CMA
Competition & Markets Authority

Reforming Competition and Consumer Policy

Driving growth and delivering competitive markets that work for consumers

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CMA149con

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1. Background

The role of the CMA

1.1 The Competition and Markets Authority ('CMA') is an independent non-Ministerial government department and is the UK's lead competition and consumer authority. Its mission is to make markets work well in the interests of consumers, businesses and the economy.

1.2 The CMA does this in a number of ways:

- investigating mergers between organisations, to make sure they do not reduce competition
- investigating entire markets if it thinks there are competition or consumer problems
- taking action against businesses and individuals that take part in cartels or anti-competitive behaviour
- protecting consumers from unfair trading practices
- encouraging government and other regulators to use competition effectively on behalf of consumers.

1.3 This is the CMA response to the government's Consultation *Reforming Competition and Consumer Policy – Driving Growth and Delivering Competitive Markets That Work for Consumers* (the Consultation).

The CMA welcomes government's commitment to legislative reform

1.4 In August 2018, the then Secretary of State for Business, Energy and Industrial Strategy asked Lord Tyrie, then Chairman of the CMA, to make proposals on legislative and institutional reforms to safeguard the interests of consumers and to maintain and improve public confidence in markets. CMA proposals in response to this commission were sent to the Secretary of State on 21 February 2019 and can be viewed at Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy. These were proposed as improvements to the current regime, rather than a fundamental rewrite of the statute book. The aim of the proposed improvements was to develop a swifter, stronger and more flexible competition and consumer protection regime.

1.5 In making these proposals, the CMA considered, and remains of the view, that the twin challenges posed by the growth of the digital economy, and declining

public confidence in market competition, required reforms to competition and consumer protection law and policy.

1.6 The CMA therefore welcomes the Consultation, which is perhaps the most important review of competition and consumer policy in a decade.[1] Indeed, it is pleased to see that the government is proposing to take forward many of the proposals made in Lord Tyrie's 2019 letter. The CMA considers that across the Consultation, government has identified a compelling package of legislative reform proposals, and areas for further consideration, that taken together will help promote fair, open and competitive markets, and promote the interests of consumers as well as those of fair-dealing businesses wishing to enter markets, grow their businesses, and compete with large incumbents. In this way, the government's proposals can also be expected to support growth and economic recovery.

1.7 The CMA stands ready to assist the government as necessary in developing the government's proposals for reform. It has provided comments in this response on certain specific questions in the Consultation, either where it might have concerns about a proposal or where it considers that its views may help in the effective development of the proposal.

1.8 The CMA notes that in the Consultation, the government has not proposed taking forward some of the CMA's recommendations in the February 2019 letter referred to above. These include the proposals for the CMA, and the courts, to have an overriding duty to promote the interests of consumers;[2] aligning the scope of the market investigation reference test with the market study's 'adverse effects on consumers' assessment (currently, the market investigation reference can only consider whether there is an adverse effect on competition);[3] and a new statutory requirement on the CMA to conduct its investigations swiftly, while respecting parties' rights of defence ('duty of expedition').[4] Legislative change is of course a matter for Parliament. The CMA nevertheless considered these proposals beneficial to the development of the UK competition and consumer regime. In particular, the CMA remains of the view that a duty of expedition would help the CMA to conduct its investigations and complete its work as swiftly as possible, while giving due consideration to parties' rights of defence.

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[1] The CMA also welcomes the government's separate consultation *A New Pro-Competition Regime for Digital Markets*, and has submitted a separate response to that consultation.

[2] See for example, page 9 of Lord Tyrie's letter.

[3] See for example, page 14 of Lord Tyrie's letter.

[4] See for example, page 31 of Lord Tyrie's letter.

