RESPONSE OF THE SOCIETY OF MOTOR MANUFACTURERS AND TRADERS LIMITED TO THE CONSULTATION "REFORMING COMPETITION AND CONSUMER POLICY"

The Society of Motor Manufacturers and Traders Limited ("**SMMT**") welcomes the opportunity to respond to the consultation "Reforming Competition and Consumer Policy" (the "**Consultation**") issued by the Department for Business, Energy and Industrial Strategy.

SMMT represents a broad cross-section of automotive activities including: vehicle manufacturers; parts manufacturers, suppliers, distributors and fitters (both line-side and those in the aftermarket for service, maintenance and repair); data and technical information providers; tools and equipment suppliers; and accessories suppliers.[1]

Summary:

(A) SMMT supports a model of competition and consumer policy and enforcement through results-based **cooperative ethical regulation** in which compliant, trustworthy businesses are encouraged to adopt and demonstrate compliant behaviours and where the CMA engages with businesses to improve practices. This would instil a productive and positive approach through which non-compliant businesses are easily identified.

(B) SMMT supports many of the proposals for a rebalanced merger control regime; current distinctions between the different levels of market inquiry should, however, be preserved together with the current structure and independence of the CMA Panel. In respect of evidence gathering powers for Competition Act investigations, sufficient flexibility exists in the current system and increasing powers could result in 'fishing expeditions'.

(C) SMMT favours a measured approach to regulating consumer subscription contracts to ensure that their definition is clear and excludes certain contracts that are not intended to be caught, for example, hire purchase; existing mechanisms should be used to remove fake review content, to avoid genuine reviews being caught by an over-rigorous prohibition.

(D) Proposals for CMA to have consumer enforcement administrative powers are not supported by SMMT: significant differences between competition law and the various consumer laws means that similar enforcement regimes are not appropriate;

(E) SMMT generally supports the proposals relating to ADR and believes businesses in the motor vehicle sector should be strongly incentivised to use ADR; ensuring the availability of high quality ADR provided by organisations with sector expertise should be a key consideration if mandatory ADR is introduced.

SMMT has provided the following responses to certain questions within the Consultation. Unanswered questions are shown in square brackets. If it would be helpful to receive any additional information, please contact Melanie Wiseman, Senior Legal Counsel at SMMT (mwiseman@smmt.co.uk).

Responses to the Consultation Questions

Chapter 1: competition policy & enforcement

More effective market inquiries

1.1 ***[Question 1: What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?] -***

[1] For the avoidance of doubt, SMMT does not represent authorised dealers, active in the resale of new vehicles to end users on either a solus or multi-brand basis.

1.2 ***Question 2: Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?***

1.3 SMMT notes that the CMA presently assesses the competitiveness of a broad range of sectors across the UK in the context of its existing activities in relation to:

(a) monitoring and investigating suspected anti-competitive conduct and/or arrangements (including monitoring businesses' pricing online)[2];

(b) investigating anticipated and completed transactions under the UK merger control regime; and

(c) conducting market studies and investigations.

1.4 In view of these existing activities, SMMT does not consider that the CMA should be given a new power to obtain information for the purpose of advising the government on the state of competition in the UK. This is on the basis that the CMA is already extremely well-placed to advise the government in relation to this issue, such that a new power is not required. Moreover, providing the CMA with a general, open-ended power by which to obtain information risks imposing unnecessary burdens upon UK businesses.

1.5 To the extent that the CMA believes it requires specific information in order to be able to advise the government on the state of competition in the UK, SMMT considers that the CMA should request that relevant parties provide this information voluntarily on a confidential basis, making clear the purpose for which the requested information will be used.

1.6 If the requested information is not forthcoming, it would then be for the CMA to determine the course of action that it considers most appropriate in the circumstances (including, for example, conducting a market study).

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

1.8 SMMT recognises the value of ensuring that the government's strategic steer remains current and relevant. SMMT considers that it would be appropriate for the strategic steer to be updated, as appropriate, during the course of a Parliament.

1.9 However, SMMT believes that the strategic steer should remain non-binding, with the CMA retaining full independence in how it approaches its work, its selection of cases, and the tools it uses to tackle them.[3]

1.10 This is on the basis that the CMA, as the lead competition authority in the UK, has the expertise to set and pursue its own strategic objectives (having regard to the relevant strategic steer), and has done so since 2014, delivering significant benefits to UK consumers as a result. For example, over the three year period from 1 April 2018 to 31 March 2021, the CMA delivered an estimated direct financial benefit to consumers in excess of £7 billion.[4]

1.11 Moreover, given the substantial powers available to the CMA under the UK competition law regime, and the significant impact that the exercise of these powers may have on businesses, SMMT believes it is vital for the CMA to remain fully independent of the government, and to be perceived to be fully independent of the government.

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[2] See, "Restricting resale prices: how we're using data to protect customers", CMA blog, 29 June 2020: "[a]*s part of our strategy to tackle RPM, our Data, Technology and Analytics unit (DaTA) has developed a bespoke price monitoring tool, created to help us detect suspicious online pricing activity. We're currently focusing our attention on the musical instruments sector following a number of breaches, but no sector is immune to scrutiny*", available at: www.competitionandmarkets.blog.gov.uk/2020/06/29/restricting-resale-prices-how-were-using-data-to-protect-customers

[3] As per, "The Government's Strategic Steer To The Competition And Markets Authority", July 2019.

