives or unintended consequences from our existing consumer law?**

49.1 We have no comments on Question 49.

50. **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?**

50.1 We would recommend government considers making amendments to existing legislation to consolidate and remove the overlap of information requirements - e.g. the CCRs, the Electronic Commerce (EC Directive) Regulations 2002 and Provision of Services Regulations 2009, to make it easier for traders to navigate and understand their obligations.

50.2 We recommend that the requirement to provide a model cancellation form is deleted. In our view these are not widely used, and in practice, provided customers are given clear information about their cancellation rights and given easy access to the same, the consumer harm intended to be avoided by the use of the model cancellation form can be avoided.

E. Responses to questions relating to strengthening prepayment protections for consumers

51. **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?**

51.1 We have no comments on Question 51.

52. **Q52: What other sectors might new powers regarding prepayment protections be usefully applied to?**

52.1 We have no comments on Question 52.

F. Responses to questions relating to contract formation and transfer of ownership

53. **Q53: How common is the practice of using terms and conditions to delay the formation of a sales contract?**

53.1 The practice described in the consultation paper of delaying contract formation until the order has been dispatched is in our experience quite common.

54. **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?**

54.1 We agree with the observations included in the consultation paper regarding potential detriment to consumers in these circumstances. The average consumer may not be aware of this delay as they may not read to the terms and conditions.

54.2 The key concern we see from traders is that they want to avoid being in breach of contract where sufficient stock is not available. Delaying contract formation until delivery may be particularly helpful for smaller traders who do not have sophisticated means of checking their stock 'live'. If the contract is formed when the consumer places the order, this will mean the terms and conditions become more complex as the trader would require additional termination rights in the event of stock issues and payment issues (which would in turn be subject to the test of fairness, creating uncertainty for traders).

54.3 In our experience, traders do not use delayed contract formation as a means of extending their 30 day delivery obligation, as where traders expect a longer delivery lead time they will normally seek to agree this upfront with the consumer.

Eversheds Sutherland (International) LLP

30 September 2021