1.9 Finally, the CMA also observes that the Consultation comes at a time when the goals of competition law are subject to revisionist debate across the globe. As part of this debate, there have been calls for significant, transformative change, including in some cases the suggestion that egalitarian and even potentially broader public interest factors should be taken into account in competition law.[5]

1.10 In this regard, the CMA notes that the Consultation proposes important but incremental, rather than radical, change to the competition regime. Certainly, nothing in the Consultation proposes transforming the key elements of UK competition law (including the merger regime) or the factors that are taken into account in its substantive application. Similarly, the CMA's response to the Consultation does not seek to address or offer views on this broader debate about the goals of competition law. It considers only proposals in the Consultation. Whether any more significant change should be made to UK competition law beyond what is proposed in the Consultation is a matter for the government and Parliament.

[5] See, for example, Kovacic, 'Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy', *Antitrust Law*, Vol. 35, No. 3, Summer 2021 at p. 46.

2. CMA Response to Consultation

The CMA's comments on the Consultation, and its response to the questions in it, are set out below.

General comments

2.1 As noted above, the CMA welcomes many of the proposals in the Consultation, many of which take forward the CMA's previous suggestions for a swifter, stronger and more flexible competition and consumer protection regime. It stands ready to assist the government as necessary in developing the government's proposals for reform.

2.2 The CMA has provided comments on specific questions, either where it might have practical observations about the successful implementation of a proposal, and challenges facing that, or where it considers that its views might otherwise help in the effective development of the proposal.

2.3 In respect of chapters 2 and 3 of the Consultation, the CMA has taken the opportunity to provide additional thematic responses giving wider views in respect of substantive consumer rights, public enforcement of consumer law, and private redress.

Chapter 1: Competition Policy

State of Competition Reports

Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

2.4 Achieving a set of comprehensive and robust indicators with which to compare the degree to which different markets are both open and competitive is not straightforward. Official statistics concerning key business indicators such as turnover, market share and profitability are typically only available with some significant lags. Further the classifications used were developed when manufacturing was the dominant part of the economy so there are challenges in the way that service industries are classified. Finally, there are also significant challenges in covering the impact of trade flows on the metrics that are of interest to a competition and consumer authority.

2.5 Therefore, the CMA will be interested to see stakeholder responses to this question. Among the range of metrics and indicators used by the CMA in its

2020 State of Competition report and which will form the basis of future reports were the following:

- concentration – the structure of industries and the extent to which industry turnover is taken by the largest firms;
- indicators of dynamic competition – the rates of business entry and exit, and the stability of the positions of the largest firms in the economy;
- profitability and mark-ups – the levels of UK businesses' profits, the mark-ups of prices over costs charged by businesses and the distribution of profits among businesses;
- profit and mark-up persistence – how likely the most profitable businesses are to remain the most profitable businesses;
- consumer surveys – broad measures such as trust in and satisfaction with consumer markets;
- high frequency data on business formation and closure during the pandemic; and
- data on consumer and business experiences during the pandemic.

2.6 Other metrics that could be considered in the future for assessing the state of competition include the following:

- productivity statistics;
- innovation statistics (eg patent counts, etc);
- cross-ownership: extending the work from last State of Competition on this;
- labour rates/share figures; and
- trade statistics.

2.7 These metrics may be estimated at the level of individual industries, of sectors of the economy and of the whole economy using existing official surveys conducted by the Office for National Statistics supplemented by targeted consumer and business surveys. Individually, each of these measures can provide only a limited amount of information, which would be significantly less detailed than that used in merger analysis, market investigations or competition law enforcement. However, the CMA believes it is possible to develop robust measures as lead indicators of those sectors which appear to be open and competitive and alternatively those sectors which appear to have incumbents who are significantly profitable and yet not subject to challenge by

new entrants. With time these data series could also improve understanding of how the level of competition in various sectors is evolving over time and may offer opportunities to better understand the impact of the work of consumer bodies, competition enforcement and regulatory interventions. Going forward it is likely to be worthwhile obtaining regional breakdowns of these metrics to better understand the extent to which there are geographical barriers to competition and innovation within markets.

Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

2.8 Timely, complete and reliable information is necessary to help ensure that future State of Competition Reports can provide the government and others with better evidence to inform overall competition policy and help shape any future actions by the government and CMA.