[4] See, the CMA's Annual Report and Accounts 2020 to 2021.

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

1.13 SMMT does not consider that the CMA should be empowered to impose certain remedies at the end of a market study process.

1.14 SMMT notes the government's proposal that:

> "[n]*ot all remedies available in a market investigation should necessarily be available at the conclusion of a market study. In particular, government believes it is likely to be appropriate to reserve structural remedies, such as the sale of assets or ownership separation, for use in market investigations only*".[5]

1.15 This suggests that, under the proposal, behavioural remedies (such as price controls) could possibly be imposed by the CMA at the end of a market study.

1.16 However, behavioural remedies in and of themselves would have material implications for UK businesses, and their continuing viability (e.g. the imposition of price controls may adversely affect existing business models). Given this impact, SMMT believes that the depth of analysis undertaken during a market investigation is required before remedies may be imposed by the CMA.

1.17 In addition, it is apparent that assessing competition and identifying an adverse effect upon effective competition within a market is a complex exercise, which is necessarily fact and data-specific. In the absence of the depth of analysis undertaken during a market investigation, SMMT believes there is a risk that imposing remedies at the end of a market study could result in outcomes which ultimately undermine the effectiveness of the remedies imposed (e.g. as a consequence of remedies being imposed on the basis of limited information, leading to sub-optimal remedy choice and/or implementation).

1.18 Further, in the context of "clear cut" cases (i.e. where both the adverse effect upon competition, and the appropriate remedy, are readily identifiable), the CMA is currently able to accept legally binding undertakings in lieu of a reference for a market investigation. In relation to these cases (which SMMT anticipates are likely to be comparatively limited in number), SMMT considers that the CMA could seek to make greater use of its ability to accept legally binding undertakings from the relevant market participants.

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

1.20 SMMT does not believe that the existing market study and market investigation system should be replaced with a new single stage market inquiry tool.

1.21 In particular, SMMT considers that the proposal for a single stage investigation risks introducing bias (as well as the perception of bias) into the decision making process, given that as proposed:

(a) the market inquiry would primarily be carried out by a CMA case team; and

(b) independent decision makers drawn from the CMA Panel would only become involved with the market inquiry, if the CMA identifies concerns, and provisionally concludes that it should impose binding remedies.

1.22 Independent decision makers drawn from the CMA Panel would therefore only become involved at a comparatively late stage in the overall investigation, by which time the case team would have:

[5] Consultation, paragraph 1.60.

(a) carried out its investigation over a substantial period of time; and

(b) identified both an adverse effect upon competition, as well as the remedies intended to be imposed by the CMA to address that adverse effect upon competition.

1.23 This is markedly different to the current decision making process in relation to a market investigation, whereby a demonstrably independent group of individuals comprising members of the CMA Panel is responsible for:

(a) conducting the market investigation (i.e. rather than being introduced at a comparatively late stage in the investigation); and

(b) deciding whether there is an adverse effect upon competition, and, if so, whether and what remedial action is appropriate.

1.24 Given the potential impact that the imposition of remedies has upon UK businesses in the context of market investigations, SMMT believes that:

(a) the associated decision making processes should minimise bias (and the perception of bias) insofar as possible; and

(b) the current decision making processes in relation to market investigations are therefore preferable in this regard, given the central role in these investigations of a demonstrably independent group of members of the CMA Panel.

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

1.26 SMMT does not believe that the government should enable the CMA to impose interim measures from the beginning of a market investigation.

1.27 As noted in response to Question 4, assessing competition and identifying an adverse effect upon effective competition within a market is a complex exercise, which is necessarily fact and data-specific.

1.28 Imposing interim measures from the beginning of a market investigation therefore risks giving rise to unintended adverse outcomes, even if the use of interim measures was subject to additional limitations and safeguards.

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

1.30 SMMT agrees with the proposal that the CMA should be able to accept legally binding undertakings offered by parties at any stage of a market study or market investigation.

1.31 SMMT also agrees that procedural safeguards are required to prevent the investigation timetable being disrupted by the CMA's consideration of undertakings offered by the parties.

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

1.33 SMMT considers that the government's proposed reforms would result in an additional administrative burden, and an unacceptable level of uncertainty for UK business.

Design processes for market investigation remedies

1.34 The CMA is a world leading competition authority, with considerable experience of implementing remedies in the context of market investigations (in addition to its expertise of implementing remedies in the context of merger investigations).

1.35 With this in mind, SMMT does not consider it appropriate for the CMA to be granted the power to compel businesses to participate in "implementation trials", so as to enable the CMA to test and trial the implementation of remedies.

1.36 The CMA consults upon proposed remedies, and the responses to these consultations, in conjunction with the CMA's working knowledge as regards the effective implementation of remedies, should enable the CMA to design appropriate remedies.

Monitoring and reviewing remedies from previous investigations

1.37 SMMT recognises the value of the CMA reviewing remedies from previous investigations, so as to assess the impact and effectiveness of these interventions.

1.38 However, SMMT fundamentally disagrees with the proposal that the CMA should be granted the power to expand or supplement existing market investigation remedies at a later date.

1.39 This would create an unacceptable level of uncertainty, which may be expected to deter investment in sectors that are subject to market investigations, reducing efficiency and competitiveness in the longer term.

