Department for
Business, Energy
& Industrial Strategy

Reforming Competition and Consumer Policy

Government Response to Consultation

CP 656

April 2022

Reforming Competition and Consumer Policy: Government Response to Consultation

Presented to Parliament

by the Secretary of State for Business, Energy and Industrial Strategy

by Command of Her Majesty

April 2022

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Foreword

The consultation on *Reforming Competition and Consumer Policy* was published last July. In that consultation, government posed a wide-ranging reform programme to the UK's competition and consumer policies to drive enterprise, innovation, productivity, and growth. Without an open and dynamic economy, we cannot hope to level up the country, eradicate our contribution to climate change, or build the foundations for making the UK the best place in the world to start and grow a business.

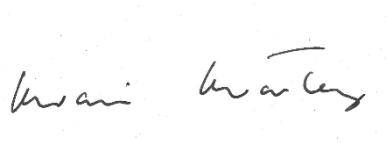
Competition and consumer policies have been the subject of a public debate in recent years, and the response to *Reforming Competition and Consumer Policy* showed that there is a huge appetite for reform. In formal responses to our consultation, and in the direct engagement we undertook, we saw an overwhelmingly warm welcome to this reform agenda. Stakeholders see the same value in competition as government; that it can and should play a leading role in the free markets that are a key feature of *Building Back Better: our plan for growth*, and why the Conservative Manifesto committed to enhancing the enforcement of consumer law.

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

Now that we have left the EU, we have an opportunity to implement regulations that work better for the UK. We are moving in a more agile way than the EU, whilst maintaining high standards. We can forge our own path to deliver growth, innovation, and competition while minimising burdens on business.

By refining and implementing our reform programme, we will build our competition and consumer policies on these foundations to make them best in class. Under this new vision we will bolster the Competition and Markets Authority, enhance consumers' rights, and ensure those rights are robustly enforced.

We are enormously grateful for the views we received during the consultation period. These will be used to refine our reform programme and seize the opportunity to build back better.



THE RT HON KWASI KWARTENG MP

Secretary of State for Business, Energy and Industrial Strategy

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Executive summary

0.1. The UK economy thrives because of rigorous support for competitive open markets with high consumer standards. When competition and consumer policies work well, markets deliver more innovation and greater productivity. Because the consumer is the focus of a competitive market, it gives all consumers access to better products, with greater choice and lower prices. High consumer standards in turn support consumer confidence in that market system. Competition and consumer policies are key tools to realising these benefits, which is why *Building Back Better: our plan for growth* stressed the importance of competition.

0.2. Dynamic, competitive markets and ensuring consumers are protected are also key to creating the right environment for enterprise. These conditions drive businesses to improve or else see their competitors make gains. Innovative, dynamic new businesses can enter markets easier, compete on level terms, and grow more readily in these conditions. Evidence from the Competition and Markets Authority (CMA) and the Office for National Statistics (ONS) points towards a need to act in order to maintain and enhance dynamism and competition in markets.[1] [2]

0.3. Our July 2021 *Reforming Competition and Consumer Policy* consultation covered three themes:

- **Promoting competition to drive enterprise, innovation, growth, and productivity:** a more active pro-competition strategy, rebalanced merger controls, stronger enforcement against anticompetitive conduct, and cross-cutting reforms to the CMA's powers.
- **Updating consumer rights to keep pace with markets:** a series of reforms to benefit consumers by tackling subscription traps, improving the consumer experience in online shopping, and better prepayment protections.
- **Strengthening the enforcement of consumer law by individuals and regulators:** changes to support individuals resolving their own disputes and strengthen state enforcement powers and delivering better guidance and support for businesses to comply with their obligations.

[1] The Competition and Market Authority published the first State of Competition Report in November 2020. It cited a range of statistics on competition, such as the fact that concentration rose as a result of the 2008 recession and, though it has decreased slightly since 2010, it remains 3 percentage points higher today than in 1998. The report can be found at: https://www.gov.uk/government/news/cma-reports-on-the-state-of-competition-in-the-uk

[2] The Office for National Statistics published *Business dynamism in the UK economy: Quarter 1 (Jan to Mar) 1999 to Quarter 4 (Oct to Dec) 2019* in October 2020. This cited new experimental data that track the business population in the UK show that business dynamism (the rate of job creation and destruction caused by entry and exit of businesses) has declined in the UK between 1999 and 2019. The report can be found at: https://www.ons.gov.uk/businessindustryandtrade/changestobusiness/businessbirthsdeathsandsurvivalrates/bulletins/businessdynamismintheukeconomy/quarter1jantomar1999toquarter4octtodec2019

0.4. These reforms will help the UK seize the opportunities of our position outside the EU to deliver growth, innovation, and increased competition while minimising burdens on business. We can now implement laws that work better for the UK, moving in a more agile way than the EU, whilst maintaining our high standards.

0.5. Decisive action has already been taken since leaving the EU. The CMA has taken on a wider and more ambitious caseload. They have been given additional powers to protect and enhance the UK's internal market, and we have taken advantage of the freedom to design a domestic subsidy control regime that reflects our strategic interests and particular national circumstances. The Subsidy Control Bill introduced in 2021 put forward a new system that provides a coherent framework to protect UK competition and investment. Through this regime, public authorities throughout the UK will be empowered to award bespoke subsidies, tailored to their local needs.

0.6. *Reforming Competition and Consumer Policy* proposed further enhancements to the powers of the Competition and Markets Authority so it can use all these new powers in conjunction to promote competition, both within and outside the UK, for the benefit of consumers.

0.7. While we were in the EU, we were limited in the degree we could implement laws that were tailored to the interests of UK consumers. We are now free to take a proportional view on whether to follow the lead of the EU on consumer matters, and where we want to plot our own course to balance the benefits of reforms for consumers with burdens on businesses.

0.8. For example, proposals to protect consumers buying subscriptions are wider and more effective because we have left the EU. To tackle problems with subscription traps we can decide what information must be given to consumers before they enter a subscription contract. We can extend rights to consumers that we could not before, such the rights of withdrawal for consumers entering subscription contracts in more sectors including transport.

0.9. We can also better protect consumers buying package travel deals. Our improved regulations are simpler and easier to use as a result of leaving the EU. They will focus on "essential features" of a package rather than arbitrary rules, in order to provide clearer rules which are easier to interpret, and they simplify the regulations around linked travel arrangements.

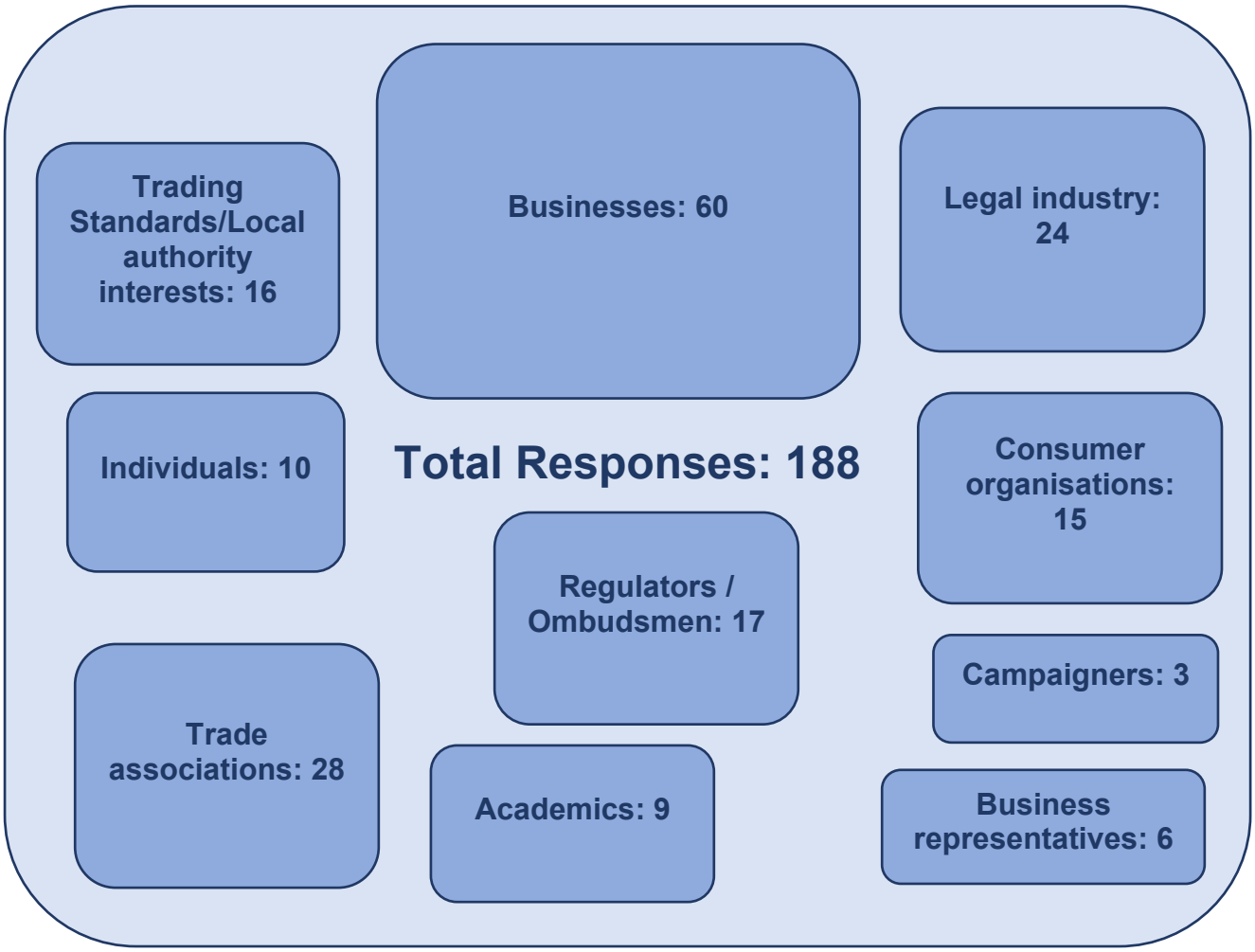
0.10. If we were still in the EU, there would be less scope and more constraints on reforms to Alternative Dispute Resolution. Any reforms would need to comply with the requirements of the EU's ADR Directive. Now we are free to implement proportional reforms in this area that are tailored best to UK businesses and consumers.

0.11. Government's response to the 2021 consultation on *Reforming the Framework for Better Regulation* highlights how we are changing the checks and balances on new regulatory initiatives to make the most of the opportunities since EU exit.

0.12. Alongside *Reforming Competition and Consumer Policy,* BEIS and the Department for Digital, Culture, Media and Sport published *A New Pro-Competition Regime for Digital Markets* seeking views on proposed reforms to the UK competition regime taking forward a number of the recommendations

of the Furman Review.[3] We are publishing the government response to that consultation separately.

0.13. Both consultations ran from 20 July to 1 October 2021. During this time, 188 responses to *Reforming Competition and Consumer Policy* were received through written contributions and through the online Citizen Space platform. A full list of stakeholders is included in Annex A, with response text published separately. A breakdown of categories of stakeholders is as follows:



0.14. In addition to these responses, BEIS ministers and officials used the consultation period to engage directly with stakeholders through a series of bilateral engagements and roundtable discussions.

0.15. Throughout this process, government ensured it was hearing a diverse range of views from across the UK, and consulted with consumer groups, legal experts, businesses, and trade associations from a range of sectors and industries, academics, and enforcers of competition and consumer law such as regulators, Trading Standards and ombudsman services. We are grateful

[3] "Unlocking digital competition, Report of the Digital Competition Expert Panel", March 2019 https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel

for the time and effort people committed during this process, and for the written feedback we received.

0.16. We have carefully considered the responses to the consultation and used the information provided to form the revised policies outlined below. Many reforms require legislation to implement. Government will identify the appropriate legislative vehicle or vehicles as Parliamentary time and priorities allow. The reforms we are taking forward are as follows:

Chapter 1: competition policy

0.17. The first chapter of *Reforming Competition and Consumer Policy* outlined a new approach to competition policy, drawing together a series of reforms to strengthen competition in UK markets.

A more active pro-competition strategy

0.18. Fair and open competition is the bedrock of the UK economy. The UK needs a commercial and regulatory environment that supports businesses to innovate, grow and compete on their merits, and there is evidence that competition in the UK may have weakened over the past 20 years. The first step to addressing this challenge is a more active pro-competition strategy. Government is progressing the following policies:

- Enhancing the CMA's role as an economic adviser to government via regular 'State of Competition' reports which assess the strength of competition in the UK economy.
- Clearer and more regular non-binding strategic steers from government to the CMA about government's economic priorities, and its expectations from the CMA.
- Introducing a statutory duty of expedition for the CMA in relation to its competition and consumer law functions, including functions relating to the new digital competition regime.

The CMA's market inquiry regime

0.19. Market inquiries are a powerful tool to look across whole markets and identify specific challenges in markets and potential routes to address those for the benefit of consumers. The consultation proposed a series of reforms to provide a more efficient, flexible, and proportionate market inquiry process. Government is progressing the following policies:

- Improving the CMA's market inquiry procedures by:
    - Allowing more opportunity for binding commitments to be accepted during market studies and market investigations;
    - Providing the CMA with greater flexibility to define the scope of market investigations; and
    - Removing the requirement to consult on a market investigation reference within the first six months of a market study.
- Encouraging the CMA to use the flexibility provided by its market study and market investigation tools as efficiently as possible to deliver maximum benefits for UK consumers and businesses.

- Creating more flexible and versatile remedies in market investigations, by:
    - Enabling the CMA to require businesses to conduct trials to determine the final format of certain remedies; and
    - Enhance the CMA's ability to amend remedies in a 10-year period following its finding of an adverse effect of competition in a market investigation.

A rebalanced merger control system

0.20. On most metrics, the UK's merger control system is working well. However, there remains room for improvement. Significant and helpful feedback was provided on the proposals, which has helped to shape matters such as the turnover threshold and treatment of specific merger cases such as 'killer acquisitions' and safe harbours for smaller mergers. Government is progressing the following policies:

- Retaining a voluntary and non-suspensory merger control regime.
- Adjusting the thresholds for the CMA's jurisdiction to better target the mergers most likely to cause harm and ensure the regime remains proportionate:
    - Raising the turnover threshold in line with inflation (>£70m to >£100m UK turnover).
    - Creating an additional basis for establishing jurisdiction to enable review of so-called 'killer acquisition' and other mergers which do not involve direct competitors. Jurisdiction would be established where at least one of the merging businesses has: (a) an existing share of supply of goods or services of 33% in the UK or a substantial part of the UK; and (b) a UK turnover of £350m. In response to feedback received these thresholds have been raised from the levels originally consulted upon.
- Introducing a small merger safe harbour, exempting mergers from review where each party's UK turnover is less than £10 million, to reduce the burden on small and micro enterprises.
- Government will also continue to monitor the operation of the share of supply test and may consider further proposals on how to reform it.
- Enabling the CMA to deliver more effective and efficient merger investigations by:
    - accepting commitments from businesses which resolve competition issues earlier during a phase 2 investigation;
    - enhancing and streamlining the merger 'fast track' procedure; and
    - updating how the CMA is required to publish its merger notice.
- Government encourages the CMA to keep its merger procedures under review to ensure these remain proportionate and appropriate to the cases under consideration, in particular regarding non-statutory pre-notification procedures and when dealing with small and medium-sized businesses.

Stronger enforcement against illegal anticompetitive conduct

0.21. Government set out in the consultation its commitment to the UK having a tough and efficient competition enforcement regime to deter, detect, investigate, penalise, and remedy breaches of competition law. With effective competition law enforcement, businesses can operate in the knowledge that they are protected from dominant businesses using unfair means to stymie competition and will not have to deal with cartels restricting growth. Stronger enforcement will deliver faster and more flexible investigations which identify and resolve unlawful anticompetitive conduct more quickly. Feedback helped to balance swift enforcement of the law with a fair and certain process for businesses. Government is progressing the following policies:

- Amending the Chapter I prohibition in the Competition Act 1998 so that it can apply to agreements, concerted practices and decisions which are implemented outside of the UK, depending on the effect of the conduct within the UK.
- Granting the CMA new evidence-gathering powers in Competition Act investigations, by:
    - Broadening the power to interview individuals as part of Competition Act investigations, so that the CMA can interview any relevant person, regardless of their connection to a business under investigation;
    - Introducing a duty to preserve evidence in all Competition Act investigations analogous to that which exists in the context of the cartel offence;
    - Giving the CMA powers to 'seize and sift' evidence when it inspects domestic premises under a warrant; and
    - Strengthening the CMA's powers to obtain information stored remotely when executing a warrant.
- In relation to the CMA's interim measures decisions in Competition Act investigations: (a) providing that appeals against interim measures decisions in Competition Act investigations are determined by reference to the principles of judicial review, rather than on the merits of the CMA's decision and (b) amending rules governing how the CMA provides access to its case file when taking interim measures decisions.
- Introducing a new statutory framework for confidentiality rings. This will include civil penalties to ensure the CMA has the tools necessary to protect confidential information disclosed into the confidentiality ring.
- Reducing the turnover threshold for immunity from financial penalties under the Competition Act for breaches of the Chapter II prohibition from £50m to £20m.
- Expanding the jurisdiction of the Competition Appeal Tribunal (CAT) to include the ability to grant declaratory relief.
- Amending the Serious Organised Crime and Police Act 2005 (SOCPA) so that the CMA is a 'specified prosecutor' and can use the Act's 'assisting offender' process to enhance its criminal cartel enforcement.

- Based on feedback received in consultation, government intends to return to the courts and Competition Appeal Tribunal the discretion to award exemplary damages for breaches of competition law.
- Removing statutory requirements on the CMA's internal decision-making processes for findings of infringement in Competition Act Cases, allowing the CMA autonomy to determine its own processes.
- Government will give further consideration to whether further reform of the Competition Appeal Tribunal's rules is necessary.

Cross-cutting reforms to the CMA's competition enforcement tools

0.22. In addition to the proposals specific to the CMA's merger, markets and Competition Act tools set out above, government proposed a range of reforms that would apply across the CMA's competition tools. These cross-cutting reforms intend to enable the CMA to remedy more harm and sooner, and to give the CMA the tools necessary to promote competition effectively in a modern economy. Government is progressing the following policies:

- Where a business (or any other entity other than a natural person) fails to comply with an investigative measure, including failing to comply with an information request, concealing, falsifying or destroying evidence and providing false or misleading information, the CMA should be able impose fixed penalties of up to 1% of a business' annual worldwide turnover, as well as the power to impose an additional daily penalty of up to 5% of daily worldwide turnover while non-compliance continues.
- Where a natural person conceals, falsifies, or destroys evidence, or provides false or misleading information, the CMA should be able to impose fixed penalties of up to £30,000, as well as the power to impose an additional daily penalty of up to £15,000 while non-compliance continues. These are the same thresholds that currently apply to breaches of competition investigative measures that are sanctionable by civil penalties.
- Enabling the CMA to impose civil turnover-based penalties for non-compliance with orders imposed by the CMA, or undertakings and commitments accepted by the CMA, across its competition enforcement functions:
    - Introduction of a civil penalty regime for breaching commitments or undertakings, directions, orders or interim measures in line with the existing interim enforcement orders in merger investigations for these penalties. This would mean that the penalty would be capped at 5% of annual turnover.
    - Introduction of an additional daily penalty of up to 5% of daily turnover of the company's corporate group while non-compliance continues.
- Permitting more effective and flexible international cooperation by updating the rules governing information sharing between authorities, and by enabling the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

- Strengthening the CMA's powers to test and verify whether the use of algorithms by companies complies with competition law.

Chapter 2: consumer rights

0.23. The second chapter of *Reforming Competition and Consumer Policy* set out a series of reforms to update the UK's consumer protection framework. The existing framework establishes a core set of consumer rights. The challenge government consulted on was how best to respond to changes in consumer markets, particularly the rapid increase in online commerce.

Tackling subscription traps

0.24. At present, it is estimated that consumers may spend as much as £1.8 billion per year on subscriptions which they regard as poor value for money. *Reforming Competition and Consumer Policy* proposed taking action in three areas: (i) at the pre-contract stage, when key information about a subscription contract should be clear and prominent; (ii) for subscriptions which contain autorenewal features, to ensure the consumer's consent is retained before auto renew or roll-over occurs; and (iii) ensuring the process of exiting a contract is clear and easy for consumers, without frictions that unfairly press consumers into retaining a subscription they do not want.

0.25. Responses to the consultation helped to shape the policies to take forward to the benefit of businesses and consumers. Government will progress the following:

- Tackling subscription traps by:
    - Requiring businesses to provide clearer information to consumers before they enter into a subscription contract;
    - Introducing a specific requirement on traders to send reminders to consumers before a contract rolls over (or auto-renews) onto a new term, which specifies that their subscription contract will auto-renew unless cancelled;
    - Creating a new specific legal obligation requiring traders to issue a reminder to consumers that a free trial or low-cost introductory offer is coming to an end;
    - Creating a new specific requirement for traders to ensure their customers have a straightforward, cost-effective, and timely mechanism to exit a subscription contract; and
    - Exempting regulated sectors with equivalent or higher rules to those being proposed in relation to subscription contracts or where there is a compelling public policy reason to do so.

Addressing fake reviews and online exploitation of consumers

0.26. Online reviews are commonplace and very useful to businesses building their brand, and to prospective consumers as they weigh up making a purchase. A fake review, on the other hand, is one that does not reflect an actual consumer's genuine experience of a good or service. Commissioned or incentivised reviews by consumers that are not clearly labelled and

distinguishable as such can mislead consumers. Government will progress the following policies:

- Strengthening the law to deter, and facilitate enforcement against, traders who engage in unfair practices, by taking a power in legislation to add to the current list of automatically unfair practices in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).
- Government will consult on the use of such a power to add the following areas to the Schedule:
    - commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services;
    - hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine; and
    - offering or advertising to submit, commission or facilitate fake reviews.
- Government will continue to build its evidence base on the impact of undisclosed paid-for advertising appearing in regular results of online search rankings and strengthening the law so that it is easier for enforcement agencies such as the CMA to take action against particular exploitative designs that feature on some websites such as “drip pricing”.

Better prepayment protections

0.27. *Reforming Competition and Consumer Policy* proposed taking steps to protect consumers, particularly those using Christmas Savings Clubs and similar savings schemes not covered by existing financial protections, and asked what other sectors similar rules might be applied to. Responses to the proposals were mostly supportive particularly from consumer organisations and regulators. Government will progress the following:

- Strengthening protections for prepaying consumers using Christmas Savings Clubs and similar “savings schemes” not covered by existing Financial Conduct Authority’s regulation and financial protections by requiring such schemes to fully safeguard customers’ money through insurance or trust accounts.

Package Travel

0.28. During the consultation process, government also engaged stakeholders on the matter of package travel. The Package Travel and Linked Travel Arrangement Regulations 2018 (PTRs) offer additional protections to consumers who book package trips compared to those booking stand-alone travel services.

0.29. Government committed to review the PTRs following the end of the transition period. Over the consultation period, workshops with a range of stakeholders (including travel retailers, travel organisers and airlines from across domestic and international sectors as well as consumer groups) raised issues with the PTRs and how they had been put under strain by the COVID-19 pandemic. This was also raised in formal responses to the consultation.

0.30. Government will update and simplify the PTRs, allowing easier enforcement and compliance with the law by businesses, better flexibility for insolvency

protection for non-flight packages and enabling BEIS to improve the quality of information and guidance available.

Chapter 3: consumer law enforcement

0.31. The third chapter of *Reforming Competition and Consumer Policy* identified that, while the system of enforcement of consumer law generally works and delivers significant benefits, there are remaining weaknesses which are undermining consumer confidence and exposing traders to unfair competition. The chapter set out a series of reforms to address these weaknesses to ensure the enforcement of consumer law is robust and effective.

