Leigh Day

By email only: RCCPconsultation@beis.gov.uk

Department for Business, Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET
United Kingdom

Direct Dial: [redacted]

Email: [redacted]@leighday.co.uk

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Dear Sir or Madam

Reforming competition and consumer policy consultation

1. Leigh Day is a leading consumer rights law firm.[1] We act for claimants only and are regularly instructed on behalf consumers who have suffered harm or loss as result of unethical and illegal behaviour on the part of sellers. Full details of our experience in this sphere is available on our website.[2] By way of example only:
   (a) We are the Court appointed joint-lead solicitors in The VW NOx Emissions Group Litigation, a group claim being brought on behalf of over 90,000 current and former owners of vehicles manufactured by the Volkswagen Group that were found to be fitted with unlawful emissions cheating software.
   (b) We act on behalf of over 30,000 current and former owners of Mercedes-Benz vehicles who allege that their vehicles are also fitted with emissions cheating software.
   (c) We are act on behalf of over 11,000 individuals who were victims of the collapse of the Woodford Equity Income Fund.

[1] https://www.legal500.com/c/london/insurance/product-liability-claimant/ and https://chambers.com/department/leigh-day-product-liability-mainly-claimant-uk-1:321:11805:1:247
[2] https://www.leighday.co.uk/our-services/product-safety-and-consumer-law/

2. As a result of our involvement in such high profile and large-scale litigation on behalf of individuals, we have acquired a significant insight into the issues faced by consumers when seeking redress. It is against this background that we are writing to provide a response to some of the questions posed by the Reforming Competition and Consumer Policy Consultation paper ("the consultation paper"). Our responses are set out below.

Question 14: Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anti-competitive 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?

3. In our view the Chapter I and Chapter II prohibitions should be extended in the manner proposed.

4. With increased globalisation, anti-competitive agreements of this kind are plainly capable of harming competition within the UK and therefore of impacting on UK consumers. It is of paramount importance that UK regulators have the power to take action in respect of anti-competitive agreements which have effect in the UK, regardless of whether the agreement was implemented in the UK or whether the business concerned has a dominant position within the UK.

5. In the context of the UK's exit from the EU, it is particularly important that this change in the jurisdictional scope of the Chapter I and Chapter II prohibitions is made. Chapters I and II of the Competition Act broadly mirror Articles 101 and 102 of the Treaty on the Functioning of the European Union, except in their territorial scope. As has been noted in paragraph 1.148 of the consultation paper, the EU (and the US) allows its competition regulators to consider conduct occurring outside their jurisdictions, but which nonetheless has an impact on their markets and consumers. Post-Brexit, UK markets and consumers no longer have the protection afforded by the EU competition regime. UK law should be brought into line with the scope of EU law in this area.

6. The proposed increase in the territorial scope of the Chapter I and Chapter II prohibitions will require a strong and robust CMA to enforce these

prohibitions. Hand in hand with the proposed changes to the scope of these laws, the CMA must be afforded sufficient resources and funding to fulfil its remit.

Question 17: 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?

7. We are of the view that providing immunity from liability for damages caused by the cartel is likely to have a significant adverse impact on UK consumers. It would be contrary to the best interests of consumers and therefore opposes the objectives of current consumer protection laws.

8. The right to bring a private action for damages arises in a situation where quantifiable loss and damage has been sustained. Depriving individuals of the right to bring a claim for damages would deprive them of an opportunity to seek redress.

9. Granting immunity from liability for damages caused by the cartel in a manner which would ensure that "*businesses who might otherwise consider coming forward with leniency applications are not disincentivised by the potential exposure to liability for damages*" would not only require granting immunity from competition law claims, but also from other potential claims.

10. For instance, in circumstances where a cartel has been in place, there are several potential causes of action which an individual might be able to bring against the proponent of the cartel. They may have claims in contract; claims under consumer protection legislation including the Consumer Protection from Unfair Trading Regulations 2008; claims for breaches of other statutory duties; claims for deceit or misrepresentation. Setting the boundaries of how far such immunity should extend would be extremely complex and risks leading to unforeseen and unintended consequences, preventing claims which do not arise solely because of the cartel.

11. Further, we question the reasoning in the statement at paragraph 1.161 of the consultation paper, that if such immunity were granted, "[p]*arties 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." This overlooks the fact that private claims are likely to be multifaceted. Granting immunity to one cartelist is likely to reduce a potential claimant's options in terms of securing redress.