1.40 **[*Question 9: What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?*]**

<u>A rebalanced merger control regime</u>

1.41 ***Question 10: 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?***

Turnover-based jurisdictional threshold and safe harbour for small businesses

1.42 SMMT welcomes the government's proposals to:

(a) increase the current turnover-based threshold for the enterprise ceasing to be distinct (e.g. the target business being acquired) from a UK turnover of more than £70 million to a UK turnover of more than £100 million; and

(b) create a safe harbour for mergers between small businesses where the worldwide turnover of each of the merging parties is less than £10 million.[6]

Share of supply test

1.43 SMMT agrees that the flexibility of the share of supply test may reduce the predictability of the UK merger control regime.

[6] Consultation, paragraph 1.98.

1.44 In order to provide greater predictability, in the context of both the current regime, and the additional jurisdictional test proposed by the government,[7] SMMT considers that:

(a) the CMA should be required to publish guidance addressing how it generally intends to apply the share of supply test; and

(b) the CMA's guidance should:

(i) identify any sectors in relation to which the CMA would generally expect to consider different criteria when assessing whether the relevant percentage threshold is satisfied; and

(ii) for those sectors, confirm the criteria that the CMA would generally expect to apply when assessing whether the relevant percentage threshold is satisfied.

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

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

Enabling the CMA to accept legally binding undertakings at any stage of a Phase 2 investigation.

1.47 SMMT agrees that the CMA should be able to accept legally binding undertakings addressing competition concerns identified by the CMA at any stage of a Phase 2 investigation.

Restricting the scope of a Phase 2 investigation to the issues that are identified during a Phase 1 investigation

1.48 SMMT considers that requiring the CMA to consider in a Phase 2 investigation only those issues identified during a Phase 1 investigation risks unnecessarily fettering the CMA. This is particularly so given that the in-depth analysis of a Phase 2 investigation may result in additional issues being identified (including issues evidencing that the transaction does not substantially lessen competition), which should properly be considered in the context of the CMA's investigation.

A new 'fast track' merger route

1.49 SMMT welcomes the proposal to allow parties to obtain an automatic reference to Phase 2, without accepting that the merger could result in a substantial lessening of competition.

1.50 This proposal would provide parties with greater procedural certainty, and afford them the ability to reduce the overall duration of the CMA's investigation.

Reducing unnecessary delays in relation to Phase 2 investigations

1.51 SMMT considers that the CMA should be encouraged to seek to agree with the parties the flexing of timetables for Phase 2 investigations wherever possible, including in the context of the parties' efforts to provide remedies for transactions affecting several jurisdictions worldwide.

[7] i.e. "*any party to the merger has at least a 25% share of supply of particular goods and services in the UK, or a substantial part of the UK, and has UK turnover of more than £100 million*" (see, Consultation, paragraph 1.110 c).

Publication requirements in the Gazette

1.52 SMMT agrees with the proposal to require the CMA to publish the latest version of the merger notification form upon its website.

Reforms to the CMA's Panel

1.53 ***Question 13: Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?***

1.54 SMMT considers that the CMA Panel should be retained, and that the size and composition of the CMA Panel, as well as its role, should remain unchanged.

1.55 SMMT believes that decision making processes should minimise bias (as well as the perception of bias) insofar as possible.

1.56 In this regard, SMMT is firmly of the view that the demonstrably independent role of members of the CMA Panel is preferable to the proposal that the CMA's staff conduct the relevant investigations, and only engage a "fresh pair of eyes" to make final decisions on theories of harm and remedies when investigations are necessarily at an advanced stage.

Stronger enforcement against unlawful anti-competitive conduct

1.57 ***Question 14: 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?***

1.58 SMMT notes that the government's proposal broadly aligns with the doctrine of "qualified effects" under EU competition law,[8] which was applicable within the UK (at least in the context of the application of EU competition law) prior to 1 January 2021.

1.59 SMMT considers that the jurisdictional requirements of the Chapter I and Chapter II prohibitions should be revised, in order to best protect competition in the UK, and the interests of UK businesses and consumers.

1.60 SMMT believes that the Chapter I and Chapter II prohibitions should be applicable to arrangements[9] and/or conduct:

(a) which is implemented in the UK; or

(b) which has, or is likely to have, immediate, substantial, and foreseeable effects within the UK (i.e. irrespective of whether the arrangements and/or conduct is implemented in the UK, or outside of the UK).

[8] See, for example, Case C-413/14 P Intel Corp. v European Commission ECLI:EU:C:2017:632, which provides at paragraphs 44 – 45 that "*…it must be noted that, in order to justify the application of the implementation test, the Court has emphasised that if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions …The qualified effects test pursues the same objective, namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market*".

[9] i.e. "*…agreements between undertakings, decisions by associations of undertakings, or concerted practices*" (see, section 2, Competition Act 1998).

1.61 ***[Question 15: 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?]***

1.62 ***[Question 16: 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?]***

1.63 ***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?***

1.64 SMMT considers that providing holders of full immunity in the public enforcement process with additional immunity from liability for damages caused by the cartel ("**Damages Immunity**") would generally be expected to incentivise leniency applications within the UK.