Stronger enforcement powers for state enforcers

0.32. The CMA plays a key role in protecting consumers where market-wide unfair trading practices occur. Government believes it therefore should have appropriate powers to incentivise firms to comply with the law and to stop and rectify harm where consumers and law-abiding businesses are losing out.

0.33. To that end, government consulted on giving the CMA the power to decide itself whether consumer law has been broken and impose directions and monetary penalties on businesses without having to go through the courts, i.e., an "administrative model". Government will progress the following policies:

- Allowing the CMA to decide for itself where consumer protection law has been breached, which is an approach mirroring its abilities in competition law enforcement. This means the CMA will be able to:
    - Direct compliance and impose turnover-based or fixed monetary penalties where it determines a person, without a reasonable excuse, has failed to comply with an information request, has concealed, falsified or destroyed evidence, or has provided false or misleading information. Penalties may be imposed of up to 1% of a business's annual global turnover, with an additional daily penalty of 5% daily global turnover while non-compliance continues. Where an individual fails to comply, the CMA would be able to impose penalties of up to £30,000, with an additional daily penalty of up to £15,000 while non-compliance continues.
    - Direct compliance and impose turnover-based or fixed monetary penalties where it determines that an undertaking given by an enforcement subject, or a direction imposed by the CMA has been breached without a reasonable excuse. Penalties may be imposed of up to 5% of a business's annual global turnover, with an additional daily penalty of 5% daily global turnover while non-compliance continues. Where an individual fails to comply, the CMA would be able to impose penalties of up to £150,000, with an additional daily penalty of up to £15,000 while non-compliance continues.
    - Determine whether an infringement of certain consumer protection laws has occurred and make appropriate directions including to bring the infringement to an end, awarding redress to consumers who have suffered loss or securing positive action from businesses to improve

compliance, or imposing turnover-based or fixed monetary penalties for current or past breaches of the law. Where a business breaks the law, the CMA would be able to impose a penalty of up to 10% of global annual turnover. Where an individual breaks the law, the CMA would be able to impose a penalty of up to £300,000.

- Continue to use its current enforcement powers through the civil and criminal courts, where appropriate, and continue cooperating with other consumer enforcers including Local Authority Trading Standards Services (LATSS).

- Introducing a suite of civil financial penalties (subject to the same caps as set out immediately above) that the civil courts would be able to impose on application from all public consumer enforcers, for:
  - non-compliance with a statutory information notice, provision of false or misleading information or destroying, concealing or falsifying information or documents in response to an information notice,
  - non-compliance, without a reasonable excuse, with an undertaking given to an enforcer,
  - non-compliance with an undertaking given to the court, or
  - infringements of the consumer legislation and rules of law within scope of Part 8 of the Enterprise Act 2002.
- Government intends to introduce a statutory duty of expedition. This will apply across the CMA's responsibilities, including consumer protections.

Supporting consumers and traders to resolve more disputes independently

0.34. Government believes a well-functioning Alternative Dispute Resolution (ADR) system supports consumers by facilitating quicker and cheaper access to redress for individual disputes without the need for going to court.

0.35. Government has already indicated that it intends to examine radical new ways to mainstream ADR for all types of disputes, including consumer disputes, so it operates as an integrated part of the justice system. As proposals for this wide-ranging and fundamental reform are developed, government consulted on more immediate plans to increase the rate of individual consumer disputes being satisfactorily resolved by strengthening and expanding the scope of ADR. Responses helped to consider the best way to take forward reforms to benefit businesses and consumers engaging with ADR services. Government will progress the following:

- BEIS will continue to work with the Ministry of Justice, regulators, consumer advocates, ADR providers, consumer enforcement bodies and businesses to:
  - Provide more support to consumers in individual disputes with businesses by increasing the uptake of dispute resolution services, thus avoiding the need to go to court
  - Improve the quality and oversight of alternative dispute resolution services.

Supporting local authority trading standards services tackling rogue traders

0.36. Government recognises the vital role National Trading Standards (NTS), Trading Standards Scotland (TSS), and LATSS play in protecting consumers across the country. Government consulted on how national and local enforcement can work best together to tackle regional and national consumer harm, enforcing criminal breaches of consumer law. Government will continue to explore how the structure of national support can best increase the resilience of local and national criminal enforcement of consumer law, with regards to management of legal and financial risks.

Impacts

0.37. Alongside the publication of *Reforming Competition and Consumer Policy* in July, there were three impact assessments; one each on reforms to merger control, subscriptions regulations, and alternative dispute resolution. These impact assessments also posed further questions concerning the appraisal of each policy. The responses to those further questions have been summarised here, as they are being used to inform further evidence gathering activities to strengthen the quality of the analysis and improve the estimated impacts of these policies for the final stage impact assessment.

Chapter 1 – Competition

1.1. Chapter 1 of the consultation set out a series of reforms to competition policy to make it more agile and robust. The first step to delivering this is a more active pro-competition strategy to deliver more targeted and effective pro-competitive interventions capable of driving new growth and innovation in key UK markets. Further, to be truly effective, government's ambition for a revised competition policy needs to be matched by reforms to our competition authorities' powers and procedures. Alongside these powers and procedures, we need to ensure that our competition authorities have the tools they need to deliver open, fair, and competitive markets.

1.2. Chapter 1 of the consultation sought views on the following:

- A new pro-competition strategy for the UK.
- Reforms to market inquiries to provide a more efficient, flexible, and proportionate inquiry process.
- A rebalanced merger control regime providing more effective and proportionate review processes.
- Reforms to the CMA's Panel to deliver faster and more consistent decisions in merger and market inquiry cases.
- Stronger enforcement against unlawful anticompetitive conduct to deliver faster and more flexible investigations which identify and resolve unlawful anticompetitive conduct more quickly.
- Stronger investigative and enforcement powers to deliver more consistent, efficient, and effective investigative procedures across the CMA's competition tools.

A new pro-competition strategy for the UK

State of Competition Reports

1.3. Government's competition policy should be informed by an assessment of the health of competition in the economy. Government has therefore commended the CMA on its first State of UK Competition report, published in November 2020, and used the consultation to seek views on the nature of the CMA's future reports.

1.4. The consultation asked the following questions on this topic:

Q What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

Q Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

1.5. Respondents generally welcomed the CMA's State of UK Competition report, regarding it as a useful and thorough document. Respondents made a range of constructive comments on the challenge of assessing levels of competition across an economy. A frequently expressed view was that government should be cautious against over-reliance on certain metrics, such as mark-ups or concentration, and that the probity of different metrics may vary significantly between sectors.

1.6. Government welcomes this feedback, which can assist in the preparation and interpretation of future reports. Government's view is that the future State of Competition reports should still aim to report on the health of competition across the economy. However, government agrees that the challenges involved in that assessment mean that there would also be value in reports considering certain key markets as case studies for more in-depth analysis.

1.7. Many respondents agreed that it was important that the CMA was able to get access to the information it needed to produce the State of UK Competition Reports. However, many respondents were concerned that responding to compulsory information requests from the CMA can be burdensome for businesses, particularly where there would be potentially significant sanctions for non-compliance. They considered that it would not be proportionate to grant the CMA the power to obtain evidence specifically for the purpose of assessing the state of competition in the UK. Respondents noted that businesses were normally willing to provide such information on a voluntary basis.

1.8. Government considers that the CMA's ability to access accurate and up-to-date information from businesses is essential to it producing useful reports on the state of competition in the UK. Government recognises that even without specific evidence gathering powers for reporting on the state of competition in the UK, the CMA has access to a wide range of other sources of relevant information, including voluntary submissions from businesses and trade bodies, information obtained through its other regulatory tools and information obtained from other government bodies, such as the ONS. Government agrees with respondents that the State of Competition reports should not impose a disproportionate burden on business and therefore does not intend to grant the CMA a new information gathering power specifically for preparing State of Competition reports at the present time. However, as work on the reports continues, government will continue to review the adequacy of the CMA's access to relevant information.

Summary

Government remains of the view that the State of Competition reports represent valuable analysis, and the CMA will produce further such reports in due course.

Government does not intend to grant the CMA a power to obtain evidence specifically for reporting on the state of competition at the present time.

A Duty of Expedition

1.9. There is a public interest in the CMA conducting its competition and consumer cases as efficiently as possible, reducing uncertainty and disruption for businesses. Government is committed to an agile and dynamic business and regulatory environment, and efficiency is therefore a key objective for the competition and consumer law regime. Although government did not propose introducing a new statutory duty of expedition – advocated for by Lord Tyrie – in the consultation, the feedback received has emphasised the need for swift decision making and certainty for business. Consequently, government now considers that this should be explicitly reflected in the CMA's statutory duties, and therefore intends to introduce a statutory duty of expedition, making clear that the CMA is under a duty of expedition in relation to its competition and consumer law functions, including the functions relating to the new digital competition regime.

Summary

Government intends to introduce a statutory duty of expedition for the CMA in relation to its competition and consumer law functions, including functions relating to the new digital competition regime.

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

1.10. Government has traditionally provided the CMA with a high level, 'strategic steer' issued by the Secretary of State for Business, Energy and Industrial Strategy once per Parliament. These steers set out, at a strategic level, government's expectations, and priorities for the CMA. Given the CMA's expanding role, the consultation sought views on the merits of a more active approach to setting the CMA's strategic steer going forwards.

1.11. The consultation asked the following questions on this topic:

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

1.12. Respondents emphasised the importance of government's strategic steer remaining non-binding. There was a general recognition that the strategic steer should not stray into the CMA's operational decisions, especially regarding matters such as case selection.

1.13. Respondents raised particular concerns around the potential for government's proposals to lead to 'annual' strategic steers. Many respondents felt this would risk providing overly prescriptive directions to the CMA.

1.14. Government recognises the importance of an operationally independent competition authority and remains committed to this principle. As set out in the consultation, government's strategic steer to the CMA will remain non-binding.

1.15. The intention of the strategic steer is to provide an overview of government's priorities. Government agrees that overly frequent steers would not be consistent with this. However, government believes that some parts of the strategic steer may benefit from being updated more regularly than just once a

parliament. Government should also be able to respond to significant economic and political developments where required.

Summary

Government intends to proceed with more regular strategic steers to the CMA as and when updates are required. Government currently expects this will mean providing between one and two updates to the strategic steer per parliament. Some parts of the steer may however be updated more regularly as appropriate.

Government intends to provide greater clarity in future steers about government's priorities and expectations. Government will therefore also expect the CMA's own plans and reporting to be clear on how it is delivering against the priorities and expectations set by government in the strategic steer.

Government will consult on the next strategic steer in due course

More effective market inquiries

Structural Reforms

1.16. As set out in the consultation, government considers that market studies and market investigations (collectively 'market inquiries') are the CMA's most powerful tools for promoting competition in UK markets.[4] Market inquiries allow the CMA to consider wider competitive conditions in UK markets including barriers to competition such as customer behaviour, market structure and the impact of regulations. They also allow the CMA to conduct an in-depth analysis of how a market is working, publish its conclusions, make recommendations and, in the case of market investigations, impose remedies to address the harms identified.

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

[4] The UK operates a concurrency regime for competition law enforcement with sector regulators having certain powers to carry out competition enforcement in the regulated sectors for which they are responsible. These include powers to conduct market studies and make market investigation references (market investigations are conducted exclusively by the CMA). Concurrent regulators also have powers to enforce the prohibitions on illegal anticompetitive conduct under the Competition Act 1998. Unless the context indicates otherwise the reforms to the CMA's competition law enforcement powers or procedures set out in this response to the consultation would also apply to the concurrent regulators' competition law enforcement powers or procedures.

competitive.[5] Government believes that more active interventions may be required in some markets to address these challenges. It is therefore important that the CMA has the best tools available to it to deliver this.

1.18. Government also recognises that market investigations may provide an effective way of setting common standards in markets, including where there may be evidence of widespread non-compliance with other regulatory requirements such as consumer protection rules. Such non-compliance should normally be addressed through other enforcement tools, but where there are market-wide problems, government recognises that this may sometimes be inefficient. Using market investigations in appropriate cases can help reduce distortions of competition by allowing the CMA to impose market-wide solutions more quickly and efficiently, without the need for multiple investigations. Among other things, this could help prevent compliant businesses being undercut by less scrupulous competitors.

1.19. A key priority in reforms to the competition regime is ensuring market inquiries can be used as effectively and efficiently as possible. To that end, government consulted on reforms to the structure of the market inquiry process, including whether to allow certain remedial powers at the conclusion of market studies, or whether to remove the distinction between market studies and market investigations altogether (thus, creating a single stage market inquiry tool).

1.20. Government also consulted on:

a. whether to enable the CMA to accept binding undertakings at any stage in the market inquiry process;

b. whether to provide the CMA with greater flexibility to define the scope of market investigations; and

c. whether to remove the requirement to consult on a market investigation reference within the first six months of a market study.

1.21. The consultation asked the following questions on this topic:

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

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

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

Q What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

1.22. Respondents were generally supportive of government's view that the market inquiry process should be as efficient and flexible as possible. A number of respondents agreed with government's assessment that a three-year plus

[5] See paragraphs 1.23-1.29 of the *Reforming Competition and Consumer Policy* consultation (July 2021)

process involving both a market study and a market investigation may be too long for many markets.

1.23. Each of the options consulted on received support from some respondents. However, most respondents noted that procedural efficiencies should not come at the expense of procedural safeguards and many respondents expressed concerns with both of the options for structural reforms to the market inquiry process on which we consulted.

1.24. In particular, many respondents argued that, if the CMA was empowered to impose certain remedies at the end of a market study process, that could blur the distinction between the two stages of the market inquiry process. Respondents also contended that the justification for remedies must be sound given the intrusive nature of remedies available to the CMA at the end of a market investigation and the fact that they can be imposed where the firms involved have not breached the law. Hence, if remedies are imposed at the market study stage, respondents were concerned that they could be imposed prematurely, without the necessary analysis required to determine the level of any intervention and result in inaccurate determinations. Respondents also argued that any remedies should be subject to rigorous independent scrutiny and raised concerns with the notion that the CMA Board could adequately fulfil this role.

1.25. On government's alternative proposal to replace the existing system with a single stage market inquiry tool, there was support from some stakeholders who agreed that this could streamline the process, remove duplication and the uncertainty of whether the investigation would consist of one or two stages. However, other respondents argued that this could result in an increase to the duration of investigations for less complex cases if the legal deadline is set by default at two years (plus a possible six-month extension) in all cases. Several respondents also noted the importance of the flexibility currently offered in market studies in appropriate cases, which should be retained. Sectoral regulators argued that any reforms should not impact their powers to undertake market studies under the Enterprise Act 2002 in their own regulated sectors.

1.26. Finally, there were some respondents who questioned the evidential basis for government's view that the market investigation tool is currently underutilised. Hence, they questioned whether any reform is needed at all.

1.27. Respondents were generally supportive in there being greater flexibility for the CMA[6] to accept binding undertakings earlier in market studies and market investigations. Some respondents noted that the agreement of earlier commitments could be challenging in some cases, particularly where the commitments would be necessary from a larger number of businesses, or where the competition concerns were more complex. Other respondents noted that consideration of commitments had the potential to take time and resource and could impact on the progress of the market inquiry as a whole. Some respondents agreed with the suggestion in the consultation document that

[6] And concurrent regulators, where they are conducting market studies.

consideration by the CMA of early undertakings could justify a 'stop the clock' procedure, to allow time in the statutory deadlines.

1.28. Finally, several respondents expressed support for empowering the CMA to be more directional in scoping the terms of reference and allow the market investigation reference to focus on key issues. They noted that this will give the CMA the flexibility to set out the focus of the investigation and speed up the market investigation process. Some respondents did however question the extent to which this required legislative reform.[7] The proposal to remove the requirement to consult on a market investigation reference within the first six months of the market study was also welcomed by respondents, who deemed that it could address some of the timing and resource concerns identified in the consultation.

1.29. Government is of the view that while each of the options for structural reforms to the market inquiry process consulted on could improve the regime for certain cases, each option also has its downsides. In light of the feedback received, government intends to retain the current structural framework for market inquiries, in which the CMA may conduct market studies and market investigations. The CMA's power to impose binding remedies by order will also remain reserved to market investigations.

1.30. Government does however intend to proceed with the following procedural reforms to the market inquiry process which it consulted on:

a. Government intends to proceed with the proposal to introduce greater flexibility for the CMA to accept binding undertakings from businesses at any stage in market studies and market investigations. It intends that commitments can be accepted and made legally binding by the CMA where they address a potential adverse effect on competition ('AEC') under consideration.
b. Government also intends to:
    i. provide the CMA with greater flexibility to define the scope of market investigations in order to allow the CMA to conduct properly targeted and proportionate market investigations more easily where appropriate; and
    ii. remove the requirement to consult on a market investigation reference within the first six months of a market study.

1.31. Government also encourages the CMA to make maximum use of the flexibility provided by its market study and market investigation tools respectively. Each of these tools have their own advantages and disadvantages and one tool may be better suited to investigating potential problems in a particular market than the other. The CMA should use whichever tool it believes will most effectively deliver concrete improvements to competition and consumer welfare in the relevant market. For example, if the CMA already has reasonable grounds to suspect adverse effects on competition in a market,

[7] Government notes in particular the views expressed by some respondents that the CMA already has some flexibility in how it scopes market investigations. Government agrees, but believes the legislative framework can be further improved to provide the CMA with greater flexibility in the use of this tool.

government would support the CMA more routinely consulting on a market investigation reference directly, without first conducting a market study. Government notes that such a policy position would help to deliver many of the benefits offered by the single stage market inquiry process that government consulted on without losing the flexibility offered by a market study in those cases where that tool remains appropriate.

Summary

Government intends to retain the current structure of the market inquiry process.

Government intends to proceed with the following reforms which it considers will improve the CMA's market inquiry procedures: a) allow more opportunity for binding undertakings to be accepted during market studies and market investigations; b) provide the CMA with greater flexibility to define the scope of market investigations; and c) remove the requirement to consult on a market investigation reference within the first six months of a market study.

Government also encourages the CMA to use the flexibility provided by its market study and market investigation tools as efficiently as possible to deliver maximum benefits for UK consumers and businesses.

More effective remedies

1.32. Government also consulted on reforms to ensure that the CMA's tools for remedying features of markets which restrict or distort competition are effective. These included reforms to the process by which the CMA can design remedies to problems identified in its market inquiries, and its ability to review and update those remedies following the market inquiry.

Q Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

Implementation Trials

1.33. Respondents were generally supportive of allowing the CMA to require implementation trialling of consumer facing remedies. Some respondents were concerned that trialling remedies could involve additional costs and uncertainty for business, and that any new powers should be appropriately constrained, including time-limits on the length of trials.

1.34. In respect of a new power for the CMA to require the trialling of remedies, government intends that this will be limited at the current time to remedies concerned with what, when and how information is presented to consumers. Government considers that the trialling of different permutations of these types of remedies is likely to be particularly valuable.

1.35. Government considers that the precise nature of the trial required may vary, depending on the type of remedy in question and the nature of the businesses conducting the trial. In that context, government does not intend to impose

specific statutory restrictions on the design of trials. The CMA should however be obliged to set out the design of the trial, so that businesses have clarity on its objectives and likely duration. Businesses should also have the opportunity to comment on the proposed design of the trial during the CMA's investigations, as they would any other remedy the CMA may impose. [8]

Remedy Reviews

1.36. Respondents were generally supportive of increasing the scope for the CMA to review existing remedies. Some respondents emphasised the value to business of certainty, and the risks of too frequent intervention by the CMA, and were concerned by the CMA having powers to supplement existing remedies. The proposal in the consultation that remedy reviews, absent changing market circumstances, could be subject to a mandatory cooling-off period received support from these respondents. The CMA opposed the proposal for a cooling-off period, citing the risks of such a constraint where the CMA is seeking to remedy adverse effects on competition in fast-moving markets.

1.37. Government remains of the view that where the CMA believes that a remedy is not achieving its intended effects, it should not be necessary for the CMA to conduct a fresh market investigation in order to adopt an improved remedy. Government proposes that this power should be available to the CMA for a period of up to 10 years from the CMA's finding of an adverse effect on competition.[9] If during this period the CMA believes that a remedy package is not having the intended effect of remedying mitigating or preventing the adverse effect on competition (or any detrimental effects on customers from the adverse effect on competition) then it should be able to vary, including by expanding or supplementing the existing remedies to achieve better outcomes. As with any proposed remedy, the CMA would be required to consult affected businesses before reaching a final decision on whether to revise the remedy, and a relevant business could apply to the Competition Appeal Tribunal for a review of the CMA's decision. [10]

1.38. Government is keen to prevent the expanded powers to review remedies prolonging uncertainty for businesses. It therefore intends to proceed with the proposal set out in the consultation that there should be a mandatory two-year 'cooling-off' period starting at the end of a remedy review, in which the CMA may not, of its own volition, conduct a further review of the same remedy. However, where a business subject to a remedy asks that it is varied by the

[8] Government intends that the ability to require certain remedies be trialled should extend to the Secretary of State's remedial powers in a market investigation subject to a public interest intervention.

[9] If the CMA believed there was a case for revised remedies more than 10 years after the original market investigation, Government believes it would be more proportionate for the CMA to conduct a new market investigation to ensure, among other things, that the underlying AEC continues to exist and justifies the proposed intervention. For the avoidance of doubt the CMA's existing powers to vary and discharge remedies whether there has been a material change in circumstance would not be subject to this ten year limitation.

[10] Government intends that the enhanced ability to vary remedies put in place following a market investigations should extend to remedies put in place by the Secretary of State following a market investigation subject to a public interest intervention.

CMA, due to a change of circumstance, the CMA should be able to review the remedy at any time, including within the 2 year 'cooling off' period.

Summary

Government intends to proceed with proposals for more flexible and versatile remedies in market studies and market investigations. In particular, government intends to:

- **enable the CMA to require businesses to conduct trialling, to determine the final format of certain remedies.**
- **enhance the CMA's ability to amend remedies in a 10-year period following its finding of an adverse effect on competition.**

Interim measures in market investigations

1.39. As set out in the consultation, in market investigations the CMA can only impose interim measures after it has issued its final report finding that there are adverse effects on competition. These interim measures can only be used to prevent a business taking action which would frustrate the CMA's design and implementation of remedies.

1.40. Government consulted on whether the CMA should be granted the same powers to impose interim measures in market investigations as it does in Competition Act investigations and if the use of such interim measures should be subject to additional limitations or safeguards.

1.41. The consultation asked the following question on this topic:

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

1.42. The proposal received support from some respondents who mostly noted that interim measures in market inquiries could enable the CMA to take swifter action to address serious and/or irreparable consumer harm. Respondents who supported this agreed that these powers could be particularly important in fast-moving markets where consumer harm becomes entrenched before remedies can be imposed. They also noted that interim measures can create a deterrent for firms to engage in bad behaviour or act as an encouragement for firms to accept binding commitments or remedies in competition enforcement cases. These respondents suggested that the CMA's experience using interim measures in other contexts suggests there could be instances of firm conduct in the context of a market inquiry where these powers would be needed.

1.43. The majority of respondents however raised concerns about this proposal, arguing that it could increase the risk of inaccurate or premature interventions in market investigations. Some respondents argued that interim measures can be amongst the most intrusive and draconian powers of the CMA, and it would be disproportionate to impose such measures without sufficient evidence of harmful conduct or wrongdoing. Some respondents also noted that any consideration of the need for and scope of interim measures could also detract

CMA resources away from the main inquiry and risk extending the end-to-end process.