12. We note that there is no such equivalent immunity from third party claims under EU competition law. Whilst the EU Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive) provides that a successful immunity applicant is only subject to joint and several liability with the other cartel participants in follow-on damages actions by its own (direct or indirect) customers, or where other customers cannot obtain damages from the other cartel participants, this is far removed from what is proposed in the consultation paper. The immunity from private damages claims in the Anti-trust Damages Directive is limited in scope and does not prevent consumers from bringing a claim.

13. Notwithstanding the above, if Government is inclined to introduce some element of leniency in respect of private claims, we would urge for there to be further consultation on this point.

Question 54: 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?

14. The practice of using terms and conditions to delay the formation of a sales contract has the potential to result in the consumer being put at a considerable disadvantage.

15. We note from the Law Commission's 'Consumer sales contracts: transfer of ownership' report that the British Retail Consortium (BRC) and the CMA stated that they were aware of the use of these terms and conditions and noted that they were used in particular for online sales; and that the Institute of Chartered Accountants Scotland reviewed the terms and conditions of some major high

street retailers and found that the majority delay contract formation until goods are dispatched.[3]

16. Without these terms and conditions delaying contract formation, in most instances the sales contract would form, at the latest, when the retailer takes payment from the consumer. Taking payment by the retailer would amount to an acceptance by the retailer of the consumer's offer to purchase the goods.[4]

17. If a contract is not formed until some point in time after a deal has ostensibly been made and payment taken, this leaves the consumer potentially exposed, with no option of ensuring the contract is performed, no contractual claim for compensation and no title to the goods they have been trying to purchase if the other party reneges on the agreement.

18. Taking the example given at paragraph 2.59 of the consultation paper, if the terms and conditions of a transaction state that the consumer's offer is not accepted by the retailer and a contract is not formed until the goods are dispatched, notwithstanding that the buyer has paid upfront, this leaves a consumer with limited protection or options in terms of recourse if the seller delays in dispatch.

19. What is of even greater concern is a situation where the seller becomes insolvent between the buyer paying the price and the contract being formed. We note the comments in the Law Commission's report that in this situation, it does not follow that the retailer holds the money on trust for the consumer; the court will not imprint the money with a trust unless it can be shown the parties intended to create a trust.[5] The most likely outcome is that the buyer would then be an unsecured creditor claiming in restitution, with no title or claim to the goods they had been trying to purchase.[6]

20. As is noted at paragraph 2.60 of the consultation paper, such terms could impact upon the effectiveness of certain existing consumer protections, such

[3] Law Commission's 'Consumer sales contracts: transfer of ownership' report, paragraph 5.30-5.31
[4] Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1952] 2 QB 795 at 802
[5] Consumer sales contracts: transfer of ownership report, paragraph 5.18-5.21; also J McGhee and S Elliott (eds), Snell's Equity (34th ed 2020) para 22-015
[6] Consumer sales contracts: transfer of ownership report, paragraph 5.22-5.28

as the obligation on a retailer to deliver goods without undue delay and within 30 days of the contract being formed under section 28 of the Consumer Rights Act 2015 ("the CRA") 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. Such terms have the potential to be used as a tool for evading the consumer protections enshrined in statute.

21. Such terms could likewise impact on the effectiveness of the further proposed amendments to consumer protection laws that are being set forth by the Law Commission in the form of the draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill. If reforms are made to the existing law so that, if the retailer identified goods for the fulfilment of that contract prior to insolvency, ownership would transfer to the consumer following payment, then businesses could avoid the transfer of ownership by delaying the formation of the contract.[7]

22. Terms delaying the formation of contract also mean that a consumer would not have the option to recover consequential losses arising from a delay in delivery or non-delivery, whereas if they had a contract, they may be able to make such claim.

23. Separating payment from the formation of a contract is not something which your average consumer is likely to expect or be alert to. By including such a term in the terms and conditions, which as is noted in the consultation paper at figure 9 will often be a separate document or webpage to be accessed via a link, the seller is taking advantage of the fact that many consumers will not engage with the terms and conditions, or at least not in any detail, before entering into a transaction. In such circumstances, the consumer would be unlikely to appreciate the terms of the deal they are making. This observation is reflected in the feedback received by the Law Commission in response to its report.[8] This puts the consumer at an unfair disadvantage.