1.65 However, SMMT also considers that specific conditions should apply to the award of Damages Immunity, including that the recipient (the "**Damages Immunity Recipient**"):

(a) actively cooperates with any party seeking to claim damages from other members of the cartel; and

(b) provides any such party with the full extent of any relevant information within the possession or control of the Damages Immunity Recipient.

1.66 **[*Question 18: 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?*]**

1.67 Appeals procedures should be able to swiftly and effectively review a decision and any related interim measures imposed.

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

1.69 SMMT does not support the reforms outlined within paragraphs 1.170 to 1.173, on the basis that these could enable the CMA to undertake "fishing expeditions", potentially undermining the rights of defence of parties under investigation.

1.70 For example, the proposal to extend the power to interview individuals in the context of investigations under the Competition Act 1998 would see individuals unconnected with the businesses under investigation being compelled to answer questions. Where these individuals are not legally represented (and they may have no desire to incur the expense of obtaining legal representation in the circumstances), the answers that the individuals provide could foreseeably have significant implications for their employers (and/or for the individuals themselves – e.g. in relation to director disqualifications), insofar as these disclose further potential infringements of UK competition law.

1.71 Similarly, the proposal to extend the legal duty to preserve evidence to all investigations under the Competition Act 1998 (with the possibly that a breach of this duty would be a criminal offence) would enable the CMA to make general, overarching requests for additional information in the knowledge that parties should have retained any evidence that the CMA has not expressly requested.

1.72 In relation to the reform outlined at paragraph 1.174, SMMT considers that the CMA already has appropriate powers to "seize-and-sift" evidence when it inspects domestic premises under a warrant.[10] Therefore, SMMT does not believe that additional flexibility is required.

1.73 ***Question 20: 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?***

1.74 SMMT recognises the benefits that UK customers and consumers may obtain from complex Chapter II cases being brought to a close more efficiently.

1.75 In the context of the government's proposals for the use of Early Resolution Agreements, SMMT considers that:

(a) where a party accepts any factual matters relating to the conduct under investigation, these should be binding in the context of any subsequent claims for damages brought against that party; and

(b) any Early Resolution Agreement agreed between the CMA and a party under investigation should be assessed and approved by the Competition Appeal Tribunal before becoming binding.

1.76 When assessing the use of an Early Resolution Agreement, SMMT believes that the Competition Appeal Tribunal should be required to determine whether this would be appropriate in all the circumstances of the case, having regard in particular to:

(a) the magnitude of the alleged harm caused by the suspected anti-competitive conduct; and

(b) the value of the settlement payment to be paid by the party under investigation, as well as the potential value to the party under investigation of the Early Resolution Agreement (e.g. where the Early Resolution Agreement would make it more difficult for parties to bring claims for damages, as compared to the position for those parties where an infringement decision has been adopted).

1.77 ***Question 21: 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?***

1.78 SMMT believes that the 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 would encourage the use of these schemes.

1.79 ***Question 22: 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?***

1.80 SMMT does not support the government's proposed reforms. SMMT considers that confidentiality arrangements should be determined in the context of the circumstances of the relevant case, and does not believe it appropriate to have a "one-size-fits-all" confidentiality ring framework.

1.81 In addition, and as an overarching principle, SMMT believes that where a third party has provided confidential, commercially sensitive information to the CMA, the consent of that third party should be obtained before that information is disclosed to other parties (including where a confidentiality ring has been established).

[10] See, section 28A(8) of the Competition Act 1998.

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

1.83 SMMT considers that the decision making processes should minimise bias (as well as the perception of bias) insofar as possible.

1.84 SMMT believes that the CMA Rules on the decision makers for infringement decisions in Competition Act 1998 investigations serve to minimise bias (as well as the perception of bias) insofar as possible, and therefore does not consider that these requirements should be removed.

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

1.86 SMMT considers that the current level of judicial scrutiny for decisions by the CMA in Competition Act 1998 investigations is appropriate, and that it is not necessary for this to be revised.

1.87 ***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?***

1.88 SMMT considers that the current level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers is appropriate, and that it is not necessary for this to be revised.

1.89 **[*Question 26: 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?*]**

<u>Stronger investigative and enforcement powers across competition tools</u>

1.90 ***Question 27: 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?***

1.91 SMMT generally considers that the new investigative powers proposed by the government should help the CMA to conclude its investigations more quickly.

1.92 In relation to the proposed penalty caps, SMMT notes that these broadly align with the fixed and daily penalties applicable in the context of investigations by the European Commission in relation to suspected infringements of EU competition law,[11] which could have been imposed upon businesses active in the UK prior to 1 January 2021 (i.e. by the European Commission pursuant to an investigation into a suspected infringement of EU competition law).

1.93 ***Question 28: 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?***

1.94 SMMT generally considers that the new enforcement powers proposed by the government should improve compliance.

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

[11] See, Articles 23(1) and 24(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

Other reforms to the UK's competition law

1.96 Having regard to paragraph 1.250 of the Consultation, SMMT welcomes the government's proposal to extend the jurisdiction of the Competition Appeal Tribunal to grant declaratory relief, thereby placing the Competition Appeal Tribunal on the same footing as the High Court of England and Wales in relation to the grant of declaratory relief.