1.44. Many respondents referred to the unique characteristics of market investigations, the scope of which is not limited to a single firm or small group, but potentially an entire industry. Some respondents cited past market investigation cases, such as the Energy and Motor Insurance investigations, to highlight that concerns identified in the early stages of a market investigation subsequently turned out on closer analysis not to be supported by evidence and not to give rise to justifiable concerns. Hence, it was argued that there is a risk of premature interventions and unjustifiable over-enforcement if the imposition of remedies was based on the CMA's early-stage concerns. In addition, even in cases where the CMA can carry out a rapid review and identify areas where the market is not working well (such as the PCR Travel Tests case), respondents argued that the CMA could take enforcement action by using its competition or consumer protection powers.

1.45. Most respondents agreed that, if interim measures were to be introduced in market inquiries, they should be subject to appropriate safeguards, by ensuring that procedural rights are preserved and the circumstances in which they can be used are prescribed very tightly. Among other things, they argued that there would have to be a high threshold to reach before considering them and appropriate judicial scrutiny.

1.46. Government recognises that the UK's market inquiries regime is a powerful tool and acknowledges the concerns raised by stakeholders on the proposal to introduce interim measures from the beginning of a market inquiry. Government is still of the view that swifter interventions are desirable and can address consumer harm sooner. Government considers that the use of interim measures in market inquiries could assist with delivering these benefits in some cases.

1.47. However, government considers that the benefits of this proposal would be case specific and are unlikely to justify the potential risks of premature regulation overall. Government is therefore not proposing to create a new interim measures power for use at the start of markets cases at this time and will keep this decision under review.

1.48. Government encourages the CMA to conduct market investigations as swiftly and effectively as possible, particularly in less complex cases where final remedial action can be taken sooner.

Summary

Government does not intend to give the CMA the power to impose interim measures in market inquiries.

Rebalanced merger control

1.49. Merger control plays an important role in the UK's competition policy. Government wants to ensure that the merger control regime remains well-

balanced by providing the CMA with jurisdiction to scrutinise mergers that are most likely to be harmful while also limiting costs and burden imposed on businesses engaging in economic activity that contributes to productivity, growth, and jobs across the UK.

Improving the jurisdictional thresholds for UK merger control

1.50. Currently, for the CMA to conduct a merger review it must be the case that either

a. the business that is being acquired has a UK turnover of more than £70 million (the "turnover test"); or
b. the merger would result in the creation or enhancement of at least a 25% share of the supply of particular goods or services in the UK, or a substantial part of the UK (the "share of supply test").[11]

1.51. We set out government's continued support for a voluntary, non-suspensory merger control regime, but proposed three changes to current merger jurisdictional thresholds:

a. raising the target turnover test threshold from £70m to £100m to adjust for inflation and preserve the original effect of this test;
b. introducing a new acquirer threshold which would enable the CMA to review a merger if any merging enterprise has a share of supply of at least 25% of a particular category of goods or services supplied or acquired in the UK or a substantial part of the UK, and a UK turnover of more than £100 million; and
c. creating a safe harbour for mergers between small business where the worldwide turnover of each of the merging parties is less than £10m.

1.52. The consultation also sought views on how the share of supply test might be improved to provide greater certainty for business.

1.53. The consultation asked the following questions on this topic:

Q 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?

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

Q Are the estimates and assumptions for the impact of changing the merger thresholds appropriate and how could they be improved?

Mandatory regime

1.54. A majority of respondents agreed with government's preference for a voluntary regime for the main merger regime, although government notes an increased support compared to previous consultations for a mandatory regime with clear,

[11] These thresholds also apply to merger review on public interest grounds via the Public Interest Intervention regime. Slightly different thresholds exist for a small number of public interest interventions as set out in the Special Public Interest Intervention regime.

turnover-based 'bright line' thresholds for establishing the CMA's jurisdiction. Government acknowledges that the benefits of a voluntary regime may be small for mergers which raise potential competition concerns but in light of the considerable overall cost savings to significant numbers of businesses that do not undergo merger review in the UK (unlike in comparable jurisdictions), we will retain a voluntary regime.[12]

Turnover threshold

1.55. Respondents strongly agreed with the proposed increase in the turnover threshold which government will implement.[13]

New threshold

1.56. Responses to the proposed new threshold were mixed. While some stakeholders agreed that there are gaps in the CMA's current jurisdiction and that government's proposal could address these, others questioned the need for a new threshold given the flexibility of the existing thresholds. Many respondents also recommended that if a new jurisdictional test was adopted, the thresholds should be raised, and a clearer UK nexus test established.

1.57. Having considered the representations made, government remains of the view that there is merit in the introduction of a new threshold to provide a more comprehensive and effective jurisdictional basis for certain vertical and conglomerate mergers, in particular so called 'killer acquisitions' that risk the development of new products or services. By giving the CMA necessary powers to investigate such mergers, the acquirer threshold will ensure that competition law continues to protect dynamic and innovative markets, to the benefit of UK businesses and consumers alike. Government also expects the CMA to apply its existing thresholds more predictably once the new threshold is available.

1.58. However, government agrees that it would be more proportionate for the new acquirer threshold to be clearly targeted towards acquisitions by larger businesses and will therefore proceed with this proposal, but with higher thresholds before it applies. Government intends that the new threshold will apply where an acquirer has both:

a. an existing share of supply of goods or services of 33% in the UK or a substantial part of the UK (compared to the 25% threshold consulted on); and
b. a UK turnover of £350m (compared to the £100m UK turnover threshold consulted on).

1.59. Government also agrees that greater clarity should be achieved through the addition of a UK nexus criterion which will ensure only mergers with an appropriate link to the UK will be captured. These amendments will reduce

[12] See the July 2021 consultation *A New Pro-Competitive Regime for Digital Markets* for more information on the new regime for businesses designated with Strategic Market Status.

[13] Government will ensure that the threshold for intervention in media mergers on public interest grounds will continue to be £70m.

costs and burden for businesses that engage in merger activities that are less likely to adversely impact competition in the UK.

1.60. As set out in the consultation, the acquirer-focused jurisdictional threshold will complement the reforms to merger control of firms with Strategic Market Status (SMS) proposed in government's new pro-competition regime for digital markets. More detail on these proposals will be set out in due course in government's response to the consultation for *A New Pro-Competition Regime for Digital Markets*.

Small merger safe harbour

1.61. A safe harbour for mergers between small companies supports government's desire to promote innovation and growth by making it easier for small and micro enterprises to grow and expand. Respondents supported in principle the proposal to exclude from the CMA's jurisdiction all transactions where each party has a small turnover, even if the merger would otherwise qualify for review under the share of supply test. Government will therefore proceed with its introduction.[14]

1.62. Government further considered the appropriate level for the safe harbour in light of feedback received from respondents. Many argued that the threshold should be set higher than the proposed £10m worldwide turnover. A safe harbour at this level would have limited impact as few businesses of this size would ordinarily undergo merger review anyway. Government also received feedback from businesses and legal advisers during the consultation that a safe harbour set by reference to UK turnover rather than worldwide turnover would provide greater certainty for so called 'foreign to foreign' mergers involving overseas businesses with little or no UK turnover. The CMA on the other hand, while supportive in principle, suggested that the proposal could lead to mergers with a potential adverse impact on UK consumers being exempt from review. It therefore advocated a lower threshold.

1.63. Government seeks to appropriately balance the benefits of reducing the regulatory burden on small and micro businesses with the costs of removing potentially harmful mergers from jurisdiction. Government will therefore proceed with a safe harbour set at £10m UK turnover (rather than worldwide turnover). Government believes that setting the threshold by reference to UK rather than global turnover will be more effective in delivering government's key objective of supporting small and micro businesses to grow and thrive. Government also notes the feedback received that this would help provide additional certainty about the application of the UK's merger regime to 'foreign to foreign' mergers involving overseas businesses with little or no UK turnover. At the same time, government considers there to be limited harm to consumers due to the nature and size of affected mergers. In the past, the CMA intervened in only a very small number of mergers meeting the proposed safe harbour criteria.

[14] Public interest interventions in media mergers will be exempted from the small merger safe harbour.

Share of supply test

1.64. Many respondents welcomed government's call for input on how the existing share of supply test could be improved and raised significant concerns about its current operation which creates unpredictability and thus imposes considerable burden for businesses. Some respondents supported the replacement of the share of supply test, while others recommended a range of potential amendments. Despite a range of options proposed there was no clear view among respondents on the best way to reform the share of supply test.

1.65. Government recognises the importance of a proportionate and effective regime that balances the benefits of predictability in merger control with the benefits of jurisdictional thresholds that enable review of potentially harmful mergers in the UK. Government believes that concerns about the share of supply test need to be assessed in this context and that it is important not to discount the overall benefits of the UK's merger control system, which allows the vast majority of mergers to proceed without being notified to or reviewed by the CMA.

1.66. The lack of clarity on how the share of supply test should be reformed means it would be premature to set out proposals for reforming the share of supply test at this time. However, in light of the concerns raised by respondents, government will continue to monitor the operation of the share of supply test and may consider further reforms at a later date.[15]

Impact assessment assumptions

1.67. There was a limited response to the questions about the assumptions we used in our impact assessment, on the costs of merger review to businesses. However, stakeholders who did respond stated that the assumptions on the costs to business of merger review were underestimated. In light of this we have been gathering further evidence which will be reflected in updated assumptions in the impact assessment published alongside the legislation.

Summary

Government intends to implement the proposed increase in the turnover threshold and the introduction of the new jurisdictional threshold. In response to representations made, government will target this threshold more clearly by increasing the threshold levels and through a UK nexus criterion.

To reduce the burden on small and micro enterprises, government will introduce a small merger safe harbour, exempting mergers from review where each party's UK turnover is less than £10 million. Government will also continue to monitor the operation of the share of supply test and may consider further proposals on how to reform it.

[15] Reforms to the share of supply test would be implemented by secondary legislation.

Government has reviewed the assumptions used in the impact assessment following stakeholder feedback that the assumed costs of merger review to business were underestimated.

Merger investigation procedures

1.68. The voluntary and non-suspensory nature of the UK merger control process reduces costs and burden on businesses and the CMA alike. However, government continues to seek ways to improve efficiency and reduce costs to businesses undergoing merger review. With the aim of delivering a streamlined and efficient merger control regime, government sought feedback on a range of potential procedural reforms:

a. Allowing the CMA to agree binding commitments earlier during Phase 2;
b. Restricting the CMA to refer only the issues that are identified at Phase 1;
c. Introducing a new 'fast track' merger route;
d. Reducing unnecessary delays at Phase 2 via changes to timeline extensions; and
e. Publishing the Merger Notice on the CMA's website.

1.69. The consultation asked the following question on this topic:

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

General comments

1.70. Respondents were supportive of government's proposals to reform aspects of the CMA's procedures to make these quicker and more efficient, noting that there has been a general increase in length and burden of UK merger reviews in recent years. Government believes that one of the reasons for the CMA's increased scrutiny in pre-notification and Phase 1 is a desire to avoid unnecessary Phase 2 references and the costs these bring to both the CMA and the merging parties themselves. Government encourages the CMA to keep its merger review procedures under review to strike the right balance between minimising the burden on businesses undergoing merger activity, ensuring swift clearances of unproblematic mergers and maintaining effective scrutiny where required. Particular attention should be given to the burden the CMA's review places on micro, small and medium sized businesses.

Allowing the CMA to agree binding commitments earlier during Phase 2

1.71. Respondents were supportive of the proposal to allow the CMA to agree binding commitments earlier during Phase 2, with a view to resolving such investigations earlier where possible. Government will introduce a more flexible Phase 2 commitments procedure to allow the CMA and the merging parties to resolve a merger investigation at any stage of the Phase 2 process.

This would apply to mergers reviewed on competition grounds and exclude Public Interest Intervention cases[16].

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

1.72. While a number of respondents agreed this proposal could make some Phase 2 investigations more efficient, others questioned whether government's proposed option of restricting the scope of Phase 2 investigations to the issues identified at Phase 1 could lead to unintended consequences, including the need for greater and more time-consuming scrutiny of mergers in Phase 1. In light of the feedback received government has decided not to proceed with this reform.

A new 'fast track' merger route

1.73. The proposal for an enhanced 'fast track' received widespread support from respondents. Government intends to put the existing non-statutory 'fast track' procedure on statutory footing, giving the CMA discretion to automatically refer a merger straight to Phase 2 where the merging parties have requested this. In these cases, the CMA will be able to make a Phase 2 reference without the need to consult on the reference or issue a reasoned decision. Merging parties will not need to accept that the merger may create a substantial lessening of competition. Appropriate safeguards will, however, be introduced to prevent potential Public Interest Intervention cases from being 'fast tracked' and thereby escaping proper scrutiny of the public interest issues they may raise[17].

1.74. Government has opted to proceed with a more flexible model for the 'fast track' than the option consulted on. This will not set a cut-off point in legislation and will allow parties to request a 'fast track' referral at any stage of pre-notification and the Phase 1 investigation (as opposed to requests having to be made prior to the Phase 1 investigation commencing). Government will allow the CMA to retain final discretion over whether to accept a 'fast track' referral request. Government anticipates the CMA will provide further guidance on how and when it expects this new fast track procedure to be used in practice.

1.75. Where a case has been 'fast tracked', government intends to ensure that sufficient time exists for a full Phase 2 investigation including the types of information gathering normally conducted during the Phase 1 investigation. Ordinarily, the existing timetable should suffice. However, where this isn't the case, the CMA will be able to extend the timetable for up to 11 weeks (as opposed to 8 weeks during an ordinary Phase 2 investigation that was preceded by a Phase 1 investigation). Respondents generally agreed with this

[16] On grounds of plurality and other considerations relating to newspapers and other media, the interest of maintaining the stability of the UK financial system, or the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies. As of 4 January 2022, the National Security and Investment Act introduces a new regime to review mergers on national security grounds. The National Security and Investment Act regime will be unaffected by reforms outlined in this document.
[17] See previous footnote.

proposal and noted that it would not nullify the timing benefits of the 'fast track'.

Reducing unnecessary extensions at Phase 2

1.76. Stakeholder responses to government's call for evidence on timeline extensions were mixed. Many stakeholders were in principle supportive of a more efficient use of extensions. However, there was no clear view on how this could be best delivered. Some stakeholders also noted the relative inflexibility of timetables in the UK compared to the US and EU and suggested that there could be situations where longer or more flexible extensions may be beneficial, not just for the CMA but also the merger parties themselves, particularly to facilitate cooperation with the CMA's international counterparts.

1.77. Government recognises that speed is a concern for parties undergoing merger review. However, government also note the views expressed by some stakeholders that those who undergo merger review and are faced with a final decision whether their merger can proceed tend to prioritise quality and fairness of decision-making over speed. While Government is keen to avoid unnecessary delays, government does not want to reduce flexibility in timetabling to the potential detriment of both the CMA and the merger parties.

1.78. Given the lack of a clear consensus on changes to extensions government does not propose to make any changes to the CMA's procedures for using extensions. However, in the interests of encouraging timely resolution of Phase 2 investigations, government encourages the CMA to keep its use of extensions under review to ensure that it remains proportionate and appropriate to the cases under consideration.

Publication requirements in the Gazette for merger notice

1.79. Respondents agreed with the proposed replacement of the requirement to publish the prescribed form of the Merger Notice in the London, Edinburgh, and Belfast Gazettes with a requirement to do so on the CMA's website which government will implement.

Summary

Government intends to deliver more effective and efficient merger investigations by a) enabling binding undertakings earlier in Phase 2, b) enhancing and streamlining the merger 'fast track' procedure and c) updating how the CMA is required to publish its merger notice.

Government will not at this time restrict the CMA to refer only the issues that are identified at Phase 1 or make changes to timeline extensions.

Government encourages the CMA to keep its merger review procedures under review to ensure that these remain proportionate and appropriate to the cases under consideration, in particular regarding non-statutory pre-notification procedures and when dealing with small and medium-sized businesses.

Streamlining CMA Panel decision making

1.80. The CMA Panel plays a key role in market investigations and Phase 2 merger reviews. Its members are appointed by the Secretary of State for Business, Energy and Industrial Strategy and act as independent 'fresh pair of eyes' in these stages of CMA investigations.

1.81. With a view to increasing the speed and quality of decision making, government consulted on two potential changes to the CMA Panel:

a. Size and composition: Creating a smaller pool of dedicated Panel members for whom work on the CMA's Panel is their primary employment.
b. Role: Revising the role of the smaller number of Panel members to making final decisions on theories of harm and remedies.

1.82. The consultation asked the following questions on this topic:

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

1.83. Consultation responses indicated a broad consensus around the benefits of the CMA Panel model. Its independence and wide range of experience is generally considered to be a key contributor to trust in the wider competition regime and respondents were not supportive of any changes that would put the independence of the Panel – or its perception as such – into question.

1.84. A majority of respondents agreed that there was scope for the Panel's operations to become more efficient, but many questioned whether the proposed legislative changes were the best way to achieve this objective.

1.85. With regards to reducing the number of Panel members, many respondents generally agreed that this would likely increase the individual Panel member's familiarity with the CMA's processes and that this, in turn, may lead to faster and more effective decisions.

1.86. However, concerns were raised about the unintended consequences this change might have for the range of experience and diversity of members recruited to such a reformed Panel. Businesses in particular noted that this proposal may impact the key benefits of the Panel model by risking reducing the sectoral mix and diversity of the current Panel, making Panel membership less attractive for those with expertise in business and reducing its perceived independence. Some respondents also noted that a smaller Panel could risk creating delays due to diary clashes rather than speeding up the process.

1.87. A few respondents – including notably the CMA itself – suggested a 'hybrid' Panel model, where a smaller group of Panel members work primarily for the CMA but are supplemented by a larger pool of part-time Panel members who can bring a broader set of skills and experience.

1.88. In light of consultation responses, government does not intend to make any immediate changes to the size and make-up of the Panel but will work with the CMA to consider potential changes to the Panel recruitment process and future members' terms and conditions. In doing so, government will reflect on the merits of a 'hybrid' Panel model and how the Panel's diversity and breadth of experience can be further improved.

1.89. With regards to changing the role of the CMA Panel, many respondents were concerned by the proposal to focus Panel members on making final decisions on theories of harm and remedies rather than the Panel overseeing the whole investigation. While some respondents recognised that day-to-day matters may best be dealt with by CMA staff, respondents felt that limiting the role of the Panel in this manner could restrict independent Panel members' ability to oversee relevant investigations and reduce the checks-and-balances provided through this role. It was also noted that a change in the Panel's role may inadvertently create delays if Panellists had to decide upon theories of harm and remedies having only joined the case at a late stage.

1.90. Government remains of the view that there are advantages to the day-to-day running of an investigation being the responsibility of the CMA's case teams. However, government recognises that this does not preclude Panellists having an oversight role throughout the investigation. Government will therefore not be making any statutory changes to the CMA Panel's role in market and merger investigations at this time.

1.91. Government encourages both the CMA and Panellists to consider if there are ways in which the overall efficiency of the investigative process can be improved. Where appropriate, government will work with the CMA to consider whether any non-legislative changes to CMA processes and procedures should be taken forward to streamline decision-making.

Summary

Government recognises the key role of the CMA Panel as independent 'fresh pair of eyes' in CMA merger and market investigations and reiterates its support for the retention of the Panel model.

Government will not at this time take forward legislative intervention to change the size or role of the Panel. We will work with the CMA where appropriate to consider potential non-legislative changes to the Panel recruitment process, future members' terms and conditions and CMA processes and procedures.

Stronger and faster enforcement against illegal anticompetitive conduct

1.92. UK competition law prohibits firms from colluding to restrict or distort competition (the 'Chapter I prohibition') or abusing a dominant market position (the 'Chapter II prohibition'). These prohibitions are fundamental to free markets. When competition law is breached, businesses and consumers suffer from higher prices and poorer choice, and the economy suffers from lower productivity, innovation, and growth.

1.93. Government set out in the consultation its commitment to the UK having a tough and efficient competition enforcement regime to deter, detect, investigate, penalise, and remedy breaches of competition law. With effective

competition law enforcement, businesses can operate in the knowledge that they are protected from dominant businesses using unfair means to stymie competition and will not have to deal with cartels restricting growth.

The territorial scope of the Chapter I and Chapter II prohibitions

1.94. Government set out its concern in the consultation that conduct taking place outside of the UK can harm competition and consumers within the UK. The consultation therefore set out proposals for amending both the Chapter I prohibition and the Chapter II prohibition to expand their territorial scope. In respect of the Chapter I prohibition – which prohibits agreements which restrict competition in the UK - the consultation sought views on amending the prohibition so that conduct implemented (or intended to be implemented) outside the UK may fall within the scope of the prohibition depending on the effects of the conduct. Similarly, in respect of the Chapter II prohibition – which prohibits the abuse of a dominant position – the consultation sought views on amending the prohibition so that it may apply to conduct by a dominant undertaking who does not have dominance in the UK, depending on the effects of the conduct.

1.95. The consultation asked the following question on this topic:

Q 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?

1.96. The majority of respondents were supportive of updating the territorial scope of the UK's prohibitions. Some respondents saw a stronger rationale for updating the Chapter I prohibition than the Chapter II prohibition and regarded the proposed amendment to the Chapter II prohibition as unnecessary.

1.97. Government agrees that, at the present time, the case for expanding the territorial scope of the Chapter I prohibition is more compelling than for the proposed change to the Chapter II prohibition. It is less clear that a significant enforcement gap arises from the requirement that the business in question have a position of dominance within the UK. Government therefore intends to proceed with updating the territorial scope of the Chapter I prohibition only.

Summary

Government intends to amend the Chapter I prohibition so that it can apply to agreements, concerted practices and decisions which are implemented outside of the UK, depending on the effects of the conduct within the UK. This will not alter the application of the Chapter I prohibition to conduct which is implemented in the UK.

Leniency and whistleblowers

1.98. The consultation sought views on the tools of the UK competition regime for identifying illegal anticompetitive conduct. In particular, it sought views on the

incentives for businesses and individuals to notify competition authorities of illegal conduct.

1.99. Government asked for views on whether the risk of private liability for infringements of competition law risked disincentivising businesses from providing evidence of cartel activity and cooperating with the public enforcement process. If so, it asked for views on creating additional immunity from private damages claims for businesses which obtained full immunity in the public enforcement process. Government also sought views on whether improvements could be made to the legal framework governing the treatment of individual whistleblowers in the competition enforcement regime.

Q 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?

1.100. Government received mixed views on the merits of these proposals.

1.101. In relation to the leniency reforms, many respondents considered that there was a relationship between the incentives to apply for leniency and the exposure to liability for private damages. Some respondents said that the potential exposure to damages was only one factor amongst others that weighed against applying for leniency. Others noted that certain changes introduced in 2017[18] to protect leniency recipients in follow-on damages action had not had time to take effect, and that additional protections were premature. Some respondents questioned the existence of clear evidence that potential exposure to damages was a disincentive for leniency applicants. Some respondents argued that the reported decline in the number of leniency applications may be attributable to a reduction in conventional cartel conduct, rather than the growth of private actions.

1.102. With regard to the wider effects of the policy, some respondents noted that it risked businesses and consumers harmed by cartel conduct being under-compensated in circumstances where the members of the cartel without public immunity were not able to pay full compensation. Others expressed a broader concern that policy was 'too generous' to holders of public immunity

1.103. Private enforcement of competition law can complement public enforcement by adding additional deterrence for illegal conduct, and by providing redress for businesses and consumers harmed by anti-competitive practices. However, in certain instances, public and private enforcement may be in tension. Leniency is one such area.