24. The Law Commission has noted in its 'Consumer sales contracts: transfer of ownership' report that such terms may already fail the fairness test under section 62(4) of the CRA which describes an unfair term as a term which is contrary to the requirement of good faith, it causes a significant imbalance

[7] Consumer sales contracts: transfer of ownership report, paragraph 5.65-5.68
[8] Consumer sales contracts: transfer of ownership report, paragraph 5.32-5.33

in the party's rights and obligations under the contract to the detriment of the consumer.[9]

25. Although it is arguable that such terms are already contrary to existing consumer law, it is apparent from the fact that businesses are still using such terms that the existing statutory provisions are not providing a sufficient deterrent to businesses or affording consumers sufficient protection. Greater clarity is needed to prevent businesses from continuing with this practice of delaying the formation of a contract unreasonably.

26. We note the potential difficulties for businesses if they are not able to delay the formation of contract in this way, as set out in the Law Commission's report.[10] Whilst we can see reasons from a business perspective for delaying the formation of the contract in certain circumstances (for instance, to provide a buffer if the business does not have the stock), we do not see any reason for payment to be taken before the contract is formed in such circumstances; nor do we see any reason why such terms which are plainly material and affect when goods might be delivered, can reasonably be hidden in the details of the terms and conditions.

27. Greater consideration must therefore be given to how such terms can be used by businesses and how they should be given the appropriate prominence, to avoid creating an unfair imbalance between the parties' rights and obligations to the detriment of the consumer

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

28. The Competition Appeal Tribunal ("the CAT") determines appeals of Competition Act decisions on the merits. Considering the current approach to be established and well understood, we do not consider that a change in the level of judicial scrutiny is necessary at this time. In addition, a higher level of scrutiny is not inconsistent with the level of fines that infringing businesses can face.

[9] Consumer sales contracts: transfer of ownership report, paragraph 5.70
[10] Consumer sales contracts: transfer of ownership report, paragraph 5.36-5.44

Question 25: 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?

29. Appeals against decisions by the CMA to impose financial penalties for non-compliance with statutory requests for information are made by application to the CAT, which has the power to quash and substitute penalties, or amend the dates by which they must be paid, if it considers it "appropriate to do so".

30. It is important that the CMA has the tools necessary to promote competition effectively in the modern economy and conduct investigations more swiftly and effectively. The appropriate level of judicial scrutiny, therefore, should on the one hand provide meaningful rights of defence commensurate with the level penalties but should not at the same time be a means to slow down or obstruct cases.

Question 42 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?

Question 44: 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?

Question 45: 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?

31. We recommend that "*commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services*" (as set out in question 42(c)) and "*traders offering or advertising to submit, commission or facilitate fake reviews*" (as set out in question 45) be added to Schedule 1 of the CPRs as an automatically unfair practice.

32. As noted in the consultation paper, the shift to online shopping has increased significantly in recent years and has been accelerated by the impact of the pandemic. This shift in market trends must be matched with an appropriate shift in regulation to best protect consumers and create a genuinely competitive market.

33. Online reviews are an integral part of the online marketplace, and have a significant impact on consumer behaviour within that context. Research by Which? has shown that nearly nine in ten people use online reviews to inform a purchase.[11] The very fact that there is a thriving industry dedicated to creating and selling fake reviews demonstrates the value they represent for businesses. Fake reviews are misleading and pose potential danger to consumers: Which? has reported that fake reviews make consumers more than twice as likely to choose poor-quality products,[12] and has consistently demonstrated issues with unsafe products on online marketplaces. As noted in the consultation paper, vulnerable consumers are particularly at risk when it comes to online transactions.

34. Adding these practices to Schedule 1 of the CPRs, making them automatically unfair, is necessary to protect consumers and ensure the online marketplace is not distorted by misleading information. This would remove the burden from consumers of having to demonstrate a fake review caused them to take a different transactional decision in order to receive the protection afforded by the CPRs.