Consumer Rights – Chapter 2

Subscription contracts

2.1 **Question 30: Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?**

2.2 The current definition of 'subscription contract' includes all contracts for goods and services between a consumer and a trader 'over a period of time'. This is a broad definition. It would be important to ensure that any new restrictions apply only to the types of contracts which the legislation is intending to capture, particularly if the trader is required to inform the customer that "this is a subscription contract". The definition could distinguish a subscription contract (from a non-subscription contract) by referring to: (i) the repeated nature of payments made at regular intervals (e.g. weekly, monthly or yearly); and (ii) consumer commitment to these repeated payments taking place at the contract formation stage. It may be necessary to explicitly exclude certain types of contract (e.g. hire purchase or rental contracts).

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

2.4 In principle, SMMT supports an increase in transparency at the pre-contract stage, so that consumers are fully informed of the terms of the contract they are agreeing to, to avoid any disputes further down the line.

2.5 It has been suggested that a consumer must be informed before they order that they are purchasing a "subscription contract" (which would need to be carefully defined) and provided with specific information on: the minimum contract terms; price per billing period; whether the contract will auto-renew or auto-extend at the end of the contract term; and any minimum notice period for cancellation. Provided that the extent of the necessary pre-contract information is clear, and it does not extend beyond these basic elements, this should not be an unreasonable requirement for businesses.

2.6 However, any changes to traders' terms and conditions necessarily involve additional costs and some of the requirements (for example relating to auto-renewal – see response to Q33 below) could have more wide-ranging impacts on traders and consumers. As recognised in the Government's impact assessment, subscription contracts have proved essential in innovative markets such as the provision of digital services and to small businesses alike. The Government's consultation itself recognises the importance of encouraging innovation within the Build Back Better agenda. On this basis, due consideration is required before making further amendments which could materially inhibit opportunities for differentiated contract models, or the ability to offer competitive acquisition pricing.

2.7 Note also that *more* information does not mean *better* information and any increased information requirements may have the potential to confuse consumers (rather than providing greater clarity). Consumers are already often provided with detailed terms and conditions which can result in 'information overload' which means that they may be more likely to miss the more important terms.

2.8 ***[Question 32: Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?]***

2.9 ***Question 33. 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?***

2.10 Changes to auto-renewal terms (requiring express consent) could have a damaging impact on a trader's business if consumers would be more inclined to actively decline auto-renewal than to actively accept it. For some products/services which are safety related (for example, repair, maintenance or breakdown cover, other insurances and any software protection/update products) this could also increase a risk for consumers being left without protection, if their contract runs out without their knowledge and express renewal.

2.11 ***[Question 34: 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***

2.12 ***Question 35: How would the reminder requirement impact traders?***

2.13 ***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?***

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

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

2.16 ***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)?***

2.17 ***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?***

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

Fake reviews

2.19 ***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?***

2.20 The Government's consultation notes that not all reviews are fake – indeed, it is fair to assume that large proportion of online reviews are legitimate. Reviews are important to consumers in assisting them in making an informed decision and are the basis of many businesses'/individuals' legitimate business models.

2.21 Whilst it may be difficult to distinguish between 'fake' and 'genuine' reviews, and this may result in consumers being misled in some circumstances, we consider that prohibiting the commissioning of all reviews could do more harm than good. Small businesses or businesses offering new and innovative products (which have not yet gained traction with consumers) may be disproportionately impacted if they were to rely on independent marketing or for their good/services to be picked by professional reviewers without any commissioning arrangement, particularly if their primary marketing tool is social media.

2.22 In addition, prohibiting commissioning of reviews altogether would not prevent individuals from independently posting false or misleading content online which is damaging to consumer interests and to the businesses involved. The commissioning of fair and reasoned reviews is important to enable businesses to counterbalance this information and present a more representative view of their goods and services.

2.23 In relation to commissioning or incentivising a person to write/submit a fake review, we agree that where it is explicit that the arrangement is designed to mislead consumers, this could be an unfair practice in breach of the CPRs. However, we do not consider that it should be added to the list of automatically unfair practices as it would involve a careful consideration of what is meant by "fake". If the reviewer is providing misleading information about the nature and qualities or terms of supply, this may be obviously "fake". However, even non-commissioned reviews include an element of subjectivity in terms of whether a product is "liked" or "better" than other similar products. It would also be necessary to distinguish between a 'review' and an 'advert' or 'endorsement' in any legislation. It is commonplace in many industries (e.g. TV advertising for cosmetics / shampoo etc) for celebrities to represent and promote the 'face of the brand', including statements to the effect that they use the products. Similar practices are used online via the use of celebrity endorsement (i.e. influencers). The line between an endorsement and review is not always clear, particularly online where content publishers are able to include larger quantities of information (in comparison to other forms of advertising).

2.24 ***[Question 43: 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?]***

2.25 ***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?***

2.26 Certain businesses (e.g. Twitter/Instagram etc) already operate 'verification' processes for content publishers whereby 'verified' users are able to present a 'blue tick' in their profile. This gives consumers a degree of comfort as to the identity and veracity of the account.

2.27 The CMA has previously engaged with several companies including Instagram, Facebook and eBay to obtain commitments to provide fake review detection systems. Other requirements include: suspending or banning users who repeatedly promote or facilitate fake reviews; limiting the output from search tools to reduce access to fake and misleading groups/profiles; and putting in place on-going monitoring to ensure issues do not resurface. Investment in such technologies (and adequate numbers of compliance staff) would be costly, and potentially prohibitive for smaller businesses. The CMA's (June 2021) decision to open a consumer protection investigation into Amazon and Google relating to fake reviews, shows that even well-resourced companies may find it difficult to self-regulate given the significant quantity of information published online.