1.104. Applications for leniency are a key tool in detecting and taking enforcement action against cartels. For this reason, the CMA's current leniency programme can offer substantial benefits for the company that is the first to report a cartel, including full immunity from monetary penalties, criminal prosecution and

[18] The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, https://www.legislation.gov.uk/uksi/2017/385/contents/made

director disqualification. At the same time, the ability for those harmed by cartels to obtain redress may act as a disincentive to apply for leniency. There are already measures in the current legal framework to manage this tension. These include restrictions on the disclosure of leniency statements in private actions, and qualifications to the joint and several liability of leniency parties holding full immunity from monetary penalties.

1.105. Government's view is that where there is a tension between public and private enforcement against cartels, there are strong reasons to prioritise public enforcement. Without effective public enforcement (which often relies on leniency to bring otherwise secret cartel behaviour to light), there is only a small prospect of businesses and consumers obtaining redress for the cartel's conduct. Rights to be compensated for cartel conduct risk becoming abstract if they frustrate the public enforcement process which identifies secret cartel conduct in the first place.

1.106. Government recognises that there is mixed evidence on the extent to which leniency programmes are frustrated by the private damages regime, and that more time may be needed to observe any effects of the changes introduced in 2017. For these reasons, government considers it may be premature to confer a private immunity on to holders of public immunity via a cartel leniency programme at this time. Government therefore does not currently intend to implement this proposal but will keep the effect of the private damages regime on leniency programmes under review, as part of the UK's commitment to the prioritise effective enforcement against cartel activity.

1.107. More limited feedback was received with respect to the protection of individual whistleblowers in the competition law enforcement process. Some respondents questioned whether the proposed bar on disclosure of the whistleblower's identity, unless the CMA relied on their evidence, would offer material reassurance to those individuals concerned about the protection of their identity. Limited suggestions were received on alternative reforms to the legal framework applying to whistleblowers in the enforcement process. Consequently, government does not intend to introduce new rules governing how individual whistle-blowers are handled in the competition enforcement regime at this time. Government may revisit this position if further evidence comes to light that the current disclosure rules are discouraging whistleblowers.

Summary

Government does not intend to introduce, at this time, a new immunity from private liability for holders of guaranteed immunity from public sanction.

Government does not intend to proceed with changes specific to the legal framework governing how individual whistleblowers are handled in the competition law enforcement process at this time.

Strengthening the CMA's interim measures powers

1.108. The consultation sought views on updating the legal framework for the CMA to apply interim measures in the course of Competition Act cases. It sought views on providing that appeals against interim measures decisions be determined according to the principles of judicial review, rather than by considering the full merits of the CMA's decision. The consultation also sought views on amending the rules governing the CMA's disclosure obligations when making interim measures decisions.

1.109. The consultation asked the following questions on this topic:

Q 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?

1.110. Respondents recognised that interim measures had an important role in competition enforcement, and some shared government's concern that the infrequency with which interim measures were applied suggested that the current framework for the tool was unsatisfactory.

1.111. The majority of respondents, particularly law firms, were opposed to any change to the standard by which appeals against interim measures decisions are determined. Respondents said businesses should have strong rights to challenge the CMA's decision, given the significant impact that interim measures could have on the business concerned. A number of respondents questioned the evidential basis for considering that full merits appeals were a contributing factor to the infrequency of interim measures. However, there was support from some consumer groups, academics and businesses, for government's proposal that appeals against interim measures should be determined by the principles of judicial review, to ensure it is a practicable tool for protecting competition.

1.112. Interim measures may be particularly important for protecting competition in fast moving markets, such as technology and digital markets. During the consultation government heard from several stakeholders who argued that interim measures have been significantly underutilised by competition authorities around the world when investigating potential competition infringements. While the new pro-competition regime for digital markets may address the impacts that conduct of SMS firms specifically may have in such markets, the importance of swift protective action to prevent harm to competition or consumers in UK markets is by no means limited to the conduct of those firms who may have SMS status. Government is therefore concerned to ensure that there is an effective framework for the application of interim measures in competition cases.

1.113. Appeals are an important part of that framework. There is a risk that the CMA applies interim measures in circumstances that might ultimately prove unnecessary. The system for appeals against interim measures decisions serves the important objective of reducing and correcting these errors, and ensuring that interventions in a business' conduct are justified.

1.114. At the same time, the framework for imposing and reviewing interim measures must be proportionate. If the framework is designed to avoid errors, without

regard to the time and resources required to apply interim measures, there is a risk that interim measures are not applied when they would be warranted and would serve an important public purpose.

1.115. Government considers that the current framework prioritises the prevention of interim measures being applied erroneously, without sufficient regard to the risk that interim measures are not applied when they are warranted. In particular, government intends to amend the framework so that appeals against interim measures decisions should be determined according to the principles of judicial review, for the following reasons.

1.116. Speed matters in interim measures. Full merits appeals are intrinsically likely to involve a closer appraisal of the CMA's decision, involving narrower margins of discretion compared to judicial review. Applying interim measures is likely to take longer and be less efficient if subsequent appeals are determined according to the merits of the decision.

1.117. In addition, a decision on whether to apply interim measures involves a significant degree of technical judgement on the facts of an individual case. Among other things, it involves balancing the likely harms of the conduct in question against the costs to businesses to determine whether interim measures are necessary and proportionate. It is not necessary to come to a definitive view on the proper interpretation of the competition law prohibitions in order to apply interim measures; it is sufficient to have reasonable grounds to suspect an infringement. Given these particular features of interim measures decisions, government does not believe that the CAT's assessment of whether interim measures are necessary should be given greater weight than the assessment of the expert economic regulator.

1.118. Government therefore considers it would be more proportionate and appropriate to require that appeals against interim measures decisions are determined according to the principles of judicial review, and that such a change would retain the important role of appeals in reducing and addressing errors.

1.119. With regard to the CMA's disclosure obligations in applying interim measures, a majority of respondents were opposed to a system where the CMA was only obliged to provide the reasons for its decision, without the business concerned having access to the underlying evidence. They argued that access to underlying evidence was an important component of a business's rights of defence, with access to evidence relied on by the CMA being particularly important.

1.120. Government recognises the importance of businesses understanding the reasons for the CMA's proposed decisions, so that they may respond and present their own case. Without processes which enable such representations, the CMA risks taking erroneous decisions. However, as noted above, interim measures do not involve a finding of illegality or the imposition of a sanction. Rather, interim measures are primarily about preserving the status quo or mitigating harm while an investigation proceeds. In this regard, interim measures are more akin to Interim Enforcement Orders and other regulatory interventions under the CMA's merger control and market inquiry tools. Like these tools, it is entirely appropriate for the CMA to provide an

affected party with the reasons for its decision without needing to necessarily provide access to all of the underlying documentation and other evidence.

1.121. Providing an opportunity for businesses to inspect the CMA's file places a significant burden on the use of interim measures. This is especially the case where the CMA may have obtained a large number of documents from third party businesses, which require filtering for sensitive commercial information prior to disclosure. Government therefore intends to amend the rules governing how the CMA provides access to its case file when taking interim measures decisions, to deliver a faster and more proportionate process.

1.122. Taken together, these reforms should allow the CMA to apply interim measures quickly and efficiently where necessary on the facts of a case and should not be deterred from using this important tool on the basis that it would require the outlay of excessive time and resource.

Summary

Government intends to proceed with providing that appeals against the CMA's interim measures decisions are determined by reference to the principles of judicial review.

Government intends to amend the rules governing how the CMA provides access to its case file when taking interim measures decisions, to achieve a more proportionate process.

New evidence gathering powers

1.123. Government proposed reforms to strengthen and expand the CMA's investigative powers in Competition Act investigations, including:

a. Broadening the power to interview individuals as part of Competition Act investigations, so it aligns with the existing powers in the Enterprise Act 2002.
b. Introducing a duty to preserve evidence in all Competition Act investigations analogous to that which exists in the context of the cartel offence.
c. Giving the CMA powers to 'seize-and-sift' evidence when it inspects a domestic premises under a warrant.

1.124. The consultation asked the following questions on this topic:

Q Will the reforms in paragraphs 1.171 to 1.175 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

1.125. Respondents generally recognised the importance of agencies having the necessary tools to carry out competition investigations in a timely and effective manner and considered them sensible, provided that appropriate safeguards are in place. These include the availability of all the appropriate rights of

defence and due process. However, there were some respondents who raised concerns on these proposals.

Wider powers to interview relevant witnesses

1.126. On the proposal to widen the CMA's powers to interview relevant witnesses, while some respondents welcomed the alignment with the CMA's powers with its existing powers under the Enterprise Act 2002 and the powers of other UK regulators such as the Financial Conduct Authority (FCA), others argued that Competition Act investigations have significant differences which necessitate the need for different powers. For example, it was noted that, if as a consequence of the attendance of witnesses who do not have a connection to a business under investigation, the identity of the businesses being investigated is made public, this could be hugely prejudicial to the businesses under investigation and have a significant impact on those businesses' affairs.[19] Other respondents noted that, if government proceeds with this proposal, clear guidance needs to be given as to when the CMA can exercise this power and, in particular, the rights of the individual to obtain proper legal representation before any such interview.

1.127. While noting the feedback received, government intends to proceed with this reform. The restriction of interview powers to individuals with a connection to the businesses under investigation has proved too restrictive and has raised challenges in previous Competition Act investigations. Indeed, the fact that some third parties may have incentives not to cooperate with the CMA's investigation underlines why government believes this reform is required. However, government agrees that the CMA should use this tool fairly and proportionately.

More effective requirements for businesses to preserve evidence

1.128. On the proposal to introduce a duty not to destroy evidence in Competition Act investigations, some respondents commented that this power would be unnecessary, as initial information notices are already broad and undertakings under investigation will halt document destruction processes. Other respondents argued that, should government proceed with this proposal, it should only introduce civil, and not criminal, sanctions for any breach. Respondents also noted that extending the current duty (where businesses that have been required to produce documents to the CMA for the purposes of a Competition Act investigation must not destroy the requested documents) to circumstances where a person suspects that an investigation is likely to be carried out may create too much uncertainty, particularly if criminal sanctions are being imposed for breach. Others commented that it could increase the burden on businesses given that, unlike the cartel offence which is designed to apply in a clear-cut manner to clearly defined misconduct, the Competition Act prohibitions are less clear in scope, especially as case law develops. Therefore, there is potential to impose open-ended document preservation obligations on undertakings in circumstances where it is difficult to assess the

[19] Government notes that the CMA intends to name the parties more routinely when opening its investigation proceedings so these types of concern are less likely to arise in future.

risk that an investigation might be launched at some unspecified point in the future, or the scope of that investigation if it is launched.

1.129. While noting the feedback received, government remains of the view that this reform is appropriate. Modern digital technology means relevant information is often held in disparate locations and may be under an individual's personal control. It is important that the CMA has robust tools to help ensure this information is preserved. Government reiterates its intention that, as for the cartel offence, the prohibition should be applied proportionately and would only apply where it could be shown that the person knew there was an ongoing investigation, or suspected that an investigation was likely to be carried out. In light of the feedback received government intends to introduce civil, but not criminal penalties for breaches of this obligation in Competition Act investigations.

More flexible powers of inspection for domestic premises

1.130. Finally, in relation to the proposal to give the CMA powers to 'seize-and-sift' evidence when it inspects a domestic premises under a warrant, some respondents noted that there is little explanation or justification in the consultation on the reasons that the CMA needs these powers and the practical difficulties it has faced without having them so far. Others noted that these powers could be unduly intrusive, as there is risk of depriving individuals of personal belongings and inadvertently taking personal information.

1.131. On the introduction of 'seize-and-sift' powers when the CMA is inspecting domestic premises under a warrant, government is still of the view that this change would ensure the CMA could conduct efficient and timely inspections, as well as reduce disruption for those under investigation. In addition, given working patterns are becoming increasingly flexible and allowing employees to work from home regularly, it is even more probable that relevant evidence (which could, for example be stored on either work or personal laptops, phones, and other electronic devices) will now be located in domestic rather than business premises. Hence, the relevance of the extension of the 'seize-and-sift' powers when the CMA inspects domestic premises pursuant to a warrant is becoming more important. Government notes that these powers would be subject to the requirements and safeguards of section 28A of the Competition Act 1998, which only allow the CMA to enter domestic premises under a warrant.

Documents stored remotely

1.132. In addition to the issues consulted on, government also intends to strengthen the CMA's powers to obtain electronic information stored remotely (e.g., in the cloud) when executing a warrant under both sections 28 and 28A of the Competition Act 1998. This will safeguard the CMA's ability to conduct its investigations effectively given the increasing trend for businesses of all sizes to store documents and other information remotely.[20]

[20] See relevant recommendation in Chapter 16 of the Law Commission's Report on Search warrants, published in October 2020.

Summary

Government intends to:

- **broaden the power to interview individuals as part of Competition Act investigations, so it aligns with the existing powers in the Enterprise Act 2002.**
- **extend the legal duty to preserve evidence that exists in the context of investigations into the cartel offence to all Competition Act investigations.**
- **give the CMA powers to 'seize-and-sift' evidence when it inspects a domestic premises under a warrant.**
- **strengthen the CMA's powers to obtain information stored remotely when executing a warrant.**

Settlement and voluntary redress

1.133. The ability for the CMA to use voluntary resolution procedures can help achieve significant efficiencies in Competition Act investigations, resolving investigations sooner, and freeing up its resources to open more cases. The consultation therefore sought views on how to improve the use of voluntary resolution in the enforcement regime.

1.134. In particular, the consultation asked whether improvements could be made to the existing settlement tool to ensure it leads to maximum efficiencies. It asked whether the making of settlement admission binding on businesses could lead to efficiencies. It asked for views on whether it would be desirable to have a new mechanism for businesses to resolve abuse of dominance investigations, without admitting liability for an infringement.

1.135. The CMA has an existing ability to provide approval for a voluntary redress scheme established by businesses to compensate for harm caused. However, it is still possible for a business operating such a scheme to face a civil claim for damages. In these circumstances, documents prepared for the purpose of obtaining the CMA's approval of the scheme may fall to be disclosed in response to any civil claim. The consultation sought views on whether protecting such documents from disclosure in civil litigation may encourage the adoption of CMA-approved voluntary redress schemes.

1.136. The consultation asked the following questions on this topic:

Q 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?

Q 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?

1.137. Respondents supported efforts to ensure that the settlement process allowed for maximum efficiencies to be achieved, including the use of short-form decisions if possible. Respondents also recognised that certain efficiencies could follow specifically from the admissions businesses make through the settlement process being made binding.

1.138. On 10 December 2021, the CMA updated its guidance on its settlement procedures, to set out that it will only agree to settlement with a business, if the business agrees that it will not subsequently appeal against the infringement decision, including any financial penalty imposed. The purpose of this change to its guidance was to ensure that settlement achieves finality in the enforcement process. In light of these developments, government considers that rather than introducing further rules into primary legislation at this time, the changes the CMA has made to its guidance should be given an opportunity to take effect. Government does, however, intend to review the relevant secondary legislation and, if applicable, revise the CMA Rules[21] to allow the CMA greater autonomy to implement a robust and efficient settlement process.

1.139. Respondents had mixed views on the proposal for early resolution agreements. Respondents agreed that an admission of illegal conduct was a significant impediment to businesses seeking early resolution with the CMA as an admission exposed the relevant business to greater risk of liability for damages. For some, the proposed early resolution agreements therefore represented an opportunity for significant efficiencies in resolving potentially lengthy investigations into breaches of the Chapter II prohibition. For others, the increased speed of concluding these investigations would be disproportionate to the loss of deterrence. Further, some respondents noted that increasing the speed at which the public enforcement process could be concluded, would be at the expense of the ability of private parties to bring damages claims who are materially assisted by the business admitting liability or being found to be liable through the public enforcement process.

1.140. Government recognises that early resolution agreements of the type described would involve complex trade-offs between deterrence and speed of public enforcement, and between the speed of public enforcement and the ease of seeking private damages. A new type of early resolution agreement may well enable the CMA to use its resources to conclude a greater number of investigations, but based on the feedback received it is not clear that this numerical increase would represent more effective enforcement capable of deterring similar conduct across the economy. Consequently, while effective enforcement against abuses by dominant companies remains a priority overall, government has decided that it is not going to prioritise these reforms at this time.

1.141. Respondents also had mixed views on the proposal for restricting the disclosure of certain documents prepared by a business as part of operating a voluntary redress scheme. Some respondents agreed that potential for

[21] The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014

disclosure of such documents in damages litigation operated as a disincentive for establishing a CMA-approved voluntary redress scheme. Others disagreed, commenting that there were other, more significant factors which disincentivised participation, such that the policy would not have the intended impact. Some respondents said that notwithstanding the incentives to participate in voluntary schemes, they did not agree with restricting documents from disclosure, where these would be relevant to private damages claims.

1.142. Government considers that placing restrictions on documents which may be disclosed in private action claims can be justified, where it leads to significant enhancements for the public enforcement process. It notes for instance that certain protections from disclosure apply to leniency statements and settlement submissions. However, government considers that it is not clear that the proposal to limit disclosure of such documents would have significant impacts on the take up of voluntary redress schemes. Government therefore does not intend to prioritise this proposal at this time.

Summary

Government intends to review the relevant secondary legislation and, if applicable, revise the CMA Rules to allow the CMA greater autonomy to implement a robust and efficient settlement process.

Government does not intend to:

- **legislate to make settlement admissions made by businesses binding on them as a matter of law.**
- **introduce statutory provision for the proposed early resolution agreements.**
- **introduce new restrictions on the disclosure of documents prepared for the purpose of voluntary redress schemes.**

Access to file and confidentiality rings

1.143. 'Access to file' is the term used in Competition Act investigations for businesses to be given access to the evidence the CMA has obtained. Access to file can be a time-consuming process because it can involve very large numbers of documents, in relation to which it is necessary to balance the need to disclose relevant evidence, with the need to protect sensitive commercial information. Depending on the size of the CMA file this process can often take a team of CMA staff months to complete. The CMA and other concurrent regulators have estimated that the access to file process has been responsible for up to a third of the total man hours required for some investigations.

1.144. The consultation sought views on the legal arrangements for the operation of confidentiality rings with a view to increasing the efficiency of these

processes.[22] In particular, government proposed that a prescribed legal framework for the use of confidentiality rings may increase the efficiency of using confidentiality rings in a given case. As part of the new legal framework, government proposed that civil sanctions should be available in circumstances where the rules for confidentiality rings are breached.

1.145. The consultation asked the following question on this topic:

Q 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?

1.146. Respondents were generally supportive of measures to make access to file more efficient in Competition Act investigations. Respondents considered that a new framework for the use of confidentiality rings would need to maintain a degree of flexibility to adapt to the specific circumstances of different cases. Respondents had mixed views on the proposal for civil sanctions for breaching the terms of confidentiality rings. Some considered it would not be proportionate, while others considered civil sanctions would be reasonable means of protecting third party confidential information.

1.147. The response to the consultation supports government's assessment that confidentiality rings provide an effective means of reducing the burden of access to file on both businesses and the CMA. Government intends to proceed with legislative changes to support a more standardised approach to the use of confidentiality rings, so that it is simpler and faster for the CMA to use these tools.

1.148. Additionally, government considers that confidentiality rings are likely to be most effective when the CMA and those participating in investigations trust that their terms will be abided by. Government therefore intends to proceed with the proposal to introduce civil penalties for breaches of confidentiality ring terms, to ensure the CMA has the most effective tools for enforcing the terms of confidentiality rings. Government recognises that the civil penalties should be designed to incentivise the adoption of robust compliance procedures by members of the confidentiality ring, and the reporting and remedying of breaches if they do occur. In particular, government intends that prompt reporting and, where applicable, rectification of unauthorised disclosures should be a defence to less serious breaches of the confidentiality ring.

Summary

Government intends to introduce a new statutory framework for confidentiality rings in Competition Act cases. This will include civil

[22] Confidentiality rings are arrangements where documents are disclosed to specified persons (such as a business' external lawyers), with those persons agreeing that they will not share details of the documents with other people The documents are placed within a 'ring', with certain people on the inside, and others on the outside. Those inside the ring can then review the documents and decide whether they require disclosure to others outside of the ring (such as to their clients). Confidentiality rings can save time and resources because disclosing documents only to certain individuals can significantly reduce the likelihood the disclosure causes harm. The CMA is therefore relieved of the burden of considering commercial confidentiality for each document.

penalties to ensure that the CMA has the tools necessary to protect confidential information disclosed into the confidentiality ring.

Government is considering whether to extend these arrangements to the CMA's other competition powers.

Revising immunities for small agreements and conduct of minor significance

1.149. A business which infringes the Chapter I prohibition, except for price-fixing agreements, currently has immunity from financial penalties when the parties to the agreement have a combined turnover of £20 million or less (referred to as a 'small agreement'). A business which infringes the Chapter II prohibition currently has immunity from a financial penalty where its turnover is £50 million or less (referred to as 'conduct of minor significance'). These immunities do not prevent the CMA investigating and prohibiting conduct if it is found to be illegal, nor do they prevent private parties from seeking damages for the infringing conduct. The CMA may also give notice to a business that it is withdrawing the immunity going forward.

1.150. The consultation sought views on reducing the turnover thresholds at which these immunities applied. In relation to the immunities for small agreements the consultation also sought views on how these should be applied to businesses party to an agreement in the case of the Chapter I prohibition. These proposals were raised with a view to ensuring a better balance between protections for small businesses and deterrence for breaches of competition law.

1.151. The consultation asked the following questions on this topic:

Q 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?

Q 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?

1.152. Respondents had mixed views on these proposals. Some respondents supported the proposed reductions, on the basis that it would create desirable additional deterrence in smaller markets which despite their size may still be important to consumers. Other respondents questioned whether there was evidence of a lack of deterrence or 'enforcement gap' in respect of small markets, to warrant an increased threat of financial penalties.

1.153. Respondents also had mixed views on whether the immunity for small agreements should apply on the basis of an individual business's turnover. Some respondents supported the proposed change arguing that it would be easier for a business to know if it had immunity if it depended on its individual turnover. Other respondents argued that the status quo - where immunity depends on the combined turnover of all parties to an agreement - avoids an undesirable scenario where some parties to an anticompetitive agreement enjoyed immunity, while other larger parties to the same agreement did not,

irrespective of culpability. The CMA supported the status quo on the basis that it provided deterrence for smaller businesses from entering into anticompetitive agreements with much larger businesses. It cited as an example a scenario business in an R&D phase which generates a small turnover agrees with a large incumbent business not to commercialise its new product.

1.154. In light of the feedback revised government intends to retain the existing immunity from penalties for small agreements and does not believe there is a clear case for changing this at this time. The immunity will therefore continue to apply to agreements – except for price-fixing agreements – where the combined turnover of all parties to the agreement is £20m or less.

1.155. Government does, however, intend to reduce the turnover threshold for immunity from penalties for conduct of minor significance from £50m to £20m. This will align the two immunity thresholds and ensure that businesses in smaller and local markets are sufficiently deterred from abusing market power to the detriment of other businesses and consumers. Government notes that a dominant company will normally account for at least half a market and that conduct covered by the current immunity from penalties for conduct of minor significance could therefore affect a market worth approximately £100m to UK businesses and consumers. Government believes this is disproportionate and runs counter to government's desire to promote open and competitive markets, including in smaller, emerging sectors and technologies.

Summary

Government intends to reduce the turnover at which the immunity from financial penalties for conduct of minor significance applies, from £50m to £20m.

Government does not propose to make additional changes to immunities from financial penalties for breaches of the Chapter I and Chapter II prohibition.