2.9 Most of the data upon which the State of Competition Report relied was and will be drawn from existing ONS data to which the CMA has access.

2.10 The CMA has not explicitly requested further powers to require information from businesses but it is aware that there are significant lags in the availability of some key data and that certain sectors – for example relating to international trade - are not comprehensively covered. The CMA therefore considers further powers could be helpful in producing future comprehensive and reliable State of Competition reports. Moreover, while the CMA may wish to rely on information that is publicly available, there is likely to be some relevant information which is not. Having the power to require people to give us information would also enable the CMA to draw on a wider range of sources of evidence and make better informed findings.

2.11 As is the case with its other information gathering powers, when deciding whether to use these statutory powers CMA would aim to be fair and reasonable in its requests for information and the deadlines it sets for parties to respond to such requests. It would expect to adopt a flexible approach – the form of engagement with addressees may differ depending on the individual circumstances (for example, the extent of informal co-operation achieved or the nature of the information requested) may affect the CMA's decision whether to proceed initially on an informal basis or formally. Such a power may be necessary to ensure that recipients of requests for information take appropriate action since the CMA would, if necessary, be able to impose penalties for non-compliance with a request.

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

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

2.12 The CMA understands and supports the government's wish to provide more detailed and regular strategic steers. However, the CMA would caution against steers being revised too frequently in order to avoid any risk that the steer in practice becomes – or is seen to become – more of an operational, rather strategic steer. For example, annual changes to the strategic steer could certainly be problematic in this regard. The CMA suggests that strategic steers should not be given more frequently than once every two to three years.

More effective market inquires

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

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

2.13 The CMA is aware that the current markets regime reflects the former separation between the Office of Fair Trading (OFT), which had the market-study function, and the Competition Commission (CC), which had the market-investigation reference function. Through the merger between the OFT and the CC that created the CMA, these two tools were essentially preserved.

2.14 Irrespective of their provenance, the market study and market investigation tools each have distinct advantages. The market study tool among other things has the benefit of flexibility of process. On the other hand, the market investigation reference tool has a more structured process and allows for remedies to be imposed by the CMA using independent decision makers in order to address adverse effects on competition that are found.

2.15 There is also a balance to be struck between speedy resolution of markets work and sufficiency of procedural checks and balances where remedies are to be imposed which can have a material impact on businesses.

2.16 The CMA supports the government's aim to increase the pace of markets work. However, it is concerned that each of the proposals for structural reforms could put at risk some of the advantages discussed in paragraph

2.14 above of the current market study and market investigation tools. In particular, the single-stage market inquiry option could risk losing the pace and flexibility advantages of the market study process. As a consequence, it could risk increasing the average duration of markets cases, contrary to its intended aim of speed and efficiency. The decision makers will by definition need to familiarise themselves with the detail of the case and reach a view on the adverse effects that have been identified, something that will inevitably take some time if they only become involved part way through the process. In practice, this may well mean that all cases default to a more onerous market investigation framework, meaning that the flexibility of the current market study process risks being lost.

2.17 The CMA can see advantages in terms of the earlier resolution of some identified concerns if the CMA Board was empowered to impose certain remedies at the end of a market study. However, the CMA notes that this enhanced process could risk the current flexibility of market studies, particularly as regards the ability to complete quicker reviews of markets where the CMA does not need to impose remedies. The CMA notes that its experience to date is that companies generally engage with market studies in a positive and cooperative way: companies may adopt a more adversarial approach where they fear remedies may be imposed (as we often see in the context of market investigations). Further, at the outset of a market study it will not always be clear whether CMA-imposed remedies may be needed and consequently the process will need to include sufficient procedural safeguards in respect of any findings and remedies that might be introduced. There is therefore a risk that some market studies will be subject to additional and unnecessary process and procedure.