2.28 The CMA currently can apply to the Court for an order requiring removal or modification of content from a website which is selling products which are in breach of the consumer laws[12]. A similar approach could be taken for suspected fake reviews which would allow businesses to take targeted action, rather than requiring businesses to invest up front in compliance strategies which would be costly and difficult to implement.

2.29 ***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?***

2.30 Please refer to the response to Question 42.

Behavioural techniques

[12] Online Interface Orders (introduced by the Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020)

2.31 ***[Question 46: Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?***

2.32 ***Question 47: 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?]***

Simplification of consumer law

2.33 ***Question 48: 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?***

2.34 There are some similarities between the UK's various consumer protection statutes. For example, the Consumer Rights Act 2015 and Consumer Protection from Unfair Trading Regulations 2008 both have similar concepts with regards to transparency, so it is not always clear where an action may fall under one or the other. In addition, the CMA continues to rely on the original 2008 CPR guidance whilst either not formally adopting it (reproduced elsewhere such as the Car Traders checklist produced by CTSI) or has supplemented it with sector specific guides following investigations. The duplication in legislation (and the uncertainty over the validity of associated guidance) means that there is a significant quantity of law covering similar legal principles. It may be simpler to condense the various provisions into a single Consumer Protection Act.

2.35 ***[Question 49: Are there perverse incentives or unintended consequences from our existing consumer law?***

2.36 ***Question 50: 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?]***

Savings Clubs

2.37 ***[Question 51: 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?***

2.38 ***Question 52. What other sectors might new powers regarding prepayment protections be usefully applied to?]***

Terms and conditions

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

2.40 ***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?]***

Consumer Law Enforcement – Chapter 3

CMA Administrative Model to enforce consumer law

3.1 ***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?***

3.2 The proposal is to bring the consumer law enforcement regime in line with the competition law enforcement regime so that the CMA can take direct enforcement action against (potentially) infringing

businesses rather than securing changes via a cooperative process and, if that fails, applying to Court to order compliance.

3.3 There are, however, significant differences between competition law and the various consumer laws which means that similar enforcement regimes are not appropriate.

3.4 Firstly, in terms of severity: there is a broad range of potential consumer law breaches from, at one end, for example, an auto-renewal contract where the consumer has not been provided with (arguably) sufficient information and, at the other end, an intentionally fraudulent scheme designed to exploit consumers. Competition law breaches (at least those which are prioritised by the CMA for enforcement action) tend to be serious infringements such as price-fixing agreements between competitors. A price fixing agreement can be a criminal offence under the Enterprise Act 2002 as well as a civil infringement of the Competition Act 1998. The seriousness of competition law infringements has been recognised by the CMA itself "at heart, this – the 'conspiracy against the public', the 'theft at the dinner table' - is what competition law enforcement is aimed at combating.[13]" It is noted that Trading Standards investigate 'rogue traders' whose conduct could be analogous to theft; however in contrast, many consumer protection cases brought by the CMA are not aimed at combatting conspiracies or thefts, but rather the clarity and fairness of terms and conditions.

3.5 Secondly, in terms of interpretation. Competition law infringements are based on evidence of whether there was/is an infringing arrangement in place, and this is a relatively objective assessment. In contrast, whether a company's terms and conditions are sufficiently fair and transparent is a more nuanced and subjective assessment and open to interpretation. For example, in the CMA's recent consumer protection investigation into anti-virus software, the CMA was concerned with whether auto-renewal terms were adequately explained to consumers – there is no obvious threshold for illegality in this context.

3.6 There are no obvious benefits to introducing a more contentious and combative regime to tackle consumer protection issues. In fact, SMMT is concerned that the regime will lead to more protracted and costly CMA investigations (like competition law investigations) and will not produce better results for consumers:

3.7 Time and cost: The Consultation raises the concern that the current consumer protection regime can result in a lengthy process, with the CMA needing to go to Court. However, the example provided (online ticketing) was largely an exceptional case. Most CMA consumer protection cases have been settled using voluntary undertakings. The current system allows for a comparatively flexible and expedient process, with relatively few appeals, whilst achieving significant benefits for consumers. Following the information gathering process, the CMA is able to move straight to a request for voluntary undertakings and, in most cases, it is successful in agreeing undertakings as companies are generally inclined to avoid litigation provided that the requested changes are not disproportionately damaging to their business. There have been only a couple of cases where the CMA has needed to go to Court (in relation to online ticketing and care homes).

3.8 Moving towards an administrative model like the competition regime is unlikely to resolve the issues with regards to timescales. If the CMA can take a formal decision that a company has acted illegally (and this is combined with the threat of significant fines and potential director disqualification), it will need to make a detailed legal case and put this to the companies involved (like a "Statement of Objections" under the competition law regime). The level of information gathering to make such a case would need to be at least as intensive as it is currently in the case of consumer protection investigations. The companies involved would also need to be able to exercise appropriate rights to defence, including access to the CMA's file and the opportunity to respond, which would further prolong the process. If businesses are no longer able to reach voluntary solutions with the CMA, without the threat of significant

[13] Michael Grenfell on the CMA's approach to competition enforcement - GOV.UK (www.gov.uk)

fines, they may be more inclined to exercise their rights of defence during the investigation and launch appeals of CMA decisions.