Decision making in Competition Act cases

1.156. In Competition Act cases after the CMA has issued its provisional findings, the CMA is currently required to appoint at least two relevant persons (as defined in the relevant rules) not involved in the investigation to make the final decision on the case. The CMA gives effect to these requirements through appointing what it terms 'Case Decision Groups' (CDG), which generally comprise a mix of senior CMA staff members and members of the CMA Panel.

1.157. The consultation set out government's preference that the CMA have greater autonomy to determine its decision-making process itself, whilst recognizing that the CMA should make its decisions on Competition Act investigations via a fair and robust process. It therefore sought views on removing the requirement to appoint new decision makers after issuing its provisional decisions in Competition Act investigations.

1.158. The consultation asked the following questions on this topic:

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

1.159. The majority of respondents (primarily businesses and legal advisors) raised concerns about the potential impacts of removing requirements on how the CMA decides Competition Act cases from the secondary legislation. Some respondents took the view that the CMA was likely to use the greater autonomy to adopt decision-making processes which may be faster, but less fair and robust. It was argued that this may allow the administrative phase to conclude more quickly but increased the risk of poor decisions resulting in more appeals.

1.160. While recognising the importance of procedural safeguards, government considers that the CMA will still be strongly incentivised to adopt internal processes leading to high-quality decisions, via a fair process. Government notes that the CDG process was first introduced voluntarily by the Office of Fair Trading (OFT) and only later incorporated into secondary legislation. Different regulators and public authorities already use a range of different decision making models. Government does not agree that granting the CMA greater autonomy to determine these processes is likely to result in a weakening of its decision making or the overall robustness of the UK's enforcement procedures. Additionally, the CMA's infringement decision will still be able to be appealed to the CAT, who will review the merits of the CMA's decision and can, if required, correct any defects (see below). In this context, government considers that the existing statutory controls on the CMA's internal decision-making processes are unnecessary, and it would be preferable for the CMA to be able to determine its own process for taking decisions in Competition Act cases. In turn government will expect the CMA to use this autonomy to deliver its decisions more effectively and efficiently.

Summary

Government intends to remove statutory requirements on who makes the decision on whether to issue an infringement decision in Competition Act cases.

Appeals before the Competition Appeal Tribunal

1.161. Rights of appeal against the CMA's decisions in Competition Act cases are an integral part of the UK's competition law system. The intensity of appeals, including the standard by which the CAT determines appeals, have been an important part of the debate on potential reform. Some – such as Lord Tyrie when chair of the CMA – have argued that the CAT should not determine appeals '*on the merits*'[23], but should instead apply an alternative standard such as judicial review. Lord Tyrie also argued for reforms to the procedures governing competition appeals, to restrict the admissibility of new evidence and the use of oral evidence. Others have strongly opposed Lord Tyrie's

[23] Competition Act 1998, Schedule 8, Paragraph 3

criticism of the current framework for appeals, arguing that a robust appeal process is an important safeguard in an administrative enforcement regime.

1.162. The consultation sought views on the appropriate level of judicial scrutiny of both the CMA's decisions in Competition Act investigations, and the CMA's decisions on non-compliance with investigative and enforcement powers. The consultation also sought views on reforms to the procedures which would increase the efficiency of the appeal process.

1.163. The consultation asked the following questions on this topic:

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

Q 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?

Q 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?

1.164. The vast majority of respondents were in favour of maintaining the status quo, in which the CAT determines appeals against infringement decisions (including decisions on the appropriate financial penalties for infringements) on the merits of the CMA's decision. Respondents argued both that determining these appeals on the merits was necessary as a matter of fairness, that determining appeals on the merits ensured that decisions were predictable and high-quality, and that moving to an alternative standard of review was unlikely to achieve significant efficiencies.

1.165. The appeal system has significant impacts on the operation of the enforcement system as a whole. It does not simply impact on the length of appeals themselves, but also how investigations are conducted from start to finish. As with the case in relation to interim measures, government considers that setting the parameters in which appeals are heard involves a range of factors, requiring careful consideration. Overall, government is not minded to change the standard by which the Tribunal determines appeals against infringement decisions at this time.

1.166. In respect of appeals against decisions imposing penalties for non-compliance with the CMA's investigative measures or remedies (including voluntary commitments and undertakings) government also intends to provide for appeals on the merits.

1.167. Respondents expressed fewer views on reforms to the CAT's procedures and rules. Government is separately reviewing the Competition Appeal Tribunal's rules which were updated in 2015, to assess whether they are delivering their intended objectives. Government will give consideration to whether further reform of the CAT's processes is necessary, incorporating the outcome of this

separate review. Government will consult further before making any reforms to the CAT's rules.

Summary

Government does not intend to vary the standard by which the CAT determines appeals against infringement decisions in Competition Act cases.

Government intends that appeals against decisions imposing penalties for non-compliance with the CMA's investigative measures and remedies are also determined on the merits.

Government will give consideration to whether further reform of the CAT's rules is necessary.

Stronger Investigative and enforcement powers across competition tools

More effective investigative and enforcement powers

1.168. In the consultation, government noted its concern that gaps in the CMA's information gathering powers may have developed over time. To address this government sought views on introducing additional evidence gathering and enforcement powers to ensure the CMA's enforcement capabilities remain effective and in line with international best practice.

1.169. In particular, government consulted on the introduction of the following evidence gathering powers which would be backed by strong sanctions if companies obstruct the CMA's investigations:

a) Tougher penalties for companies that slow down or obstruct cases.
b) Personal accountability for the provision of evidence.
c) A wider prohibition against providing false or misleading information to the CMA.

1.170. The consultation asked the following questions on this topic:

Q 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?

Tougher penalties for companies that slow down or obstruct cases

1.171. Several respondents agreed that the increase of the statutory penalty caps is likely to ensure better compliance with information requests, as responses will likely be more accurate, and parties will be less likely to obstruct cases. Respondents recognised that the previous penalty caps were too low or even

insignificant for large businesses and the penalty levels that government currently proposes will provide a much more significant incentive to comply with the CMA's evidence gathering powers. Hence, several respondents welcomed the proposed penalty caps and contended that this reform would particularly increase the incentive for the biggest global businesses to comply with investigations. This will in turn allow the CMA to reach its decisions more quickly and efficiently.

1.172. However, several respondents did express concerns about this proposal. They argued that further evidence and analysis is needed to justify the introduction of penalties and the penalty levels themselves. Respondents also urged government to consider the impact of the proposal on small businesses. Finally, they argued that there is a risk of delay if businesses or individuals request more time to ensure correct information is submitted.

1.173. Following the feedback received, government remains of the view that the current package of sanctions for non-compliance with investigative measures does not provide effective deterrence. Government also remains of the view that the CMA should have adequate tools to ensure that businesses comply with its investigations and tougher penalties is an important means to achieve effective deterrence. Government will ensure that penalties for breaches are proportionate with a requirement for guidance to be published to ensure there is certainty around how these penalties will be applied in practice.

1.174. Whilst some respondents noted that the evidence base behind these proposals showed that there were few court cases required to ensure compliance, government remains of the view that effective deterrence should also account for the likelihood of enforcement action being brought. Government recognises that most businesses take their responsibilities seriously and that what matters for them is not the financial penalty but the moral or reputational imperative to abide by the law. However, to be effective, a penalty regime should be designed to incentivise compliance in those businesses that are willing to contemplate breaking the law.

Personal accountability for the provision of evidence

1.175. On personal accountability for providing evidence, some respondents acknowledged the importance of involving board members and directors in the provision of evidence as this would ensure standard setting from the top-down and encourage a culture of compliance. However, there were concerns around the practical implications of involving individuals in CMA investigations and requiring personal declarations by directors. Responses largely focussed on the considerable liability burden already imposed on directors. Some responses also noted that this could further obstruct cases as individuals may be more likely to request extended deadlines if they could be held personally liable for any inaccuracies in the information provided, irrespective of whether such delays were likely to improve the quality of information being provided.

1.176. Government is of the view that companies should be complying with information requests and that the information provided to the CMA should be accurate. However, government also acknowledges that the proposal could be particularly burdensome for smaller businesses, which tend to have fewer staff and less resources. This could lead to further delays and obstruction of cases.

Therefore, in light of the feedback received, government does not currently intend to introduce personal accountability for the provision of evidence.

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

1.177. The extension of the current prohibition against the provision of false or misleading information to the CMA (i.e. to also include information provided voluntarily that is unrelated to the CMA's markets, mergers and competition enforcement functions) was also welcomed by some stakeholders, as it was argued that it would ensure greater coherence regarding the CMA's powers, given the prohibition applies to most of the CMA's other functions. However, a number of respondents argued that increased penalties might have negative effects on information being provided voluntarily and urged government to consider the burden of proof required for the application of this provision and the relevance of the seriousness of the breach. Finally, some respondents stated that, should government proceed with this reform, companies should be given a reasonable opportunity to rectify their conduct (e.g., by correcting inaccuracies) and the penalties should not apply retrospectively.

1.178. Government expects business to engage with the CMA and other regulators in good faith and to take their obligations in this area seriously. It is important that information provided to the CMA is complete, accurate and not misleading. However, informal calls for evidence and other forms of information gathering outside of the CMA's formal investigatory tools are important tools for the CMA and government notes the concerns raised by stakeholders about the potential for a chilling effect if this proposal was adopted. On balance, government has therefore decided not to prioritise this reform. Government may however revisit this decision if evidence emerges that businesses are failing to meet the standards expected of them when engaging with the CMA.

Summary

Government intends to proceed with the following reforms:

- **where a business (or any other entity other than a natural person) fails to comply with an investigative measure, including failing to comply with an information request, concealing, falsifying or destroying evidence and providing false or misleading information, the CMA, and the concurrent regulators, should be able impose fixed penalties of up to 1% of a business' annual worldwide turnover, as well as the power to impose an additional daily penalty of up to 5% of daily worldwide turnover while non-compliance continues.**

- **where a natural person fails to comply with an investigative measure the CMA should be able to impose fixed penalties of up £30,000, as well as the power to impose an additional daily penalty of up to £15,000 while non-compliance continues. These are the same thresholds that currently apply to breaches of competition investigative measures that are sanctionable by civil penalties. It is**

also intended that the statutory cap for these penalties should be able to be adjusted by a statutory instrument to ensure they remain relevant over time.

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

1.179. In the consultation, government expressed its concern that the CMA's powers to ensure compliance are insufficient and suggested that the CMA is given the power to impose civil penalties on companies that fail to comply with the CMA's directions, orders, or undertakings or commitments the company has given.

1.180. The consultation asked the following questions on this topic:

Q 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?

1.181. Respondents raised the same issues that they did in the previous question. There were also some concerns that civil penalties might disincentivise parties that are subject to a market study or market investigation to offer binding commitments and bring such investigations to an end, especially in the absence of any significance or materiality threshold (i.e., in case the seriousness of the breach is irrelevant to determine whether there has been a breach). Respondents also noted that CMA guidance would be needed as non-compliance here was usually technical or unintended.

1.182. While noting the feedback received, government intends to proceed with these proposals as outlined in the consultation. The purpose of these reforms is to make the CMA's enforcement powers directly enforceable without relying on the courts. Government also intends to set the threshold for the imposition of civil penalties at the right level to ensure the penalties are proportionate and appropriately align with the nature of the breach. The CMA will be required to issue guidance to ensure there is clarity on how the penalties will apply. Government also intends to set the penalty level at 5% of annual worldwide turnover, in line with the existing civil penalties for interim enforcement orders for mergers to ensure a degree of consistency with the existing regime.

Summary

Government intends to proceed with the proposed reforms and in particular:

- **the introduction of a civil penalty regime for breaching commitments or undertakings, directions, orders or interim measures in line with the existing interim enforcement orders in merger investigations for these penalties. This would mean that the penalty would be capped at 5% of annual turnover.**

- **the introduction of an additional daily penalty of up to 5% of daily turnover of the company's corporate group while non-compliance continues.**

These penalties, and their level, will be appealable by the company affected.

Stronger powers and tools for more effective international cooperation

1.183. Government consulted on two proposals to strengthen international cooperation between overseas and UK competition and consumer authorities and make it more suitable for a post EU-Exit regime.

1.184. The consultation outlined government's intention to update Part 9 of the Enterprise Act 2002 to provide for clearer and more flexible rules for information sharing between the UK's competition and consumer authorities and their overseas counterparts, in line with international best practice. The consultation also noted government's intended aim of facilitating the negotiation of new cooperation arrangements with key international partners.

1.185. Government also outlined its intention to introduce new investigative assistance powers in civil competition and consumer enforcement investigations to allow the UK's competition authorities to use compulsory information gathering powers to obtain information on behalf of overseas authorities.

1.186. The consultation asked the following questions on this topic:

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

1.187. The international cooperation proposals received a positive response, with many respondents acknowledging the importance of maintaining good working relationships with international partners.

1.188. Consultation responses also noted that there should be legal certainty surrounding the protection and use of confidential business information. Most responses noted that cooperation should be subject to clear and defined terms to afford businesses legal certainty on how confidential information would be treated by UK and overseas authorities. More specific responses focussed on building in consent from the parties to the information sharing where possible.

1.189. Some respondents raised concerns around balancing the public interest with the independence of the CMA**.** Most responses acknowledged the benefits of introducing some form of ministerial oversight on a grouped basis (e.g., with ministers potentially approving international agreements before any investigative assistance took place) whilst also maintaining the independence of the CMA on a case-by-case basis. However, some responses noted the importance of excluding from assistance any issues relating to the public interest, specifically those relating to national security.

1.190. Respondents also raised the need for clear conditions surrounding reciprocity and the types of conduct that could be investigated. Some responses noted that investigative assistance should be subject to conditions of reciprocity

(e.g., ensuring a UK request for assistance could similarly be fulfilled by an international partner) and equivalent conduct (e.g., the conduct being investigated by an international partner is similar to that which could be investigated in the UK).

1.191. In line with consultation responses, government proposes to proceed with the proposal to update the UK's legal arrangements to ensure that UK competition and consumer protection authorities can share information more easily with international partners, while still ensuring that confidential business information is properly protected by both the UK and overseas authority.

1.192. Government is also proposing to introduce a simplified approach if an international competition or consumer cooperation arrangement is in place; in these instances, the UK's competition and consumer authorities should be able to share information and cooperate with the relevant overseas authority under the terms of a specific competition or consumer cooperation arrangement. Prior to sharing information with overseas authorities, UK competition and consumer authorities will still be required to assess whether there are public interest reasons why information should not be shared outside the UK and have regard to whether the legitimate interests of individuals and businesses might be significantly harmed.

1.193. Government will also permit the UK's competition and consumer protection authorities to use their compulsory information gathering powers to obtain information on behalf of overseas authorities. Government is proposing that all requests for investigative assistance should be subject to Ministerial approval and that reciprocity should be a default requirement for the use of these powers. However, government also proposes that the Secretary of State for Business, Energy and Industrial Strategy should be able to provide general consent for the provision of assistance which is deemed to be in the UK's interest. For example, if requests are made in accordance with a designated international agreement or for a specific purpose. Requests for assistance will still be subject to statutory safeguards to protect confidential information, as well as public interest considerations.

Summary

Government will ensure that UK competition and consumer protection authorities can share information more flexibly with international partners while still ensuring that confidential business information is protected by both the UK and overseas authority. A more streamlined approach is proposed where an international competition cooperation arrangement is in place.

Government will permit the UK's competition and consumer protection authorities to use their compulsory information gathering powers to obtain information on behalf of overseas authorities. Reciprocity and Ministerial consent are proposed default requirements, with the Secretary of State for Business, Energy and Industrial Strategy being able to

provide general consent where this is in the UK's interest. This will be subject to confidentiality and public interest safeguards.

Other information gathering reforms

1.194. In addition to the proposals consulted on government is also considering modernising the CMA's information gathering powers in relation to the interrogation of algorithms, by strengthening the CMA's powers to test and verify whether the use of algorithms by companies complies with competition law.

Other reforms to the UK's competition law

Private competition claims: declaratory judgments and exemplary damages

1.195. Government stated in the consultation that it proposes to extend the CAT's jurisdiction to grant declaratory relief. Respondents were generally supportive of this proposal. The CAT welcomed the proposal by stating that it will enhance the Competition Appeal Tribunal's ability to deal appropriately with collective proceedings and, more generally, provide an important element of flexibility. Other respondents noted that it is a sensible extension of the CAT's existing jurisdiction, and it will increase certainty to both businesses responsible for the conduct in question as well as prospective claimants.

1.196. Government remains of the view that empowering the CAT to grant declaratory relief would avoid the need for parties to formulate their competition law claims as damages claims, or applications for an injunction, when what would be most helpful is a declaration of how the law applies to the facts of the case.

1.197. An additional proposal raised with government during the consultation was that the courts and CAT should be able to make awards for exemplary damages in private competition law claims, to create additional deterrence for breaching competition law.

1.198. In 2014, The European Union adopted the EU Damages Directive which contained certain rules to coordinate how claims for damages for breaches of EU competition law were to be treated within the EU. The UK implemented the EU Damages Directive into UK law in 2017 and applied its requirements both to the rules governing claims for damages for breaches of EU prohibitions against anticompetitive conduct, and the equivalent UK domestic prohibitions.

1.199. A requirement of the EU Damages Directive was that damages for breach of competition law should result in full compensation, but not 'overcompensation'. When the UK implemented the EU Damages Directive, awards of exemplary damages were therefore prohibited in competition law claims.

1.200. Following the UK's departure from the EU, government intends to return to the courts and CAT the discretion to award exemplary damages in competition law claims, depending on the particular features of the case. Government does not however intend to allow exemplary damages to be awarded in the case of collective proceedings; exemplary damages were prohibited in these

cases before implementation of the EU Damages Directive and for separate reasons.

1.201. Although an award of exemplary damages would only be expected in a limited set of cases, government considers that the possibility of exemplary damages should represent an additional deterrent for particularly egregious breaches of competition law. Further, outside of collective proceedings, government considers that there is no reason for the principles governing the award of damages for breaches of competition law to be different from those that apply for other tortious claims.

Amend the Serious Organised Crime and Police Act 2005 (SOCPA) so that the CMA is a 'specified prosecutor' and can use the SOCPA 'assisting offender' process to enhance its criminal cartel enforcement

1.202. Most respondents did not comment on this proposal. The proposal received criticism from a small number of stakeholders who commented that the CMA has not yet demonstrated itself to be a competent enforcer of the criminal cartel offence or asked for further detail around the application of these powers by the CMA, including the circumstances in which they may be used.

1.203. Government is of the view that the lack of cartel enforcement by the CMA to date is a poor indicator of the future benefits of this proposal. If the CMA is not a specified prosecutor under SOCPA, neither the CMA nor the suspect can benefit from the increased safeguards and transparency this brings. Designating the CMA as a specified prosecutor under SOCPA will contribute to more effective enforcement against criminal cartels by providing a defendant who wishes to assist the prosecution but does not qualify for a 'no action' letter with greater certainty regarding the applicable procedure and the benefit of the accompanying statutory safeguards.

Allowing the CMA to reclaim discounts to penalties if a party fails to carry out a promise for which a discount was granted

1.204. The CMA can choose to reduce penalties for infringements of competition law, on the basis of promises a business makes as to its future conduct. The consultation sought views on the merits of allowing the CMA to 'claw back' discounts to penalties if a business fails to carry out a promise for which a discount was granted. Government also notes that since the consultation the CMA has revised its penalty guidance in this area. Under the new guidance, the CMA will no longer normally offer businesses discounted penalties in return for commitments to introducing compliance programmes.

1.205. Few respondents commented on this proposal, and no respondents specifically opposed such a mechanism. In light of the lack of specific feedback received, and the recent changes to the CMA's penalty guidance, government does not consider that this represents a significant weakness in the regime and does not consider that this is a priority for reform where there are other more impactful changes it wishes to make to the legal framework for Competition Act enforcement. Government may however revisit this issue in the future if the evidence of its potential impact changes.

Extended deadlines in public interest interventions in media mergers

1.206. The consultation proposed that, where the Secretary of State for Digital, Culture, Media, and Sport has issued an Intervention Notice in relation to a completed media merger, they should have the power to extend the deadline for referral to Phase 2 once, by a period of 28 days.

1.207. Government does not intend to proceed with this reform at this time. Instead, government proposes to update the existing statutory guidance concerning media mergers. The guidance, published in 2004, is now increasingly out of date and government considers revising this to be more appropriate at this time.

Summary

Government intends to:

- **proceed with the proposal to extend the CAT's jurisdiction to grant declaratory relief.**
- **aside from collective proceedings, return to the courts and CAT the discretion to award exemplary damages for breaches of competition law.**
- **proceed with the proposal to amend SOCPA so that the CMA is a 'specified prosecutor' and can use the SOCPA 'assisting offender' process to enhance its criminal cartel enforcement.**

Government does not intend to:

- **prioritise making specific statutory provision for the CMA to reclaim discounts from financial penalties in Competition Act cases.**
- **give the Secretary of State for Digital, Culture, Media and Sport the power to extend the deadlines of public interest interventions in media mergers.**

Chapter 2 – Consumer Rights

2.1. Chapter 2 of the consultation set out proposed enhancements to consumers' rights that are fair to consumer and business. These are intended to modernise consumer rights law by keeping it up to date with consumer markets that are continually changing. In particular, the trend towards online retail and advertising that has accelerated since the pandemic.

2.2. Chapter 2 of the consultation sought views on the following:

- Tackling subscription traps, potentially by strengthening and clarifying the law on pre-contract information so that consumers know what they are signing up for and are given a choice on auto-renewal; nudging consumers so they are aware of ongoing subscriptions; and making it easier for consumers to exit subscriptions.
- Strengthening the law to better prevent posting of fake reviews online, and championing 'fairness by design' principles in how online transactions are presented.
- Strengthening prepayment protections for consumers by amending the law to mandate that consumer prepayment schemes like Christmas savings clubs have means to safeguard customers' money.

Tackling subscription traps

2.3. At present, it is estimated that consumers may spend as much as £1.8 billion per year on subscriptions which they regard as poor value for money.[24] Respondents to the consultation helped us identify specific areas where this is most pronounced. In particular, consultation responses pointed us towards contracts that have the potential to lock-in consumers indefinitely (by virtue of an automatic renewal provision that repeatedly extends the contract period), when the roll-over period was lengthy (e.g. one year) and where unclear information buried in lengthy terms and conditions obstructs a consumer making an informed decision.

2.4. *Reforming Competition and Consumer Policy* proposed taking action in three areas: (i) at the pre-contract stage, when key information about a subscription contract should be clear and prominent; (ii) for subscriptions which contain autorenewal features, requiring the consumer's express agreement before auto renew or roll-over occurs; and (iii) ensuring the process of exiting a contract is clear and easy for consumers.

2.5. Government recognises the significant benefit of subscription models to both consumers and businesses. Consumers can find convenience, competitive

[24] This is based on BEIS assessments of consumer surveys. The consultation-stage impact assessment provides the details of how the figure was derived.

pricing and peace of mind, among many other positives. Business can operate with more predictable revenue.

Better pre-contractual information about subscriptions

2.6. The consultation proposed new rules to prescribe information that should be supplied to consumers before entering into a subscription, and asked about the appropriate definition of a subscription. The following questions were asked:

Q Do you agree with the description of a subscription contract set out in Figure 8 of this consultation[25]? How could this description be improved?

2.7. There was a diverse range of views on this question, from wholesale agreement with the proposed definition to strong objections on the breadth of contracts it would capture. There were clear indications from several respondents that there should be a distinction between paid and free subscriptions, with the latter being outside of scope of the proposals.

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

2.8. Some businesses and trade associations made it clear that the impact was heavily dependent on the business and a one-size-fits-all approach was not appropriate. Other businesses and consumer groups were positive about the proposals, highlighting existing commitments to ensuring information is clear and digestible for consumers.