2.18 Moreover, the CMA acknowledges the government's desire to ensure that more 'interventionist' remedies be imposed by independent decision makers. However, the CMA notes that in the absence of clear statutory provisions setting the scope of potential remedies at the end of a market study, this raises additional grounds for a legal challenge to any CMA-Board remedy decisions. We note that parties typically have differing views as to how interventionist a particular remedy is. As a consequence, in some cases it is possible that under this option only the most clear-cut remedies of a very limited nature would be imposed.

2.19 Taking all of these factors into account, the CMA considers that the current structure of the markets regime is worth maintaining in that it strikes an appropriate balance between speed and procedural safeguards.

2.20 That said, the CMA agrees with the government that the speed and efficiency of markets work should be further increased. It considers that

many of the other reforms proposed in the Consultation will also assist in this regard. The CMA will also continue striving to streamline its markets processes internally. Importantly, in order to avoid unnecessary delay and duplication, the CMA will seek, where appropriate, to make market investigation references without first having done a market study (since a market study is not a necessary pre-condition to a market investigation reference) or at a much earlier stage of a market study than in the past.

2.21 The CMA also welcomes the proposal to remove the requirement to consult on a market investigation reference within the first six months of a market study. And the CMA supports the proposal in the Consultation at paragraph 1.62 for legislative amendments providing the CMA with greater flexibility to narrow the scope of a market investigation reference in respect of specific issues within a market. This would enable the market investigation group to focus on the referred issues and should therefore be likely to increase the pace of market investigations. The CMA will be pleased to work with the Government to identify if there might be additional legislative changes that might also help to streamline the markets process further.

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

2.22 The CMA supports the proposal that the CMA be able to impose interim measures from the beginning of its markets work. Being able to impose legally enforceable requirements on firms on an interim basis, pending the completion of its market work, will mean that the CMA can take swifter intervention in the face of consumer harm. This can be especially important in fast-moving markets, which can 'tip' meaning the consumer harm is entrenched before remedies can be imposed. That said, the CMA would not expect that such powers will need to be used regularly, since they will be only be imposed in cases where there is an urgent need to address harm.

2.23 The CMA considers it important to have safeguards for such an interim measures tool, particularly in view of the impact interim measures can have on a business. Such safeguards should be designed to protect the rights of the business proposed to be subject to interim measures, while ensuring that the CMA can act with due speed to prevent harm. As is the case with Competition Act 1998 ('CA98') interim measures,[6] the CMA considers that

[6] Though for the avoidance of doubt, the CMA welcomes the government's proposals for reform of the CA98 interim measures tool discuss in the Consultation, for example at paragraph 1.168 of the Consultation.

parties on whom such interim measures are proposed to be imposed in markets cases should be able to make representations to the CMA before any interim measures can be imposed on them. And such parties should be able to appeal to the Competition Appeal Tribunal ('CAT') any decision to impose interim measures on them in a market case. The CMA considers that interim measures imposed in markets cases should be reviewed by the CAT in line with the principals of judicial review, as the CAT does with other decisions relating to the CMA's markets functions.[7]

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

2.24 Subject to the comments above, the CMA welcomes the government's proposed reforms and agrees that they will help deliver effective and versatile remedies for the CMA's market inquiry powers.

2.25 The CMA would however also have serious concerns about specifying a cooling-off period of any duration before which it could revisit the operation of a markets remedy. Such a time period may not be problematic in some markets, but could be highly costly in fast-moving ones. If there are rapid, significant and/or unforeseen changes in the market, but the remedies imposed cannot be reviewed by the CMA for some time, then the market might 'tip' or even need to be subject to another market investigation reference. Moreover, a pro-active review by the CMA might even be in the business' interest (such as if a more effective remedy emerges owing to changes in circumstances), even if a review has not been explicitly requested. A time-based statutory block on review duration could have adverse consequences in all of these circumstances.

2.26 The CMA suggests that the necessary protection against remedies being under continual review would be a 'reasonable grounds' threshold, such as reasonable grounds to suspect the remedy is failing to address the adverse effect on competition identified. If this were not deemed sufficient, an additional safeguard could be a requirement to consult with affected parties before taking a decision to review remedies.