Outcomes:

3.9 The consumer protection rules are based on concepts of fairness and transparency, which includes an element of subjectivity. Under the current regime, the CMA can secure voluntary undertakings from businesses to made changes which arguably go further than necessary to remedy a breach of consumer law; it is only if the business does not agree to undertakings and the matter goes to Court that it needs to be determined whether there has in fact been a breach of the law. This enables the CMA to negotiate significant changes in the interests of the consumer. For example, in its online gambling investigation the CMA raised broad concerns about aspects of the operators' business models which were not obviously in breach of consumer laws but where the CMA considered there could be improvements made and it secured undertakings from the companies involved to make significant changes. If the CMA had needed to take a decision on breach (rather than "raise concerns"), this would have limited any remedies to addressing those demonstrable breaches of consumer law. Providing the CMA will more robust enforcement powers could therefore result in worse substantive outcomes for consumers.

3.10 ***Question 56: What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?***

3.11 The CMA's current enforcement scope – i.e. typically dealing with "systemic failures in a market" whilst cooperating with other regulators on other matters – does not obviously lend itself to the types of infringement which could justify the significant fining powers currently being proposed. In the UK's competition regime, these types of issue are dealt with via the 'market investigation' regime under which the CMA has the power to remedy the concerns identified but not to fine the companies involved.

3.12 The types of market failure which result in consumer protection investigations (of the type typically dealt with by the CMA) are generally not the result of a conspiracy or an intentional illegal act. In some cases, the practices raising concerns may have developed over time to become market norms. For example, the Citizen's Advice Loyalty Penalty super-complaint to the CMA led to numerous studies into 'price walking' and auto-renewal policies. These issues are not new but have been pervasive for several years in many industries and arguably it was not clearly foreseeable that they could be considered as a serious breach of consumer law.

3.13 The enforcement scope for the CMA under an administrative model could remain the same but the CMA would need to develop enforcement priorities (as it does under the competition law regime) to identify those serious infringements which merit a full investigative and decision-making process and (perhaps) retain the ability to secure voluntary undertakings for less serious (potential) breaches of consumer law. The concern is that businesses may be less willing to engage with the CMA in a cooperative and productive manner in the context of a more contentious process and under the threat of fines. Hence, the CMA will likely find it harder, rather than easier, to secure better outcomes for consumers.

3.14 ***Question 57: What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?***

3.15 The CMA's competition regime has a highly developed system of checks and balances which would need to be replicated in the context of an administrative decision-making regime. Hence SMMT's concerns that the regime would result in more protected and costly investigations. For example:

3.16 A Statement of Objections procedure allows those parties concerned to have access to the CMA's provisional findings in order to properly exercise their rights of defence;

3.17 An Access to File procedure (with confidentiality ring procedures) ensures that parties have access to the evidence relied upon by the CMA whilst protecting commercial confidentiality where possible;

3.18 Parties have the right to an Oral Hearing;

3.19 The CMA has a separate Case Decision Unit – which takes the ultimate decision as to whether an infringement has occurred and is separate from the investigatory case team;

3.20 There is a Procedural Officer, independent from the case team, to review any complaints relating to procedure; and

3.21 The Competition Appeal Tribunal is a specialist body which hears both procedural and substantive appeals relating to CMA decisions.

3.22 ***Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?***

3.23 If the potential outcomes from consumer protection investigations mirror those from the competition regime, then the scope and powers of judicial scrutiny should arguably be the same. Considering the significant risks to businesses, the Court (or a specialist consumer protection tribunal) should be able to undertake full merits review of the CMA's substantive findings. It is noted that the future of the full merits review in competition cases is also under consultation.

3.24 ***Question 59: Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?***

3.25 The CAT was established in part to alleviate the judicial burden from the Court system, but also due to its specialist nature and experience of CAT judges to enable them to preside over complex competition law matters. Whether this would be necessary for consumer protection law is debatable. However, if the volume and nature of appeals is significant, which is more likely if the potential sanctions are more severe, then a specialist tribunal should be considered to ensure timely resolutions.

3.26 ***Question 60: Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?***

3.27 Sector regulators have had access to concurrent competition law enforcement powers for several years. However, BEIS has previously noted that relatively few competition cases have been brought by these regulators. Regulators such as Ofcom, Ofgem and the FCA have a variety of regulatory powers, and can impose licence conditions, to secure changes in the interests of consumers which do not necessarily involve intensive and time-consuming investigations. It is not clear whether enabling regulators with additional consumer protection powers would make a significant difference to their enforcement activity where they have greater expertise and access to existing sector specific powers.

Fines for non-compliance with information requests & breach of consumer law

3.28 ***Question 61: Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?***

3.29 SMMT does not consider that introducing significant fines would make a material difference to incentives to comply with information requests. Companies generally take CMA investigations very seriously and are sufficiently incentivised by their own compliance policies and the risk of negative publicity. It is not clear that there is a significant problem in relation to non-compliance with consumer protection information requests. The CMA currently has the power to go to Court to order compliance with an information request if it encounters difficulties, but we are aware of only one example of where this was necessary (in the context of the anti-virus software investigation).