Q Would these proposals make it easier or harder for traders to comply with the pre-contract requirements? And why?

2.9. There were mixed responses to this question. Some pointed to easier compliance with requirements, while others saw this as making compliance more challenging. There was no clear consensus on this question.

Consumers' consent to subscription that auto-renew onto new terms

2.10. The consultation sought views on prompts and opt-ins that would ensure that the consumers' consent was sought and maintained as a subscription auto-renewed. The following questions were asked:

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

2.11. This question provided some of most diverse views, even among the same category of respondent. Consumer advocacy groups, individual consumers, and regulators expressed support for the proposals. Some businesses argued that the implementation of this proposal would negatively impact their business model with some making the point that two sets of terms and conditions would be required. In particular, the concern was that subscriptions would be withdrawn undermining businesses which relied on subscription contracts. Nevertheless, it was made clear that the impact of this proposal would depend almost entirely on the circumstances of the business in

[25] p.87, *Reforming Competition and Consumer Policy* consultation (July 2021)

question. One regulator recognised that it had potential to lead to less revenue for business but concluded that it would also be positive for business and would lead to more competitive markets overall.

Q 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. The consultation sought views on a proposal specifically requiring businesses to send a reminder to consumers before their subscription auto-renewed to a new term. Generally, businesses and trade organisations were either of the view that delivery of their product to a consumer was an effective reminder that the subscription would auto-renew or roll-over, or were in favour of option (b). Consumer advocacy organisations and regulators were mostly in favour of both.

Q How would the reminder requirement impact traders?

2.13. Business expressed concerns around potential costs, relative ineffectiveness of reminders, especially where there is only a short time between the initial purchase and the reminder being sent, and the potential to lose favour with consumers due to frequent reminders. Some of the regulators expressed the view that some businesses already do this, and it is not costly.

Q 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. Consumer advocacy groups, individual consumers, and regulators expressed support for the proposals. The responses within those groups split on the two options with option (b) generally being viewed more favourably. Trade organisations and businesses generally opposed both. Their rationale was centred around the ineffectiveness of the reminder, the product itself serving as an effective reminder, and the risk of potentially irritating consumers by forcing frequent interaction to maintain the service.

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

2.15. The consultation sought views on whether subscriptions inactive for a long period should be required to be cancelled. Consumer advocacy groups, some of the business representatives, and most regulators were supportive of this proposal. Those opposed expressed the view that the impact would be limited as their offering was unlikely to create a scenario involving long-term inactivity. Those who viewed themselves as likely affected described additional complexity being added to their systems and the difficulty that would come with defining "inactivity".

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

2.16. While some viewed as little as 3 months of inactivity as sufficient, others pointed to 1-2 years of inactivity as being the appropriate threshold. Trade organisations and businesses highlighted that it would be difficult for a subscription contract to be deemed inactive in certain sectors e.g., regular deliveries of goods and that this proposal is not likely to be appropriate across all sectors.

Removing frictions when exiting a subscription

2.17. Finally, the consultation sought views on how the principle that a subscription should be as easy to exit as it is to enter, should be implemented. The following questions were asked:

Q 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)?

2.18. Respondents were split on this question. Individuals, consumer advocacy organisations and regulators were generally in agreement with the statement, however, businesses and trade organisations disagreed and provided examples where they believed this was not the case.

Q 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?

2.19. There was very strong consensus that among the vast majority of those responding that if a consumer wants to exit a contract and is able to do so under their contract, it should be straightforward. Some respondents added that automated processes were not always appropriate and may take away an opportunity from the business to make things right. Those disagreeing generally were pointing to existing law being adequate.

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

2.20. There was relative consensus that all of the areas identified in the consultation were generally correct to consider exempting. This included essential or regulated markets like insurance and the supply of medicine. Some respondents also clarified that any exemptions should be carefully considered and very limited rather than encompassing whole sectors.

Impact assessment considerations

2.21. Alongside the consultation we published an Impact Assessment and sought views on the evidence and analysis in that assessment. There was a limited response to the questions asked. Those who did respond noted that the expected implementation cost to business, including charitable enterprises, was underestimated and needed to reflect the variation in costs across size of business. Stakeholders also challenged the evidence supporting the estimate of the consumer detriment caused by unwanted subscriptions. The potential cost to business has informed the package of proposals to be taken forwards. We have also been gathering further evidence to support the assumptions

used in the final impact assessment and to inform the details of the policy design.

Summary

To empower consumers, increase their confidence, and facilitate further market growth, government is making changes to subscriptions rules and will legislate to:

- **clarify and enhance existing pre-contract information requirements for subscription contracts**;
- **introduce a specific requirement on traders to send reminders to consumers before a contract rolls over (or auto-renews) onto a new term**;
- **create a specific obligation requiring traders to remind consumers that a free trial or low-cost introductory offer is coming to an end**; **and**
- **create a specific requirement for traders to ensure their consumers are able to exit a contract in a straightforward and timely way.**

This package of proposals provides high levels of benefit to consumers while mitigating concerns raised around business costs.

In response to feedback provided, especially around costs to business, government will not be taking forward the proposals to explicitly:

- **require traders offering consumers subscription contracts to offer those consumers a choice (at the pre-contract stage) to take the subscription without auto-renewal or rollover terms (i.e. for a fixed initial commitment period only);**
- **require traders, before the end of a free trial or low-cost introduction offer, to obtain the consumer's explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends; and**
- **require traders, after a reasonably long period of time where there is evidence of inactivity to give notice of suspension of service and to stop charging money for the consumption or use of goods, services, and digital content under a subscription contract.**

Regulated sectors with equivalent or higher rules in relation to subscription contracts (or where there is a compelling public policy reason) will be exempt or largely exempt. This includes areas regulated

by Part C of Ofcom's General Conditions of Entitlement, financial services and insurance within the regulatory scope of the Financial Conduct Authority, the regulated supply of gas, electricity, water and the supply of medicine and certain medical products by a prescriber.

Fake reviews

2.22. Genuine consumer reviews are made by consumers who have used goods, services, or digital content, and are a vital part of supporting consumer choice and making markets work. A genuine review is given without pressure or incentive to provide a particular perspective. A fake review, on the other hand, is one that does not reflect an actual consumer's genuine experience of a good or service. Commissioned or incentivised reviews that are not clearly labelled and distinguishable as such are misleading. Reviews that deliberately mislead consumers to benefit the business should be considered 'fake'. The consultation considered this in the context of the provisions in the Consumer Protection from Unfair Trading Regulations 2008 ("CPRs").

2.23. The consultation asked the following questions on this topic:

Q 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?

Q What impact would the reforms mentioned in the previous question have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?

2.24. Respondents agreed that banning the practices of (b) commissioning a person to write and/or submit fake consumer reviews of goods or services and (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services would create a more level playing field. Some respondents thought that large businesses would benefit more from the proposed reforms given they rely on reviews whereas smaller business rely on word of mouth more often.

2.25. Respondents were in agreement that fake reviews were a concern and not helpful to consumers. Genuine reviews are helpful, and respondents agreed that there should not be a ban on commissioning consumer reviews in all circumstances. Genuine reviews are also helpful for businesses to compete on a level playing field. There was agreement that commissioning a person to write and/or submit fake consumers reviews and commissioning or incentivising any person to write and/or submit a fake review should be banned.

Q 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. Some respondents suggested that businesses should take on more responsibility for conducting more quality control on reviews or provide systems that could filter out obvious malicious content before a review is published. Most businesses, while agreeing with the principle behind the proposal, wanted to see more detail on the definition of 'reasonable and proportionate' steps, which government will work on in consultation with businesses and consumer groups.

Q 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?

2.27. Respondents considered that commercial practices of offering or advertising to submit, commission or facilitate fake reviews should be added to the list of automatically unfair practices in Schedule 1 of the CPRs.

Summary

Government recognises the importance of ensuring that the list of automatically unfair practices in Schedule 1 of the CPRs can be updated to reflect current business practices and intends to take a delegated legislative power to amend the Schedule, subject to Parliamentary approval.

Government will consult in due course on the use of such a power to add the following areas to the Schedule:

- **commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services;**
- **hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine; and**
- **offering or advertising to submit, commission or facilitate fake reviews.**

Preventing online exploitation of consumer behaviour

2.28. Businesses may design webpages in such a way to nudge consumers towards decisions that they would not otherwise have taken. As more data becomes available to businesses via their web operations, some have utilised it in a way that distorts free choice resulting in unfair competition. In many cases, firms design their systems in ways which benefit consumers' interests. However, there is growing evidence of the negative impact of exploitative

online choice architecture practices[2627]. Government believes that consumers should be able to exercise choice and that this is important for competition.

2.29. The consultation asked the following questions on this topic:

Q 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?

2.30. Most respondents agreed that consumers were not aware of businesses using behavioural techniques to influence choice that affects consumers purchasing decisions, and that this is a concern that should be addressed.

Q 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?

2.31. Respondents generally agreed that government and regulators should do more to address drip pricing and paid-for search results as practices likely to be in breach of the CPRs.

2.32. Much is still unknown about the scale and prevalence of harm of such practices. This presents a valuable opportunity to carry out substantive research which sets such practices into the wider context of markets, for example exploring the influence of major players and commerce platforms. Such research could provide further evidence for BEIS, the CMA and other consumer protection enforcers to take action to reduce the impact of these harmful practices.

Summary

Government will continue to research this subject to identify specific consumer harm and how it can be tackled.

Balancing burdens on businesses

2.33. The consultation set out that effective consumer rights should benefit businesses as well as consumers, while also noting that there may be historic parts of the consumer law framework that are now out of date or redundant.

2.34. The consultation asked the following questions on this topic, with relevance to the UK's existing consumer protection legal framework, comprising of the Consumer Rights Act 2015, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, and the Consumer Protection from Unfair Trading Regulations 2008:

[26] "Dark Patterns at Scale: Findings from 11,000 Shopping Websites", Princeton University, September 2019
[27] "Shining a Light on Dark Patterns", University of Chicago, August 2019

Q 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?

Q Are there perverse incentives or unintended consequences from our existing consumer law?

Q 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?

2.35. We received a wide range of responses to these questions, from small and relatively technical suggested changes to legislation, to high-level, general points about the landscape of consumer law.

2.36. Some suggestions were raised several times by respondents. These made the point that government should look holistically at reforms to the wider landscape of consumer law, and avoid instances of double regulation or duplication between government departments, the CMA and sector regulators. In addition, respondents felt that government could do more to educate both consumers and businesses through clarifying information requirements and improving guidance and signposting to routes of redress.

2.37. Government is committed to a regulatory system that is smart, proportionate and considers the needs of business, and in *The Benefits of Brexit*[28], published January 2022, announced policies to improve and control the flow of regulation across government and assess its value.

2.38. Section 3 of this document sets out government's ambition to provide business guidance and further awareness of consumer protection law. In addition, we will continue to consider ways in which consumers can be supported in finding routes to redress, working with Citizens Advice to achieve this.

Summary

Government will develop its policy thinking in line with the policies outlined in *The Benefits of Brexit,* putting money back in people's pockets by improving consumers' rights

Government will continue to work with partners on improving the business and consumer guidance available for understanding and complying with consumer protection law.

[28] https://www.gov.uk/government/publications/the-benefits-of-brexit

Strengthening prepayment protections for consumers

2.39. Consumers often pay for goods and services in advance of receiving them. If the business that has taken the prepayment becomes insolvent, consumers may be left without the item they paid for and uncertainty over how much of their money they will get back via the insolvency process. In its consultation, government proposed taking steps to protect consumers, particularly those using Christmas Savings Clubs and similar savings schemes not covered by existing financial protections, and asked what other sectors similar rules might be applied to. Responses to the proposals were mostly supportive particularly from consumer organisations and regulators. There was a mixture of views on sectors where consumers might require further protections.

2.40. The consultation asked the following questions on this topic:

Q 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?

2.41. The overwhelming majority of respondents who commented on this question were supportive of the proposal to introduce protections for prepayments to savings clubs not covered by existing financial protections with some respondents arguing such schemes should fall under the remit of the FCA. Those who disagreed cited added burdens for business in overly prescriptive financial protections.

2.42. The strongly positive response to this question suggests that the proposed approach is broadly correct, and government should legislate to ensure "savings clubs" not within the scope of current financial protection laws are protected.

Q What other sectors might new powers regarding prepayment protections be usefully applied to?

2.43. The majority of responses to this question mentioned an area already subject to statutory protection: travel. However, some respondents were of the view that COVID-19 had highlighted that the rules to ensure operators set aside their own funds to cover reimbursement claims were not stringent enough.

2.44. Some respondents suggested there was a need to consider prepayment protections across the board. The growth in online shopping and increasing use of digital technology with new types of financial services provider was highlighted by respondents as a reason for taking a flexible power which could be used quickly if the situation required it.

2.45. A small number of respondents to this question highlighted weddings and home improvements as sectors where substantial prepayments are collected often a lengthy period in advance of the actual event/work taking place, leaving consumers open to substantial risks.

2.46. Government will work with consumer groups, regulators and industry bodies to undertake further research on this topic.

Q How common is the practice of using terms and conditions to delay the formation of a sales contract?

2.47. A large majority of respondents said the practice of use of Terms and Conditions to delay sales contract formation until orders have been dispatched is common with online retailers offering goods to consumers. Some respondents were aware of the practice but stated it was not widely employed in their sectors.

Q 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?

2.48. The majority of respondents to this question provided a positive response. There was support for the idea that the practice described in the consultation document had the potential to cause detriment to consumers, with some respondents going further and stating that it currently *did* cause detriment.

2.49. Respondents cited the potential impact on existing consumer protections, most notably Section 75 of the Consumer Credit Act 1974 which is predicated on the existence of a sales contract.

2.50. A number of online retailers responding to this question confirmed the use of this practice but stated that it had no material impact on consumers. Retailers would face practical problems if the sales contract formed (and the obligation to deliver arose) prior to dispatch of the goods. These problems would include being bound to honour orders where pricing errors have been made and most notably stock errors given the nature of online trading where it can be difficult to limit numbers of orders placed. It was suggested that delaying contract formation until despatch may be particularly helpful for smaller traders who do not have sophisticated means of checking their stock in real time.

2.51. Stakeholders in the grocery sector said this was a necessary practice given the nature of common grocery business models where perishable products are procured just in time. If legislation was taken forward on the timing of contract formation it could have a detrimental impact on businesses, who may lose control of being able to confirm they have the produce to fulfil orders.

2.52. A number of large online retailers sell goods provided to the consumer by third party suppliers rather than stocked in their warehouses. With third party suppliers, these retailers use an assumed despatch date based on a service level agreement because suppliers have their own despatch systems that cannot communicate with the retailer's own ordering systems. Banning the practice of delaying contract formation until despatch would therefore require retailers to operate contractually in a way that does not reflect the reality of their operations.

Summary

Government will:

- **legislate to ensure consumer prepayment schemes marketed as a savings mechanism (or generally understood to be for that purpose)**

and not within scope of existing financial protections must fully protect customer payments by way of a trust or insurance, subject to certain exclusions; and

- **undertake further research to identify whether there are other sectors which pose particular risks to prepaying consumers, and whether similar insolvency protection provisions might be justified.**

Package travel

2.53. The Package Travel and Linked Travel Arrangement Regulations 2018 (PTRs) offer additional protections to consumers who book package trips compared to those booking stand-alone travel services. These include requiring that consumers are refunded within 14 days of a cancelled trip and requiring that organisers of packages set aside the funds to ensure consumers can be refunded and, if necessary, repatriated if the package organiser becomes insolvent. Government committed to review the PTRs following the end of the transition period. Over the consultation period, workshops with a range of stakeholders (including travel retailers, travel organisers and airlines from across domestic and international sectors as well as consumer groups) raised issues with the PTRs and how they had been put under strain by the COVID-19 pandemic. This was also raised in formal responses to the consultation.

2.54. During the workshops, the following topics were discussed:

a. Scope of the PTRs
b. Insolvency protection mechanisms
c. Cancellation and refund rights
d. Consumer understanding of the PTRs

2.55. Participants emphasised that Linked Travel Arrangements (LTAs) were confusing, rarely used and challenging to enforce. Opinion was divided on what the scope of LTAs should be but there was consensus agreement that they needed to be simplified.

2.56. Participants questioned whether the list of services comprising a package could be improved. There were differing views around what services should be included. ‘Other tourist services’ can currently form a package if combined with a more major service (such as accommodation, travel, or vehicle hire) and they are either a ‘significant proportion’ or an ‘essential feature’ of the combination. Participants agreed that the current ‘significant proportion’ element was less helpful than focusing on the ‘essential feature’ element.

2.57. Participants had differing views around which methods of insolvency protection work best. The majority agreed that having multiple routes to comply with the regulations was a positive thing, however the importance of having trust accounts that are independent and verifiable by the consumer was emphasised.

2.58. Many participants thought that the PTRs stood up as well as could be expected during the pandemic regarding cancellations and refunds, and

despite many delayed refunds, most consumers were eventually able to receive redress from package travel organisers. Many stakeholders highlighted the issues in travel supply chains as being the main problem causing delays in consumers receiving refunds. Many organisers struggled to get money back from suppliers.

2.59. There was consensus among participants that the regulations were too complex and that there was a low level of consumer understanding. Many participants agreed that the information requirements in the Schedules to the PTRs could be simplified.

2.60. Government recognises that there are ways in which the PTRs can be simplified to make them work better operationally in the short term. Government believes that some of the changes suggested by participants would alter the dynamics of the industry significantly and therefore should be considered further as part of a formal review in due course.

Summary

Government intends to simplify the definition of a Linked Travel Arrangement (LTA) in relation to the circumstances in which an LTA can be created and simplify when a minor tourist service is classified as part of a package or LTA.

Government plans to improve the flexibility of insolvency protection provisions (for non-flight packages).

Government also intends to put in place a mechanism to enable BEIS to make changes to the information requirements of the PTRs.

BEIS will publish a consumer-focused PTR guidance document.

Chapter 3 – Consumer Law Enforcement

3.1. Chapter 3 of the consultation identified that, while the system of enforcement of consumer law generally works and delivers significant benefits, there are weaknesses which are undermining consumer confidence and exposing traders to unfair competition. These weaknesses covered procedural difficulties for enforcers, weak sanctions for breaching the law, and low uptake of alternative dispute resolution services.

3.2. To address these weaknesses, chapter 3 sought views on the following:

- Stronger enforcement powers, including giving the CMA enhanced powers to tackle consumer rip offs and bad business practices, including new fining powers, and testing the case for extending these powers to sector regulators.
- Supporting consumers and traders to resolve more disputes independently. This includes improving consumers' access to high quality dispute resolution services, and making it easier for consumers to band together to seek redress collectively from traders.
- Supporting local authority trading standards services tackling rogue traders.
- Giving businesses support to comply with consumer law.

Strengthening enforcement by the Competition and Markets Authority and other enforcers

Empowering the Competition and Markets Authority to enforce consumer law directly

3.3. The CMA plays a key role in protecting consumers where market-wide unfair trading practices occur. Government believes it therefore should have appropriate powers to incentivise firms to comply with the law and to stop and rectify harm where consumers and law-abiding businesses are losing out.

3.4. To that end, government consulted on giving the CMA the power to decide itself whether consumer law has been broken and impose directions and monetary penalties on businesses without having to go through the courts, i.e., an "administrative model".

3.5. The consultation asked the following question on this topic:

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

3.6. There was broad support for a CMA administrative model among those who opined. Many respondents emphasised the need for improved timeliness of enforcement interventions and provided multiple examples of the harmful effect protracted proceedings can have on consumers and their welfare. Some of the specific benefits they identified include streamlining the process and enabling limited regulatory resource to be used in a more cost-effective way, thereby leading more swiftly to better outcomes for consumers and fairly competing businesses. Many respondents considered that the proposal would raise the perceived certainty of enforcement and act as deterrence to increase overall compliance with the law.

3.7. Several respondents highlighted that in other countries such as Canada, France, Italy, and Australia national bodies responsible for consumer protection have had powers for some time to issue infringement notices and impose monetary penalties to uphold consumer law, and suggested replicating this for the CMA is appropriate given the remit and impact of its work.

3.8. Some respondents conditioned their support for the proposal on adequate safeguards and a requirement for due process while others were opposed altogether due to what they perceived to result in over-concentration of power in the hands of the CMA. The latter expressed concerns about the CMA's impartiality in light of its mandate to promote competition for the benefit of consumers. Others questioned the ability of smaller businesses to bring appeals even if the court could ultimately side with them. Finally, a few responses queried whether the proposal would dispense with the CMA's current powers to bring civil proceedings in court or be an additional power.

3.9. Government welcomes the broad support for its proposal and continues to believe that empowering the CMA to enforce consumer law directly would improve its capacity to take action against more of the highest-impact breaches of the law, which in turn has greater potential to safeguard the wider interest of consumers across the economy.

3.10. Government agrees with the point a few respondents made that it should not seek to align consumer and competition enforcement frameworks as an end in itself and does not intend to do so. However, the existing administrative competition regime provides a helpful, if not determinative, reference point for setting the CMA robust governance and decision-making parameters to reach fair, evidence-based decisions that command the confidence of business and stands up to independent scrutiny by the courts.

3.11. Government also agrees the challenges raised are important and believes that its intended design of the CMA administrative process (see below) would mitigate the concerns raised by the minority of sceptical respondents.

Summary

Government intends to legislate to give the CMA the power to enforce consumer protection law directly. This means the CMA would be able to:

- **direct compliance and impose turnover-based or fixed monetary penalties where it determines that a person, without a reasonable**

excuse, has either not complied with a statutory information request, has provided false or misleading information in response to an information request, or has destroyed, concealed, or falsified information and documents. In these circumstances the CMA would be able to impose a penalty fine on a business of up to 1% of annual global turnover, with an additional daily penalty of up to 5% of daily global turnover while non-compliance continues. Where an individual fails to comply, the CMA would be able to impose fixed penalties of up £30,000, with an additional daily penalty of up to £15,000 while non-compliance continues.

- **direct compliance and impose turnover-based or fixed monetary penalties where the CMA determines that an undertaking given by an enforcement subject to the CMA, or a direction imposed by the CMA has been breached without a reasonable excuse. Where a business breaches an undertaking or a direction, the CMA would be able to impose a penalty fine of up to 5% of annual global turnover, with an additional daily penalty of up to 5% of daily global turnover while non-compliance continues. Where an individual breaches an undertaking or a direction, the CMA would be able to impose fixed penalties of up £150,000, with an additional daily penalty of up to £15,000 while non-compliance continues.**

- **determine whether an infringement of certain consumer protection legislation has occurred and make appropriate directions including to bring the infringement to an end, award redress to consumers or secure positive action by businesses to improve compliance and reduce the likelihood of future breaches, and/or impose turnover-based or fixed monetary penalties for past or current infringing conduct. Where a business breaks the law, the CMA would be able to impose a penalty fine up to 10% of the enforcement subject's global annual turnover. Where an individual breaks the law, the CMA would be able to impose a fixed penalty fine up to £300,000.**

The CMA will continue to be able to use its current enforcement powers via the civil courts (which government intends to strengthen with additional fining powers for the civil courts as set out below) and will retain the ability to use criminal enforcement options via the criminal courts for the most serious breaches of consumer law. Retaining these court-based civil and criminal enforcement powers would help to ensure the CMA is able to continue cooperating and coordinating effectively with other consumer enforcers such as LATSS.

3.12. Government also consulted on how the administrative model could work in practice, particularly so that it achieves transparent and open procedure with robust safeguards that gain the confidence of business and the wider public.

3.13. The consultation asked the following questions on this topic:

Scope of an administrative model

Q 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 Enterprise Act 2002?