35. The act of commissioning or incentivising fake reviews is not just harmful to consumers but also to businesses: fake reviews have no place in an authentically competitive market, and legal tools to prevent them should operate on a strict liability approach. It is hard to see the justification for not doing so: commissioning fake reviews can never be an acceptable commercial practice and without proper sanctions against that practice, there is a risk that the market becomes a race to the bottom where businesses are driven to compete on increasingly unfair grounds. The argument that this would place a significant burden on businesses and/or changes to business models does not stand up to scrutiny in the context of a transparent and genuinely competitive market. If

[11] https://www.which.co.uk/news/2021/09/two-thirds-dont-trust-tech-giants-to-protect-them-against-either-scams-dangerous-products-or-fake-reviews/
[12] https://www.which.co.uk/news/2020/05/the-real-impact-of-fake-reviews/

anything, prohibiting the practice of commissioning and/or incentivising fake reviews is likely to promote innovation and competition from a business perspective.

36. We also recommend that the proposals go further as posited in question 44: online platforms hosting the fake reviews should also be legally responsible for the content on their sites. As noted in the consultation paper, the increase in online sales is particularly seen in the context of online platforms, citing Amazon's reported sales growth of 45%, this is evidently a key area to target. Without this angle of protection, the changes referred to above are unlikely to have the level of impact required.

Question 55: Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

37. Primarily the CMA enforces consumer protection legislation by seeking statutory undertakings or by applying for an enforcement order from the court under Part 8 of the Enterprise Act 2002.

38. The Government is seeking views on reforming the CMA's civil consumer enforcement powers so that the CMA would be the primary decision-maker and an independent court or tribunal would play a role only on appeal.

39. We consider this to be a suitable enhancement of the CMA's consumer enforcement powers to bring them in line with competition law. In the competition law space, the CMA has shown that it has the requisite skillset to discharge stronger enforcement powers efficiently and reliably. We do not consider there is any reason to suggest that the CMA would not be able to reliably deliver on comparable powers in the consumer law space.

40. What is more, such an enhancement of powers is important given that many of the CMA's competition decisions affect upstream markets that do not assist consumers. This gap in assisting consumers could be partially met by this enhancement of consumer enforcement powers. The Government should also consider introducing opt-out collective actions to complement these new CMA powers.

Question 58 What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

41. We consider that an enhancement of the CMA's consumer enforcement powers, including the ability to impose fines of up to 10% of global turnover directly on companies that are found to be in breach, should be paired with a higher level of judicial scrutiny. The level of judicial scrutiny in competition cases, which is to determine appeals of decisions on the merits, would seem to be adequate.

Question 63 Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

42. We are of the view that such a process could considerably enhance the protection afforded to consumers and consider the failure to incorporate such a process to be a missed opportunity in the context of enhancing consumer protection.

43. Within the context of litigation, an admission of liability on the part of a defendant is a significant initial step. In many cases, it is often the step that is most time consuming and costly. We are therefore broadly in favour of any process through which an admission of liability is provided.

44. An undertaking that includes an admission of liability could result in earlier resolution of certain disputes, streamlining and potentially avoiding otherwise protracted processes that are more likely to follow where an admission of liability is omitted. Once an admission of liability is provided, it would be more difficult for a trader to delay or avoid taking remedial action.

45. In the event that an undertaking was to be made available to the public, for example, on a register possibly together with a media press release, the inclusion of an admission of liability may also have a deterrent effect as traders would be less likely to engage in conduct mirroring that which a trader has admitted liability in relation to.

46. In our view, the provision of an early admission of liability could also be advantageous for traders in that it may result in a reduction of any financial

penalties and the avoidance of costs associated with prolonged dispute. This should provide traders with sufficient incentive to seriously consider providing an admission of liability.

47. Undertakings without an admission of liability can be used by traders to delay a dispute, undermining the purpose of undertakings. If an undertaking is not complied with, an administrative or court process may be required for it to be enforced or for the dispute to be progressed. Such a process would likely be duplicative, waste time and resources, and damage consumer confidence.

48. Where a dispute arises with a trader that is sufficiently similar to a previous dispute involving a different trader which was the subject of an admission of liability; the trader may be guided by the admission of liability resulting in the issue being resolved sooner, and avoiding duplication of processes and resulting unnecessary expenditure of time and resources.

49. The above reflects paragraph 3.62 of the consultation with which we agree: '[a]*dmissions 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.'*

50. In terms of the specifics of the formal process, we agree with the statement at paragraph 3.63 of the consultation paper that the process could reflect, with appropriate tailoring, the CA98 settlement process.