3.30 The proposed fines for non-compliance with information requests are significant – up to a maximum level of 1% of a business' annual turnover, with an additional daily penalty of up to 5%. Consequences of this nature have only recently been proposed in the competition regime, which has to date relied on a much more limited fines of up to a £30,000 fixed fine and/or £15,000 daily penalty. The introduction of fines for consumer protection investigations would alienate businesses from the process and, as

explained above, a more contentious regime will not create a more productive environment which encourages businesses to cooperate with the CMA to achieve better consumer outcomes.

3.31 In relation to the introduction of fines of up to 10% of group global turnover for a breach of consumer protection law, SMMT considers that this is excessive and disproportionate. The severity of a competition law infringement cannot be compared to a consumer protection breach and the interpretation of consumer laws is more nuanced. For the CMA to have the same fining powers as it has in relation to competition law infringements for consumer law breaches is therefore not appropriate. In this context, we note that the recent EU Omnibus Directive introduced fines for consumer protection breaches in the EU of 4% of global turnover - significantly lower than the UK's proposals - presumably to reflect the difference in severity between consumer protection and competition law infringements[14].

3.32 ***Question 62: What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?***

3.33 The Government consultation notes that competition 'commitments' cases currently require the CMA to go to Court for an order requiring businesses to comply. This is also similar in relation to consumer protection undertakings and would appear to be sufficient; the CMA has only needed to take such action in relation to online ticketing which suggests that, in general, businesses will comply with commitments or undertakings agreed with the CMA.

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

3.35 Under the competition law regime, there is the ability to agree "commitments" which does not involve an admission of liability and which avoid the need for a formal decision and the imposition of fines. Alternatively, where commitments are not appropriate, there is settlement process which requires an admission of liability in exchange for a reduction in fines and the CMA still takes a formal infringement decision.

3.36 If significant fines are introduced in relation to the consumer protection regime, then it would be sensible to introduce a formal process for settlement (where there is an admission of liability). However, this should not be at the expense of the CMA being able to agree to undertakings where no admission of liability is made. If undertakings are only available to companies who admit liability, this would significantly reduce the incentives for companies to agree undertakings (as it would also increase the risk of damages claims), which would ultimately disadvantage consumers.

3.37 ***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?***

3.38 SMMT does not consider that an undertaking regime should contain an admission of liability. This may, however, be appropriate in the context of a settlement regime. Either way, compliance can be suitably incentivised by the risk of the CMA applying for a Court order; see response to Question 62 above.

Alternative Dispute Resolution

3.39 ***Question 65: What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?***

3.40 SMMT supports clear sign-posting through Citizens' Advice Bureaux, Law Centres and online to provide relevant information to ensure consumers access the most appropriate ADR providers. Multiple channels of engagement with ADR providers should be encouraged, for example, ensuring contact can

[14] The UK is not required to implement the terms of the Omnibus Directive following its exit from the EU.

be made via telephone and on the consumer's behalf by a trusted third party, as well as through online and postal enquiries.

3.41 ***[Question 66: How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?]***

3.42 ***Question 67: What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?***

3.43 Regular auditing and assessment by the Competent Authority should take place in the same way as the scrutiny and review that occurs for CTSI-approved Codes of Practice under the Consumer Codes Approval Scheme.

3.44 ***Question 68: What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?***

3.45 ***Question 69: Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?***

3.46 SMMT believes businesses should be strongly incentivised to use ADR in the motor vehicles sector but that the reputation of the sector depends on the provision of ADR services from those organisations which have sector expertise (as well as expertise in the provision of ADR).

3.47 Whether to mandate ADR needs to be balanced against the need to ensure (a) availability of high quality ADR whilst (b) allowing for business models that support sector expert ADR providers, whether that be by 'per case' or by subscription basis.

3.48 ***[Question 70: How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?]***

3.49 ***Question 71: How can government best encourage businesses to comply with these changes?***

Collective Redress

3.50 ***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?***

3.51 Several routes to collective redress currently exist. For example, the CMA can seek redress using Enhanced Consumer Measures ("ECM") introduced by the Consumer Rights Act 2015. It has already achieved significant compensation for consumers in relation to several sectors (including care homes, anti-virus software and leasehold properties). Group Litigation Orders are available and are being actively used as a mechanism to manage court proceedings on behalf of large groups of consumers.

3.52 The current system of allowing businesses to engage cooperatively with the CMA reduces the need for extensive litigation, leading to expedient outcomes for consumers. Introducing collective actions for consumer protection claims was mooted by Parliament as part of its legislative processes for the CRA 2015. The ECM regime was introduced to offer a more flexible, balanced and proportionate approach with a wider range of remedies. The collective redress mechanism for competition law infringements has, so far, not had any demonstrable success albeit that it is still relatively new.

3.53 Broadening the scope for collective redress in relation to consumer protection breaches would therefore likely lead to significantly more litigation but would not produce quick and effective redress for consumers. As noted above, an increased risk of collective consumer claims would also result in an increased reluctance of businesses to engage in CMA settlement processes if an admission of

culpability/liability is required. It would add to the general incentive under the proposed new regime for businesses to defend themselves robustly against any alleged breach of consumer law by the CMA, creating a more adversarial administrative process.

3.54 ***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?***

3.55 Please refer to the response to Question 72.

Trading Standards Enforcement

3.56 ***[Question 74: How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?***

3.57 ***Question 75: Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?]***

1st October 2021