Decision-making process

Q What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

Right to appeal

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

Appeal body for the CMA's administrative enforcement decisions

Q 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?

Scope of an administrative model

3.14. The CMA's existing court-based consumer enforcement powers in Part 8 of the Enterprise Act 2002 (EA 02) enable it to go to court to enforce a broad range of over 90 pieces of legislation and rules of law. This includes general (or "core") consumer protection legislation (such as that relating to unfair commercial practices and unfair contract terms) and a much broader selection of sector- or issue-specific legislation that contains provisions that directly or indirectly impact consumers.

3.15. Many respondents supported the CMA being empowered to directly enforce the same range of consumer laws it can currently apply to court to enforce as it was argued this would enable it to retain flexibility to act in areas other regulators cannot always prioritise and where therefore consumers may suffer insufficient protection. Another benefit highlighted is that the CMA could select cases involving breaches that may span more than one sector and set of legislation. It was also argued that a broad scope of directly enforceable legislation could reduce the courts' caseload and facilitate quicker resolution of cases. A few stakeholders considered that the expertise and experience the CMA has developed working within the current system should be "portable" to an administrative model.

3.16. However, there was some concern about the degree of expertise the CMA had to understand the nuance in the application of specific regulation or legislation to particular industries. It was argued consumer law can involve interpretation of complex legislation and where an issue relates to rules of law

previously not investigated or enforced by the CMA, it may not produce the same quality of decision as a court.

3.17. Government considers that there are significant benefits to be had if the CMA is able exercise its administrative powers flexibly where consumer laws enable it to tackle systemic issues that hinder consumer choice such as the use of dishonest claims or unfair contract terms.

3.18. However, government recognises that giving the CMA powers to adjudicate on the full range of consumer protection laws under Part 8 of the EA 02 will not be necessary or proportionate to ensure that the CMA can flexibly respond to multi-faceted or unexpected consumer harms. This is because there are many consumer laws dealing with, for example, consumer safety matters ranging from age restricted products to food standards and safety which go beyond resolving "structural market problems" adversely impacting consumer choice that government has tasked the CMA to address.[29]

3.19. Therefore, government considers it appropriate to empower the CMA to directly enforce a subset of the legislation in Part 8 of the EA 02, including the core pieces of consumer protection legislation as well as some other legislation which deals with closely related subject matter, protects the economic interests of consumers and where the CMA has relevant experience, to enable its continued focus on the areas where it is best positioned to make a positive difference for consumers.

Summary

Government intends to empower the CMA to enforce a subset of the consumer protection legislation in scope of Part 8 of the Enterprise Act 2002. Government will specify the legislation that will comprise that subset in forthcoming legislation. We intend for it to be compatible with the principle that the CMA should be allowed to directly intervene in areas where general consumer protection legislation applies across the economy as well as where legislation deals with closely related subject matter, protects the economic interests of consumers and where the CMA has relevant experience.

Decision-making process

3.20. Many respondents agreed with the outline decision-making process that the consultation proposed, stating that completing these steps would facilitate a fair and proportionate process overall. Many also called for CMA's decision-making to be subject to robust internal scrutiny by way of an objective and independent panel that is prepared to challenge the relevant case team before a final decision and penalties are imposed, arguing for a separation between investigative and adjudicative roles within the CMA.

[29] The CMA's remit and responsibilities in relation to market conditions that make it difficult for consumers to exercise choice were set out in the Government's response to the consultation *Empowering and Protecting Consumers*, published in April 2012.

3.21. It was argued that an ability for enforcement subjects to see and understand the case against them and make representations, with some respondents insisting on oral hearings, is essential for procedural fairness. A few respondents argued for specific arrangements in relation to the issuing and coming into effect of CMA final decisions such as those being in writing and suspending a requirement to pay any penalty pending appeal.

3.22. A few respondents were concerned that an administrative decision-making process would relieve the CMA, as the party asserting a breach of the law, of the obligation to duly prove its case as it currently does before the courts. They considered that to have legitimacy the administrative process should rest on an assumption that a business has not committed an infringement until such a time as the allegation is proven.

3.23. Several respondents emphasised the need for early dialogue between the CMA and businesses ahead of any formal administrative enforcement proceedings being commenced.

Summary

Government intends to provide for the CMA to make administrative decisions in line with the process set out in the consultation document.

Government will ensure appropriate separation between those investigating potential breaches of consumer law and those making the decision within the CMA's internal process. Government will also make provision for those suspected of breaching the law to see the case against them and the basis for this, along with the opportunity to make written and/or oral representations as appropriate in order to ensure a fair process.

Government also intends to provide that penalties or redress measures imposed following a finding of infringement by the CMA will be suspended if the CMA's decision is appealed.

Finally, government intends that the CMA will be required to publicly consult on its rules of procedure, which will need to be approved by government and ultimately Parliament, and guidance for running administrative investigations and hearings.

Right to appeal

3.24. A majority of respondents were strongly in favour of CMA decisions being subject to on appeal on the merits. This means, broadly, an ability for the appeal body to review all the facts and evidence underlying the CMA's decision, consider fresh evidence if relevant, and confirm, quash, or substitute the original decision, including by imposing, revoking, or varying the amount of any penalty. It was argued that this was necessary as a matter of fairness, that

it would provide necessary checks and balances on the proposed expanded powers of the CMA, and that it would ensure high-quality decisions.

3.25. Several respondents disagreed with elements of a full merits appeal, with a few being concerned that a power for the appeal body to substitute its decision for that of the CMA would weaken legal certainty. Another concern was that as part of any investigative process the business has ample opportunity to submit evidence in their defence for consideration by the enforcer before a decision is made so it was suggested it would be inequitable for defendants to submit fresh evidence before the appeal body.

3.26. Government recognises that most decisions that the CMA would be making under an administrative model, for the purposes of either enforcing compliance with investigations or remedial measures put in place following enforcement action, would involve both a finding that a business had failed to comply with its legal obligations and potentially significant sanctions. Therefore, government intends that a trader subject to a CMA direct enforcement decision that could directly or indirectly result in monetary penalties will be able to lodge a full merits appeal.

Summary

Government intends to give the appeal body for the CMA's administrative enforcement decisions, which can directly or indirectly lead to the imposition of a monetary penalty, the following jurisdiction:

- **the ability for the appeal body to review issues of law and fact relevant to the appeal before it,**
- **the ability for the appeal body to admit fresh evidence (not before the CMA) on appeal, however there will not be an automatic right for it to be considered and it will be up to the appeal body to assess if admitting or excluding any adduced evidence or arguments from the challenger would be relevant, necessary, or just in the particular circumstances of the case,**
- **the ability of the appeal body to quash decisions of the CMA on legal and factual issues relevant to the appeal before it, and**
- **the ability of the appeal body to substitute its own decision for that of the CMA or to take any other step that the CMA could have taken. However, the appeal body should only interfere with the first instance decision if it concludes that the first instance decision is wrong in a material respect.**

All other, non-fining decisions, actions or omissions taken by the CMA in the course of the administrative enforcement process will be subject to

the supervisory jurisdiction of the courts' exercised through judicial review.

Appeal body for the CMA's administrative enforcement decisions

3.27. There was no consensus among respondents on the degree of specialism inherent to consumer law and the corresponding need for a specialised appeal body. Some respondents argued that consumer law does not involve technical matters, assessments, or evidence to the same or similar degree as competition law and as such it requires no more expert interpretation than what a generalist judge could apply. It was also suggested that if anything consumer law is broad in scope as it ranges from unfair terms rules to common law such as breach of contract rules, meaning a generalist court versed in a wider background would be more appropriate.

3.28. Others were in favour of a specialised tribunal because they considered consumer law to be a relatively specialist field, requiring insight into consumer behaviour, market dynamics and business economics so they argued it is desirable that appeal decision-makers are familiar with those. Some also said that the Competition Appeal Tribunal (CAT) would be particularly well placed to assume this appellate function because it had transferrable expertise in considering cases in the competition sphere in which harm to consumers stemming from breaches of competition law is a core component.

3.29. Many respondents emphasised the need for timely appeal hearings and argued that other things being equal, a specialised tribunal could provide that more easily than generalist courts which they considered to be under pressure given their caseload.

3.30. Government sees some merit in these differing views but considers that ultimately the appeal body should be expert or experienced in hearing and deciding cases involving legislation of cross-cutting application given that consumer protection law is broad in scope. Generalist courts such as the High Court in England and Wales and the Court of Session or the Sheriff in Scotland already grapple with consumer litigation and have provided clear and reasoned judgements. These courts already have discretion to allocate cases to judges with relevant expertise and with a view to achieving efficient throughput of cases, which government believes to be conducive to affording enforcement subjects and consumers expertly decided resolution of any appeals from relevant CMA direct enforcement decisions.

3.31. Government believes it is important to ensure that the choice of appeal body achieves all its objectives in a balanced way. Respondents expressed fewer views on the need for the decisions reached by the appeal body to contribute to a consistent body of jurisprudence which has and will continue to be developed through the existing system for public enforcement and private litigation of consumer law. In this existing system, the county courts or High Court in England and Wales and the Court of Session or the Sheriff in Scotland decide civil consumer protection cases instigated by other enforcers (e.g., sector regulators, LATSS) under Part 8 of the EA 02 who would not themselves enforce the law directly either initially or at all. As such, the "fit" of

the appeal body with the current system is important for providing legal certainty for businesses.

3.32. Government believes that the creation of a new specialised consumer tribunal or the expansion of the Competition Appeal Tribunal would add an extra judicial decision-maker to the system which would likely lead to less consistency in jurisprudence overall and is therefore undesirable. This position was recognised and supported by those who opined on this issue.

Summary

Government intends to legislate for all appeals from CMA first-instance direct enforcement decisions which can directly or indirectly lead to the imposition of a monetary penalty to be heard by the High Court in England and Wales in relation to appeals from CMA direct enforcement decisions concerning an enforcement subject who carries on or has a place of business in England and Wales; and the Court of Session in Scotland in relation to appeals from CMA direct enforcement decisions concerning an enforcement subject who carries on or has a place of business in Scotland.

All other, non-fining decisions, actions or missions taken by the CMA in the course of the administrative enforcement process will be subject to the supervisory jurisdiction of the courts using the existing processes to apply for permission for judicial review to the Administrative Court in England and Wales and to lodge a petition for judicial review to the Outer House of the Court of Session in Scotland.

Empowering the sector regulators to enforce consumer law directly

3.33. Government consulted on what, if any, benefits there might be in extending administrative enforcement powers to sector regulators with consumer enforcement powers under Part 8 of the EA 02.[30]

3.34. Government wished to understand if any systemic current or emerging bad business practices existed in the regulated sectors that could not be addressed either through the use sector-specific regulatory powers or through the use of consumer enforcement powers under Part 8 of the EA 02, which government intends to strengthen with additional fining powers for the civil courts as set out below.

3.35. The consultation asked the following question on this topic:

Q Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an

[30] Namely, the Civil Aviation Authority, the Financial Conduct Authority, Ofcom, Ofwat, Ofgem, the Information Commissioner's Office, the Office of Rail and Road, and the Northern Ireland Utility Regulator.

administrative model? What specific deficiencies do you expect this to address?

3.36. Many respondents highlighted that sector regulators increasingly have to deal with firms operating at the edge of the regulatory perimeter and as such require sufficiently robust "general" consumer enforcement powers to ensure harmful practices do not go unchecked if they happen to fall outside sector regulators' remits to enforce licensing conditions. Several argued that direct enforcement powers would allow sector regulators more flexibility in their approach and provide more effective deterrence. Another benefit they foresaw was reducing reliance on the CMA for general consumer enforcement as they anticipated the CMA would have competing priorities that may limit the resources it can make available to address the range of consumer harms within and at the margins of regulated sectors.

3.37. However, some felt strongly that only the CMA, as a cross-economy enforcer, should get administrative enforcement powers as they argued it would be inappropriate for a sector regulator, which by design has a narrow focus on an individual industry, to set a precedent for how consumer law applies across the whole economy. A few respondents stated that sector regulators have not made sufficient use of their existing powers and were therefore unconvinced they were particularly deficient, or that in future the possibility to use either existing regulatory powers or the proposed enhanced general consumer enforcement powers would leave a material amount of consumer harm unaddressed to justify administrative powers too.

3.38. A few responses argued that Local Authority Trading Standards Services (LATSS) should also avail themselves of administrative powers, specifically directly imposable monetary penalties .

3.39. Government is still committed to ensuring all public consumer enforcers have sufficient powers to protect consumers. In the first instance, this means bringing forward reforms to the powers of the CMA as that would mean bolstering protections for consumers right across the economy. In addition, government wishes to significantly enhance the powers of the civil courts via which sector regulators can enforce consumer law as a means of uniformly improving the rest of the public enforcement system.

3.40. Government will keep the case for extension of administrative powers to sectoral regulators under review, with BEIS continuing to assess the systemic effects of such a change.

3.41. Besides the CMA and sector regulators, civil consumer law has a parallel system of public enforcement from approximately two hundred LATSS that tackle (among other things) scams, e-crimes, the estate and letting agency sector and large consumer enforcement cases that are not indicative of market failure. It is not envisaged that LATSS will be granted direct consumer enforcement powers. This is because LATSS consist of, in many cases, a small number of qualified employees of a local authority who are authorised to enforce trading standards laws, but this diffuse structure lacks the institutional capacity of a regulatory authority to set rules, intervene in markets and adjudicate the law in the same style as a court. However, LATSS already can apply to the civil courts for an enforcement order requiring the business to

comply with consumer protection law and therefore will be able to avail themselves of the new court-based fining powers set out below.

Summary

Government will keep the case for extension of administrative powers to sectoral regulators under review, with BEIS continuing to assess the systemic effects of such a change.

Strengthening sanctions for breaking the rules

Non-compliance with information gathering powers

3.42. Government wants to ensure that all public consumer enforcers, including the CMA, sector regulators and LATSS, can perform, or consider performing, their consumer protection functions based on information that is accurate and complete, and to gather that information as quickly as possible. However, their current means of securing compliance with a statutory information notice (IN) do not provide sufficient deterrence for non-compliant behaviour.

3.43. Therefore, government consulted on introducing new civil monetary penalties. In government's view, the threat of penalties will deter future non-compliance with relevant investigatory powers and will penalise appropriately those on whom monetary penalties have been imposed for the adverse impact of their conduct on enforcers' ability to do their job and protect consumers.

3.44. The consultation asked the following question on this topic:

Q Would the proposed monetary penalties 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?

3.45. Respondents expressed a mixed sentiment where some questioned whether there was enough evidence to support the proposal that this would incentivise compliance. They argued that replying to statutory INs is time and labour intensive for businesses and individuals and monetary penalties for non-compliance therefore risk disproportionately penalising those without the resources to comply on time. Others stated that the prospect of monetary penalties would result in businesses seeking extensions from enforcers so they can be sure they supply every piece of information correctly which would result in longer, less efficient process overall.

3.46. However, many respondents stated that the current sanction – court action to instruct the company to act – is not effective and the proposed penalties would provide stronger incentives to comply. Some emphasised the need for proportionality and that automatic monetary penalties after a certain period would not be appropriate if IN recipients can show effort is being made to comply but at the same time there might be cases where the level of the potential fine needs to appear significant enough, so it is not seen as a cost of doing business.

3.47. Government remains of the view that enforcers should have adequate tools to ensure that IN recipients comply with their investigations and that penalties are an important means of achieving effective deterrence. However, government recognises that efforts to supply information, where made, may not always result in full compliance for legitimate reasons. Therefore, monetary penalties will only be imposed where the IN recipient lacks a reasonable excuse for a failure to comply. In general, enforcers will be required to consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the person's control has caused the failure and the failure would not otherwise have taken place (for example, a significant and demonstrable IT failure).

3.48. The levels of the monetary penalties government already proposed, i.e. 1% of annual global turnover, with an additional daily penalty of up to 5% of daily global turnover while non-compliance continues, are necessary in our view to meaningfully dissuade non-compliance especially by businesses that can easily absorb lower-value fixed monetary penalties but are ultimately a ceiling that may not be justified in many cases.

Summary

Government intends to proceed with the proposed reforms to introduce turnover-based or fixed civil monetary penalties where a person, without a reasonable excuse, has either not complied with an information request under Part 3 of Schedule 5 to the Consumer Rights Act 2015, has provided false or misleading information in response to an information request, or has destroyed, concealed, or falsified information and documents.

In these circumstances, a penalty fine of up to 1% of annual global turnover would be imposable on a business, with an additional daily penalty of up to 5% of daily global turnover while non-compliance continues.

In addition to these monetary penalties which were proposed in the consultation and in recognition of enforcers' ability to serve INs on individuals as well as businesses, where an individual fails to comply, fixed penalties of up to £30,000 would be imposable, with an additional daily penalty of up to £15,000 while non-compliance continues.

The CMA as a newly established administrative enforcer will be able impose these monetary penalties directly (i.e. without the need to apply to court) while all other public consumer enforcers, including sector regulators and LATSS, will be able to apply to the civil courts to impose these monetary penalties.

There will be statutory guidance, subject to prior public consultation, in relation to the considerations that will be relevant to the imposition of any monetary penalty as well as its nature and amount.

Breaches of undertakings

3.49. The value of accepting undertakings for the CMA is that it brings about a quicker case resolution instead of going through a full investigation and court (or administrative) procedure, which may result in the court (or the CMA under an administrative model) issuing an infringement decision and the imposition of a fine in respect of the breach, but which can last for a long time and be expensive. Therefore, undertakings are a quicker way to secure compliance with consumer protection law and redress for injured parties.

3.50. However, government considers that the current means of securing compliance with a consumer enforcement undertaking do not provide sufficient deterrence and/or proportionate punishment for non-compliant behaviour. Breaches of undertakings, in whole or in part, can foster a culture of recidivism for traders towards lucrative, yet unfair, practices and allow harm to consumers and competitors to persist even after enforcement action has taken place, thereby reducing confidence in the enforcement process.

3.51. The consultation asked the following question on this topic:

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

The options presented in the consultation were:

1. uplifting a fine for a proved breach of consumer law if a pre-existing undertaking has also been breached,
2. applying for a court to decide whether the undertaking has been complied with, and to order the enforcement subject to comply and pay the costs of the application,

2A. bespoke fining powers where undertakings are breached without a reasonable excuse.

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

Q 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?

3.52. Respondents generally chose a combination of Option 2 and 2A regarding enforcement powers as they contended that making undertakings enforceable in their own right (i.e., without a need to prove an underlying breach of consumer law) and introducing monetary penalties for breaches of undertakings would best incentivise compliance. Many stated that making

undertakings enforceable in this way would improve businesses' engagement and buy-in in the negotiation of undertakings and ensure they are treated as serious commitments to change their practices. Several of those who supported this option argued that monetary penalties based on turnover would be an appropriate basis to set their levels, invoking a parallel with international jurisdictions like Australia and the EU.

3.53. A few respondents were opposed to the penalty options proposed in the consultation and were in favour of either the current option or the proposed option to treat breaches of undertakings as an aggravating factor in penalising breaches of consumer protection law. They argued undertakings can be quite prescriptive and that there may be many ways to comply with consumer law that are not also compliant with the related undertakings.

3.54. Government believes that making undertakings enforceable in their own right and introducing civil monetary penalties will raise the perceived certainty of consequences for breaches of undertakings, thereby deterring traders from entering into agreements with enforcers with spurious intent to end, or not to carry out, harmful practices. Where a fine is likely or imposed, this would alleviate the unnecessary detriment caused to affected consumers, for example by continuing practices businesses had agreed to desist and/or failing to give or delaying redress included in undertakings, as well as the unfair market advantage over competitors for the period of non-compliance with the undertakings.

3.55. As for monetary penalties for non-compliance with INs, government considers that fines need to be subject to sufficiently dissuasive statutory caps that take account of whether the undertaking is given and then breached by a business or an individual. Where the former is the case, government considers turnover-based penalties would ensure they are meaningful, proportionate and not simply a business expense. Where individuals are concerned, a fixed fine would be appropriate.

Summary

Government intends to introduce turnover-based or fixed civil monetary penalties for breaches of undertakings.

Where a business breaches, without a reasonable excuse, an undertaking given to a public consumer enforcer, a penalty fine of up to 5% of annual global turnover would be imposable, with an additional daily penalty of up to 5% of daily global turnover while non-compliance continues. The same monetary penalties would be imposable if a business breaches an undertaking given to the court.

Where an individual breaches, without a reasonable excuse, an undertaking given to a public consumer enforcer, fixed penalties of up to £150,000 would be imposable, with an additional daily penalty of up to £15,000 while non-compliance continues. The same monetary penalties would be imposable if an individual breaches an undertaking given to the court.

The CMA as a newly established administrative enforcer will be able impose these monetary penalties directly (i.e. without the need to apply to court) for breaches of undertakings given to the CMA. It will also be able to impose these fines for any breaches of any directions it makes following the conclusion of an administrative enforcement case.

All other public consumer enforcers, including sector regulators and LATSS, will be able to apply to the civil courts to impose monetary penalties for breaches of undertakings.

There will be further consultation on statutory guidance in relation to the considerations that will be relevant to the imposition of any monetary penalty as well as its nature and amount.

3.56. Some respondents saw benefits in there being a formal process for agreeing undertakings that include an admission of liability by the trader as that would provide a clear signal to other businesses as to the nature of unacceptable practices.

3.57. However, there were widespread concerns that a default expectation for securing admission of liability in an undertaking could result in fewer undertakings being agreed overall as those would come with reputational damage and financial loss (by means of accepting a penalty albeit at a reduced rate) for businesses. It was also argued that some breaches of consumer law were deliberate so admitting liability and in return receiving a reduced penalty would be seen as a good deal for exploitative businesses.

3.58. Government accepts there might be unintended consequences for the use of undertakings if an admission of liability is made compulsory and has therefore decided not to take forward a mandatory approach. Instead, government is envisaging that the reforms to introduce monetary sanctions as described above will be sufficient to ensure the behavioural changes undertakings normally implement can continue to be achieved in a swift, flexible, cost-effective way without undermining the attractiveness of this tool for both traders and enforcers.

3.59. However, government considers it may be appropriate for the CMA, as a newly established administrative enforcer, to have the flexibility to introduce a process akin to the settlement agreements that exist in its competition regime. Through the prospect of a reduced fine upon reaching a settlement, this could serve to incentivise a trader with whom agreeing an undertaking has not been possible to instead adopt a CMA direction. Therefore, government intends to enable the CMA to institute a formal settlement process which will be subject to further consultation.

A Duty of Expedition

3.60. As mentioned above in paragraph 1.9, government intends to introduce a statutory duty of expedition, making clear that the CMA is under a duty of expedition in relation to its competition and consumer law functions, including the functions of the new digital competition regime.

Summary

Government intends to introduce a statutory duty of expedition for the CMA in relation to its competition and consumer law functions, including the new functions of the new digital competition regime.

Breaches of consumer protection law

3.61. The consultation restated government's commitment, previously announced in the 2018 Consumer Green Paper, that all public consumer enforcers will be able to ask the court to impose monetary penalties on businesses for consumer law breaches. Government confirms its intent to implement this reform.

Summary

Government intends to introduce turnover-based or fixed civil monetary penalties for breaches of consumer protection law.

Where a business breaches consumer law, a penalty fine of up to 10% of annual global turnover would be imposable.

Where an individual breaches consumer law, fixed penalties of up to £300,000 would be imposable.

The CMA, as a newly established administrative enforcer, will be able impose these monetary penalties directly (i.e., without the need to apply to court) but only in relation to breaches of the subset of the legislation in Part 8 of the EA 02 that it will be empowered to enforce directly (see above).