2.27 Additionally, there is the important point the CMA would consider it necessary to give the remedy a chance to work before committing further resource to reviewing it. This means that any risk of continual review is in practice very unlikely to arise.

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[7] Section 179 EA02.

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

2.28 Recognising the already considerable range of proposals designed to bolster the strength, speed and flexibility of the markets regime captured here, and in other cross-cutting reform proposals (such as on administrative penalties for non-compliance with information requirements), the CMA has no further comments to make on markets regime reform at this time.

Rebalanced merger control

2.29 Mergers can have a significant impact on consumers and their welfare, including an impact on the prices they pay for goods and services, and the range and quality of those goods and services that they have available to them.[8] Robust merger control is a key limb of any effective competition policy regime and, as the CAT has noted, '[t]he CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance.'[9]

2.30 The CMA wishes to ensure that it has the appropriate tools to protect UK consumers in accordance with its statutory duty, having regard to the evolving UK economy.

2.31 The CMA also supports any changes to the merger review processes that reduces the potential burden of merger controls on the businesses involved, particularly small businesses, while still protecting the welfare of UK consumers

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

Turnover test

2.32 The CMA supports the turnover threshold being increased to £100 million for the reasons identified by BEIS in paragraph 1.98 of the Consultation.

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[8] *CMA Merger Assessment Guidelines* (CMA129), at paragraph 1.3.

[9] *Electro Rent v CMA* [2019] CAT 4 at paragraph 120.

New jurisdictional threshold

2.33 The CMA strongly supports the introduction of the proposed new jurisdictional test to protect UK consumers against harmful mergers that might otherwise fall outside of the scope of the UK merger control regime. The existing share of supply threshold, which requires a merger-specific increment to the share of supply, can exclude from investigation some mergers between parties purely active at different levels of the distribution chain (vertical mergers), as well as some mergers that could raise consumer harms relating to potential competition or dynamic competition (for example, where an established market participant is seeking to acquire a nascent competitor).

2.34 The proposed reforms come at a time shortly after the CMA has issued revised Merger Assessment Guidelines that place considerable emphasis on the importance of properly scrutinising potential competition and dynamic competition theories of harm. This forms part of a broader emerging consensus in relation to the harm to consumers that vertical transactions and acquisitions involving potential competition or dynamic competition theories of harm can bring about.[10] In order to effectively protect UK consumers, it is therefore critical for the CMA to be able to properly scrutinise such transactions.

2.35 For example, the proposed new threshold would better enable the CMA to review mergers such as those where a powerful firm acquires a competitor with a pipeline product that would provide an important source of competition in future. It would also make the CMA better placed to intervene where a powerful firm seeks, through an acquisition, to leverage its strong position into another market. The CMA considers that this is consistent with the overall purpose of threshold tests, which the CAT recently noted is to identify mergers in which there is a 'sufficient prospect of a competition concern' arising to make them 'worthy of investigation.'[11]

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[10] For vertical mergers: Steven C. Salop (2018), 'Invigorating Vertical Merger Enforcement', *The Yale Law Journal*, pp.1962-1994., and Jonathan B. Baker, Nancy L. Rose, Steven C. Salop and Fiona Scott Morton (2020), 'Recommendations and Comments on the Draft Vertical Merger Guidelines'. For potential competition and dynamic competition: *Unlocking digital competition, Report of the Digital Competition Expert Panel* (March 2019) (the Furman report); OECD (2020), 'Start-ups, Killer Acquisitions and Merger Control'; Carol Shapiro, Giulio Federico, and Fiona Scott Morton (2020). 'Antitrust and Innovation: Welcoming and Protecting Disruption', . *Innovation Policy and the Economy* 20, pp.125-180; and Ioannis K, Valletti T (2020) 'Innovation considerations in horizontal merger control', *Journal of Competition Law and Economics* 16, pp.220- 261,.

[11] *Sabre Corporation v CMA* [2021] CAT 11, paragraph 144.