Question 64 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?

51. In our view, in order to incentivise compliance, the enforcement powers available to regulators in these circumstances should be strengthened. This would bring consumer protection enforcement powers into line with those available in competition enforcement and consumer protection internationally.

52. The enforcement powers that could be made available to enforcers are:
    (a) The power to impose civil sanctions e.g. fines linked to turnover and/or the severity of the breach.

(b) The power to enforce undertakings that contain an admission of liability by applying for a court order requiring compliance (with the costs of the application to be paid by the trader).

(c) The power to bring contempt of court proceedings where there is non-compliance with a court order.

(d) The power to treat breach as an aggravating factor resulting in penalty uplift.

(e) The power to bring joint proceedings on the behalf of affected consumers (as occurred in the US when the Environmental Protection Agency brought civil proceedings for breach of environmental regulations by Volkswagen in relation to emissions).

(f) The power to order Alternative Dispute Resolution, and

(g) The power to punish traders that deliberately delay disputes.

53. The above will require the current position, that courts cannot directly adjudicate under Part 8 of the Enterprise Act 2002 on whether a trader has complied with an undertaking, order compliance or sanction such a breach, to be amended.

54. Generally, greater powers should be available to enforcers so that consumers can better enforce their rights and breaches are deterred.

55. We would caution against attaching disproportionate weight to the anticipated fears and/or complaints of some traders regarding increased burden or 'red tape', which will inevitably outnumber the largely unrepresented views of the principal beneficiaries of enhanced enforcement powers: consumers. The purpose of any changes would be to improve the markets overall; to this end, traders' individual concerns regarding perceived burden on them personally should encourage assessment of their behaviour, practices, and compliance with the relevant regulations.

Question 72: 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?

56. The avenues of collective redress currently available to UK consumers lag behind those that are available to consumers in other jurisdictions. In an increasingly globalised world, this can lead to perverse situations where UK based consumers adversely affected by the actions of a large multinational corporations are faced with the prospect of lengthy and protracted litigation to seek redress; whilst consumers in other jurisdictions, who are similarly impacted find their avenues of redress available to them significantly more straightforward and often lead to quicker resolution.

57. Specifically, consumers in the UK have historically had to fight harder than consumers in the US to enforce their rights, and on many occasions UK consumers find that class action proceedings started in the US arising from a parallel set of facts are settled long before any remedy is provided by the UK courts.

58. By way of illustration, the group action launched on behalf English and Welsh vehicle owners in the wake of the Volkswagen emissions scandal in 2015, is currently listed to begin trial in January 2023. By contrast, a US federal court approved the settlement of class action proceedings brought on behalf US based owners of Volkswagen vehicles in late 2016. Similarly, class action proceedings initiated in Australia were settled in 2019 and German proceedings were settled in 2020. Whilst the regulatory landscape in these jurisdictions differ, it is apparent that consumers in the US, Australia and Germany are in a markedly different and, arguably better, position than consumers bringing similar claims in England and Wales.

59. The use of opt-out class actions in England and Wales was introduced by the CRA, however, their use is limited and remains restricted to claims for the infringement of EU or UK competition law. Until recently, the CAT had adopted a relatively conservative approach in certifying cases under the regime. A change in approach has recently been triggered by the Supreme Court decision in the widely reported case involving Mastercard and Walter Merricks[13] and it is expected that this is likely to lead to the regime being more widely utilised.

[13] Mastercard Incorporated and others V Walter Hugh Merricks CBE [2020] UKSC 51

60. Despite this development, we are of the view that the limited scope of the regime is unduly restrictive and believe that its use should be widen, such that all consumer disputes are included. We are therefore firmly of the view that it is necessary and in the best interests of consumers to open up further routes to collective redress for consumers to help them resolve disputes.

Question 73: 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?

61. The implementation of this proposal would represent a seismic change in the consumer protection landscape. In our view, given the deficiencies in the current landscape, such a change would be welcome and would have a positive impact on consumers.

62. Whilst businesses may express concern that such a move is likely to signal a shift towards a class action culture associated with the US, we believe that such concerns are misplaced. In our view, such a change is likely to increase consumer confidence overall and will serve to ultimately benefit both consumers and businesses alike.

63. We hope that you find our responses helpful. Please let us know if we can assist further.

Yours faithfully

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Leigh Day