All other public consumer enforcers, including sector regulators and LATSS, will be able to apply to the civil courts to impose monetary penalties for breaches of any of the legislation in Part 8 of the EA 02.

There will be further consultation on statutory guidance in relation to the considerations that will be relevant to the imposition and amount of any monetary penalty.

Supporting consumers enforcing their rights independently

3.62. Government believes a well-functioning Alternative Dispute Resolution (ADR) system supports consumers by facilitating quicker and cheaper access to redress for individual disputes without the need for going to court.

3.63. Government has already indicated that it intends to examine radical new ways to mainstream ADR for all types of disputes, including consumer disputes, so it operates as an integrated part of the justice system. As proposals for this wide-ranging and fundamental reform are developed, government consulted on more immediate plans to increase the rate of individual consumer disputes being satisfactorily resolved by strengthening and expanding the scope of ADR.

3.64. Government sought views on three specific groups of improvements:

a. Improving consumer awareness and signposting
b. Increasing the quality and oversight of ADR
c. Improving the take-up of ADR by businesses in non-regulated markets

Improving consumer awareness and signposting

3.65. Most businesses try hard to resolve consumer complaints. However, when consumers and businesses cannot agree, it should be easier and simpler for consumers to understand their rights and choose to pursue the best redress option.

3.66. Although consumers currently have access to a variety of public and privately funded advice providers, consumers can still find it difficult to understand their redress options, make the right choice for them and navigate the routes to resolving their problem, particularly if they are vulnerable. This includes finding out whether ADR is available, how it works and what other options are available.

3.67. The consultation asked the following question on this topic:

Q What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

3.68. Responses raised a number of ideas in response to this question, which broadly split into two distinct areas. Firstly, the need for improved provision of signposting, advice and support to enable consumers to benefit from ADR. Secondly, systemic issues within the ADR landscape that prevent, or can deter, consumers from accessing services.

3.69. Public recognition of ADR is low. This is in part likely to be due to a lack of understanding as to how it works, and what it can do to help consumers resolve problems they face, but also because information, advice and support is decentralised and, outside of the regulated sectors, the voluntary nature of ADR creates large gaps in markets where it is unavailable.

3.70. This serves to make the ADR landscape complex and difficult to understand, with multiple schemes in some sectors and none in others. Many respondents

argued that access to a single entry and advice point would make ADR easier to understand and navigate.

3.71. Many respondents also noted that ADR providers themselves could do more to respond to the needs of vulnerable consumers directly, through engaging with and seeking opportunities to promote their services through organisations that vulnerable groups use.

3.72. In terms of the process of ADR, several responses advocated for ADR schemes to publish vulnerable consumer policies. These might include designing processes that support the identification of vulnerability, training for staff to ensure this is embedded and use methods of recording vulnerability once it has been identified.

Summary

Government will continue to work closely with regulators, consumer advocates, ADR providers, consumer enforcement bodies and businesses to help promote the benefits of ADR and ensure ease of access.

Speeding up access to ADR

3.73. In regulated markets, the majority of disputes are resolved within four weeks, but most regulators have typically set an informal upper limit of eight weeks for businesses to resolve complaints before consumers are entitled to take a dispute to ADR.

3.74. Government recognises that there are some complaints that are complex and may take businesses longer to resolve and that referring a complex case into the ADR process prematurely before the facts are established could introduce delay later in the process. Government sought views on whether regulators should aim to set a significantly lower threshold for consumers to exercise their right to access ADR and if so whether exceptions could or should be made to allow more time to resolve complex cases.

3.75. The consultation asked the following question on this topic:

Q How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

3.76. Many of the responses agreed that there is a strong case for reducing the currently informal upper time limit for businesses to resolve complaints before taking a dispute to ADR from eight weeks to four weeks. Furthermore, a reduction in the time limit would incentivise businesses to improve their complaints handling processes and deal with simple cases more quickly.

3.77. However, some responses highlighted the potential problems that come with reducing the upper time limit to resolve complaints before taking a dispute to ADR, including preventing businesses from properly investigating claims and placing additional burdens on business. Many of these responses felt a ‘one

size fit all' approach would not work as some sectors have a large number of cases with complex products and services that take time to investigate fully.

3.78. Several responses highlighted ways in which a balance could be struck such as a mandatory quality check on a case that has passed the four-week mark, a reiteration of a consumer's right to access ADR after four weeks, a statutory definition or guidance on what would be consider a complex case and splitting the case handling process into clear milestones with time limits attached to each one.

3.79. A general theme across all the responses was the importance of good communication and delivering the right outcome for consumers as soon as possible. The general consensus was that a 'one size fits all' approach is unrealistic and there should be a general push to improve the quality and speed of complaints handling with as much consistency across all regulated sectors where possible.

Summary

Government will not impose a standardised four-week limit for businesses to resolve complaints informally prior to ADR. Government will continue to engage with regulators individually and through the Consumer Forum to explore the case for reducing the current informal upper time limit of eight weeks for businesses to resolve complaints before taking a dispute to ADR, while also ensuring appropriate safeguards are put in place for complex cases.

Quality and oversight of ADR services

3.80. Government signalled its intention to improve the quality and consistency of ADR services in consumer markets, to further increase business and consumer confidence in ADR.

3.81. This would include strengthening the accreditation process ADR providers must comply with, for example by embedding in the regulations additional criteria around the neutrality, efficiency, accessibility, and transparency of service provision.

3.82. The consultation asked the following questions on this topic:

Q What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

3.83. The majority of respondents to this question highlighted the importance of a Competent Authority in setting, applying, and monitoring standards as well as promoting the benefits of ADR in helping to solve disputes. Many these respondents felt overall ADR service standards should be improved and more oversight put in place to monitor performance

3.84. A number of respondents pointed to the work Ombudsmen do, including the Ombudsman Association, to improve standards for ADR services and

complaints handling more broadly. Many highlighted the value of having an Ombudsman or equivalent body in each sector with a consistent and clear set of standards. If this was not possible, then ensuring all bodies are assessed against similar standards would improve ADR as a service. Similarly, the Consumer Codes Approval Scheme was often highlighted as a good example of where a set of standards is universally applied and regularly assess with a high level of scrutiny.

3.85. A general theme in the responses to this question was around ensuring standards were consistent, clear, universally applied and enforced with appropriate sanctions to incentives and drive performance.

Q What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?

3.86. Some respondents felt more robust initial accreditation processes and increased reporting requirements would bring improved accountability practices, particularly in the non-regulated sectors. A small number recommended specific checks such as a 'fit and proper persons' test.

3.87. Improved transparency and demonstration of independence were highlighted as areas where more could be done to improve business and consumer confidence in ADR. Suggestions included a formal requirement to publicise annual reports, creating uniform Key Performance Indicators (KPIs), and stronger governance processes.

3.88. The ADR Regulations currently allow 'Competent Authorities' to approve any and as many ADR bodies as they see fit within a given sector. Most of the regulated sectors have one or a small number of ADR providers whereas the non-regulated sectors tend to have many more. A number of respondents highlighted that this proliferation causes confusion for the consumer and drive overall standards down through a 'race to the bottom'. Others, however, highlighted the benefits of competition to drive innovation and lower prices for businesses, if appropriate safeguards and basic minimum standards were put in place and upheld.

Summary

Government intends to require all businesses that offer dispute resolution services in consumer markets to be approved under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.

Government also intends to improve the quality and oversight of ADR services by strengthening the existing accreditation framework to ensure a common set of standards are applied and that providers can be held accountable by the Competent Authority.

Improving the take-up of ADR by businesses in non-regulated markets

3.89. In the regulated sectors, it is generally mandatory for traders to participate in ADR schemes. For sectors where participation is voluntary, there is little engagement, particularly amongst SMEs.

3.90. Government sought views on whether to make business participation mandatory in the motor vehicles sector (to include the supply of new and used vehicles and servicing and repair) and in the home improvements market (such as roofing, glazing, plumbing work, or the fitting of flooring, kitchens, or bathrooms). Unresolved problems in these markets can have a significant impact given their cost and importance, particularly for vulnerable consumers.

3.91. The consultation asked the following questions on this topic:

Q 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?

3.92. The majority of respondents to this question agreed there is a strong case for making business participation in ADR mandatory in the motor vehicles and home improvements sector. Others went further and felt mandatory ADR should be extended to all or other sectors where levels of consumer detriment are high. A number of respondents highlighted that enforcement of this, particularly in sectors with a high number of sole traders or SMEs such as home improvements, would be challenging.

3.93. On managing costs, responses were mixed – a number of the responses felt a subscription model would cover some of the fixed costs associated with providing ADR with more bespoke and proportionate case handling fees. Subscription models, typically offered by organisations such as trade associations and Ombudsmen, often offer more than just ADR such as business education which help businesses and consumers learn from cases and improve their practices.

3.94. In contrast, many respondents felt a 'per case' model would allow businesses, primarily SMEs, to manage costs and put the largest burden on businesses who resisted solving disputes directly with consumers. Some respondents identified that a 'per case' model offers greater flexibility and choice for smaller businesses when ADR is needed to solve a dispute. However, some respondents raised the concern that this freedom may be abused by ADR providers looking for the cheapest option, which may be of a lower standard.

Q 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?

3.95. Responses to this question were varied – a number of respondents saw the value of a nominal fee in helping deter frivolous or vexatious claims which could be crafted to ensure redress is still cheaper than the courts but also

supports the initial administration of a complaint, with fees returned to the consumer if the claim is successful.

3.96. However, several respondents felt that a 'nominal fee' is a significant barrier to redress, especially in instances where consumers are financially vulnerable or on low incomes. Some respondents highlighted that the concept of a 'nominal fee' conflict with the Ombudsman principles of providing free ADR to consumers.

Q How can government best encourage businesses to comply with these changes?

3.97. Responses to this question offered a number of different options to drive compliance ranging from Government-backed initiatives through to increased education and awareness.

3.98. Increased awareness campaigns for both consumers and businesses were regularly highlighted as an effective way to drive up compliance. Increased engagement through Government-sponsored campaigns and incentives were cited as key to spreading the message on the benefits of using ADR as an alternative to court. This includes creating clearer guidance and signposting for consumers and businesses to ADR providers.

3.99. Other respondents felt that government resources and initiatives could be used to encourage compliance. For example, encouraging and directing consumers to pick businesses that are approved by a Consumer Code or Trustmark/Kitemark-like scheme through GOV.UK. A small group of respondents felt that financial penalties and strong enforcement tools would be the primary driver of compliance alongside educational programmes.

Summary

Government believes dispute resolution services play an important role in helping people get the support they need at the right time to get the best outcomes for their issue. The Ministry of Justice's recent Call for Evidence[31] sought views on how dispute resolution services can provide an effective route to redress without the need for court-based litigation. BEIS will work with the Ministry of Justice to help inform and support their policy development and analysis and ensure that there are more routes to redress for business and consumers to solve disputes outside of court.

Collective redress

3.100. The UK has an established regime for addressing collective consumer harm and enabling consumers to gain collective redress when consumer law has been broken. This covers both public collective redress procedures, whereby

[31] https://www.gov.uk/government/consultations/dispute-resolution-in-england-and-wales-call-for-evidence

regulators and the CMA can seek redress on behalf of consumers under Part 8 EA 02, and, to a certain extent, private collective redress, for example through Group Litigation Orders. However, the UK fundamentally has a civil enforcement regime whereby enforcers, such as the CMA, seek compliance with consumer law rather than taking representative legal action on behalf of consumers.

3.101. Government consulted on whether there is a case for strengthening the UK's collective redress regime, to make it easier to gather many individual claims together into a single lawsuit that can support the cost of litigation. The impact of a strengthened collective redress regime may make direct access to remedies for infringements of consumer law, through collective representative actions, more accessible to consumers in general.

3.102. The consultation asked the following questions on this topic:

Q 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?

3.103. There was a mixed response to this question, with some support for opening up further routes to collective redress that highlighted the benefits to consumers of providing a variety of means to ensure compliance with consumer rights. However, a number of respondents also raised issues around the financial mechanisms to support collective redress, particularly the financial burden of bringing a claim and the potential of failed actions to act as a strong disincentive for further actions from, for example, consumer organisations.

3.104. The question of regulation was also raised, with a number of respondents highlighting the need for safeguards to protect against the exploitation of consumers in terms of protecting the compensation due to them, to prevent vexatious or speculative cases, guard against the risk of encouraging a claims culture and ensure transparency.

Q 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?

3.105. Responses to this question were also mixed, with a number of responses noting that strengthening collective redress could be a significant step forward for consumers' rights and that businesses would be more likely to work with consumer groups where the possibility of failing to do so would result in collective redress.

3.106. There was particular focus on increasing consumers' ability to seek and obtain fair treatment as set out in consumer law. Also noted was a positive impact on businesses and markets, with those businesses complying with consumer law enjoying a competitive advantage through increased consumer trust and satisfaction. However, the issue of effective safeguards and regulation was also raised here as it would be important to protect businesses against unmeritorious claims and to ensure an appropriate balance between facilitating such redress and protecting defendants' rights.

Summary

Government does not propose to take immediate action at this stage, in the light of the differing perspectives presented during consultation.

Trading Standards Enforcement

3.107. National Trading Standards (NTS) and Trading Standards Scotland (TSS) are national coordination bodies for Trading Standards in England, Wales, and Scotland. They are the two national bodies that form a key part of the current consumer enforcement system, alongside Local Authority Trading Standards Services (LATSS) and the CMA. Their primary focus is enforcing against criminal breaches of consumer protection. These are often criminal in nature and include doorstep crime, e-crime, and mass-marketing scams; often requiring a coordinated approach across local authority borders.

3.108. Government recognises the vital role NTS, TSS, and LATSS play in protecting consumers across the country. Government consulted on how national and local enforcement can work best together to tackle regional and national consumer harm, enforcing criminal breaches of consumer law.

3.109. The consultation asked the following question on this topic:

Q 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?

3.110. The majority of respondents who answered this question welcomed greater coordination between local and national enforcement authorities.

3.111. Most respondents felt that LATSS should be better resourced. Since LATSS are a local government funding responsibility, BEIS remains in contact with the Department for Levelling Up, Housing and Communities on matters of funding.

3.112. Some suggested that increasing the capacity for LATSS to mitigate risk could enable local enforcement to pursue more cases.

3.113. It was also noted that arrangements differed across Administrations, with the Procurator Fiscal bearing the cost of enforcement in Scotland. TSS Northern Ireland noted that they had relatively limited access to national support structures.

3.114. A proposal raised with government during the consultation was to reassess the time limits under the CPRs. This proposal highlighted the increasing complexity of cases since the formation of the CPRs, driving an increasing difficulty in meeting the current time limits for bringing a prosecution. Government considers that there is good reason to look further into the subject of time limits for LATSS' prosecutions, specifically the date of discovery limitations, so that they are better placed to tackle the largest and most complex cases of consumer harm.

Summary

Government will continue to explore how the structure of national support can best increase the resilience of local and national criminal enforcement of consumer law, with regards to management of legal and financial risks.

Government will assess the case for increasing the time limits for bringing a prosecution under the CPRs.

Giving businesses the right support to comply with consumer protection law

3.115. Government sees preventative action such as educating businesses about their obligations as an important tool for increasing compliance with consumer law without the need for formal enforcement action.

3.116. This can benefit businesses by lowering the risk of enforcement action against them and improving their reputation with customers who will ultimately benefit from improved services.

3.117. Public enforcers cannot take formal enforcement action in every case of non-compliance with consumer law so achieving as much compliance as possible through softer tools like guidance allows them to direct enforcement resources to cases involving the most significant harms to consumers.

3.118. The consultation asked the following questions on this topic:

> **Q 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?**

3.119. Respondents expressed fewer views on this question, but some made suggestions regarding both the accessibility and the content of business guidance.

3.120. Some respondents said a lot of business guidance is currently out of date and following an online clean-up a consistent approach should be taken by public bodies to signpost to a single source.

3.121. Several respondents argued information was delivered retrospectively and that instead it must be updated and provided regularly to ensure consumers and business are properly protected and informed.

3.122. Several respondents praised the quality of guidance on the Business Companion website as well as the system of Primary Authority relationships, but some argued that more could be done to ensure guidance is consistent

with the body of existing and emerging jurisprudence stemming from court judgements.

3.123. Another point raised was that there may be scope for more efficient knowledge and resource sharing between and within LATSS so that duplication of information can be avoided.

3.124. It was also argued that more could be done to ensure that business guidance produced and delivered by public bodies in Great Britain successfully reaches businesses and consumers in Northern Ireland, for example by extending the Business Companion to cover NI or alternatively providing resources and funding to NI directly to allow for the creation of bespoke NI business guidance.

Summary

Government will work with our partners and stakeholders to explore how we can improve the 'Business Companion' service.

Annex A: List of respondents

Business

1. Affinity Water Ltd
2. Airbnb
3. Amazon
4. Appreciate Group
5. Balanced Economy Project
6. Barchester Healthcare Homes Ltd
7. Barclays Bank
8. Beer52 Limited
9. British Telecommunications (BT)
10. Building Societies Association (BSA)
11. Care England
12. Care UK Group
13. Centrica
14. Chimera Insurance Agency
15. Clearpay (Afterpay) Ltd
16. Computershare Investors Services PLC
17. Consumer Dispute Resolution Limited (CDRL)
18. Co-operatives UK
19. CORGI Fenestration Scheme Ltd
20. Deliveroo
21. Domestic and General
22. E (Gas and Electricity) Ltd
23. Electrical Safety First
24. Experian

25. Facebook
26. Fair By Design
27. Fideres
28. Gumtree
29. Hello Fresh
30. Independent Betting Adjudication Service (IBAS)
31. Just
32. Kelkoo Group
33. Looking After Your Pennies Ltd
34. Company A
35. Pact Coffee
36. People's Postcode Lottery
37. QASSS Ltd
38. Resolver
39. Rightmove
40. Royal Institution of Chartered Surveyors (RICS)
41. Ryanair
42. Scottish Mediation
43. Scottish Power
44. Sky
45. Skyscanner Limited
46. St James Place Wealth Management
47. Stewarts
48. Stitch Fix UK
49. Tails.com
50. Tesco PLC
51. Thames Water Ltd

52. The Institute of Chartered Accountants in England and Wales (ICAEW)
53. Trailfinders
54. Tripadvisor
55. Trustpilot
56. Virgin Media O2
57. Visa Europe
58. Vodafone
59. Water UK
60. Yelp

Business Representation

1. British Brands Group
2. British Retail Consortium (BRC)
3. Confederation of British Industries (CBI)
4. Federation of Small Businesses (FSB)
5. Institute of Directors (IoD)
6. US Chamber of Commerce

Trade Associations

1. ACT – The App Association
2. Association of British Travel Agents (ABTA)
3. The Anti-Counterfeiting Group (ACG)
4. Association for Commercial Broadcasters and On-Demand Services
5. Association for Interactive Media and Micropayments (AIMM)
6. Association of Mortgage Intermediaries and Association of Finance Brokers (AMIAFB)
7. British Hallmarking Council (BHC)
8. British Private Equity and Venture Capital Association (BVCA)

9. British Vehicle Rental and Leasing Association (BVRLA)
10. Centre for Effective Dispute Resolution (CEDR)
11. Consumer Credit Trade Association (CCTA)
12. Credit Services Association (CSA)
13. Energy UK
14. Federation of Master Builders (FMB)
15. Finance & Leasing Association (FLA)
16. GC100 - Association for the General Counsel and Company Secretaries
17. The Independent Networks Cooperative Association (INCA)
18. Motion Picture Association (MPA)
19. National Federation of Builders (NFB)
20. National Federation of Roofing Contractors (NFRC)
21. National Hair and Beauty Federation (NHBF)
22. News Media Association (NMA)
23. National Franchise Dealers Association (NFDA)
24. Professional Publishers Association (PPA)
25. Society of Motor Manufacturers and Traders Limited (SMMT)
26. TechUK
27. UK Competitive Telecommunications Association (UKCTA)
28. UK Finance

Regulators / Ombudsmen

1. Advertising Standards Authority (ASA)
2. Civil Aviation Authority (CAA)
3. Competition and Markets Authority (CMA)
4. Dispute Resolution Ombudsman
5. Financial Conduct Authority (FCA)

6. Gambling Commission
7. Legal Services Board
8. Office of Rail and Road (ORR)
9. Ofgem
10. Ombudsman Association
11. Ombudsman Services
12. Payment Systems Regulator
13. Phonepaid Services Authority (PSA)
14. The Motor Ombudsman
15. The Pensions Ombudsman
16. The Property Ombudsman
17. The UK Regulators Network (UKRN)

Legal

1. Addleshaw Goddard LLP
2. Allen & Overy LLP
3. American Bar Association
4. Ashurst LLP
5. Baker McKenzie
6. Bristows LLP
7. Competition Appeals Tribunal (CAT)
8. Chancellor of the High Court
9. Clifford Chance LLP
10. CMS Cameron McKenna Nabarro Olswang LLP (“CMS”)
11. Competition Law Committee of the City of London Law Society
12. Euclid Law Ltd
13. Eversheds Sutherland

14. Freshfields Bruckhaus Deringer LLP
15. Hausfeld & Co. LLP
16. Herbert Smith Freehills LLP
17. Hill Dickinson LLP
18. Joint Working Party of the Bars and Law Societies of the UK on Competition Law
19. Leigh Day
20. Linklaters LLP
21. Nockolds Solicitors
22. Office for Legal Complaints (OLC)
23. The In-house Competition Lawyers' Association (ICLA)
24. TLT LLP

Consumer Bodies

1. Advice Direct Scotland
2. Civil Aviation Authority Consumer Panel
3. Citizens Advice
4. Citizens Advice Scotland (CAS)
5. Communications Consumer Panel and advisory Committee for Older and Disabled People
6. Consumer and Public Interest Network (CPIN)
7. Consumer Council for Northern Ireland (CCNI)
8. Consumer Scotland
9. Consumer Council for Water (CCW)
10. Holiday Park Action Group
11. Institute of Consumer Affairs (ICA)
12. Money and Mental Health Policy Institute
13. National Consumer Federation
14. Renewable Energy Consumer Code (RECC)

15. Which?

Trading Standards / Local Authority

1. Buy With Confidence Partnership
2. Consumer Codes Approval Scheme (CCAS)
3. COSLA/Trading Standards Scotland
4. Chartered Trading Standards Institute (CTSI)
5. Chartered Trading Standards Institute (CTSI) – ADR
6. Chartered Trading Standards Institute (CTSI) – UK Contact and Advice Centre Team/UKICC
7. Kent County Council (ADR Scheme)
8. London Borough of Camden
9. Middlesbrough Borough Council
10. National Conciliation Service
11. National Trading Standards Estate & Letting Agency Team (NTSELAT)
12. Northern Ireland Trading Standards
13. National Trading Standards/Association of Chief Trading Standards Officers (ACTSO)
14. Society of Chief Officers of Trading Standards in Scotland (SCOTSS)
15. The Local Government Association (LGA)
16. Trading Standards South West (TSSW)

Academics

1. Professor Amelia Fletcher – University of East Anglia
2. Professor Andreas Stephan – University of East Anglia
3. Assistant Professor Suzanne Chiodo, Facility of Law, Western University, Ontario, Canada
4. Professor Bruce Lyons – University of East Anglia
5. Doctor Chris Colvin – Queens University Belfast

6. Professor Christopher Hodges – University of Oxford
7. Doctor David Reader – Newcastle Law School
8. Professor Christine Riefa – University of Reading
9. Professor Christian Twigg-Flesner – University of Warwick

Independents/Individuals

10 responses were received from individuals.

Campaigners

1. Fan Fair Alliance
2. All-Party Parliamentary Group on Ticket Abuse (APPG)
3. The Complaining Cow

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