2.36 The CMA recognises that the proposed new jurisdictional threshold could, in theory, attach to deals with little UK nexus (for example, where one merger party meets the jurisdictional requirements but the other is not active in the UK).

2.37 It is, however, important to also recognise that this test will be applied within the context of the UK's existing voluntary merger control regime, in which merging parties are not required to notify any transaction. In keeping with its established practice (and the statutory test that requires the CMA to establish whether the merger gives rise to a substantial lessening of competition within any market or markets in the UK),[12] the CMA will only ever 'call in' a transaction for investigation where there is a reasonable chance that it raises competition concerns in the UK. The CMA would expect merging parties to adopt a similar approach in deciding whether to notify a transaction for review in the UK.

2.38 In addition, the CMA notes that the proposed thresholds (being based on at least one of the businesses involved generating at least £100 million in revenues in the UK and holding a share of supply of 25% or more) are specifically intended to capture transactions where one (or both) of the merging parties is likely to already hold a significant market position within the UK. This contrasts with the position taken in some other jurisdictions, in which competition authorities are provided with the power to call in any merger that may raise concerns (without applying any jurisdictional threshold).

2.39 Accordingly, the voluntary regime, combined with the existing and new jurisdictional thresholds, effectively balances the need to identify, and prevent or remedy, anti-competitive mergers with the aim of avoiding undue regulatory burden on businesses.

2.40 The CMA also notes that the proposed new threshold should have practical benefits. In particular, in some previous cases, which raised potential concerns in UK markets but where the nature of the overlap between the merging parties' activities was not straightforward, the CMA and merging parties have devoted significant time and resources to the assessment of whether a merger gives rise to an increment for the purposes of the existing share of supply test.[13]

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[12] Enterprise Act 2002, sections 22(1)(b) and 33(1)(b).

[13] For example, *Sabre/Farelogix*, *Roche/Spark.*

2.41 The proposed new threshold should result in a more efficient approach to establishing jurisdiction in some cases. This should, in turn, help merger control investigations to proceed more efficiently, saving time and money for businesses and the CMA, while ensuring that the focus of the CMA's investigation can be on substantive concerns – that is, whether a transaction could ultimately result in harm to UK consumers.

Safe harbour provisions

2.42 In principle, a clear and easy to apply safe harbour threshold would provide more certainty for small businesses, as well as helping to ensure that the CMA's resources are focussed on the larger transactions that are likely to have the most significant overall impact on UK consumers. It is, however, important to recognise that the introduction of any such safe harbour rules would necessarily limit the CMA's ability to intervene in smaller mergers that could have a significant impact at the local level (for example in remote communities) or on vulnerable customers.[14] While the number of 'local' mergers investigated by the CMA varies each year, the CMA's ability to intervene provides a significant deterrent effect, which would be removed by the introduction of safe harbour rules.

2.43 It is also important to ensure that any safe harbour rules are set at the right level, so that the appropriate balance can be struck between protecting the interests of businesses and the overall consumer interest. In this regard, the CMA is concerned that the current proposal (under which the CMA would not have jurisdiction over a merger if the worldwide turnover of each of the merging entities was less than £10 million) gives rise to a risk that mergers that could have a material adverse impact on UK consumers could be exempt from review.

2.44 By way of example, the proposed safe harbour could, in practice, prevent the CMA from intervening in a merger involving two of the main players in a market in which UK consumers were spending close to £40 million per year. Where four main suppliers accounted for the vast majority of sales in

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[14] In this regard, in considering whether to apply the existing 'de minimis' exception, the CMA will consider whether 'a substantial proportion of the likely detriment would be suffered by vulnerable customers'. For example, the CMA decided against applying the de minimis exception to refer in two recent cases. In *Tobii/Smartbox*, the merger parties supplied hardware and software in the area of 'augmentative and assistive communication' which is designed to assist people with complex speech, language and communication needs. Likewise, in *Imprivata/Isosec* the parties supplied secure authentication management solutions to healthcare providers in England. These technologies give staff protected access to sensitive patient data which allows NHS staff to work more efficiently across wards and different workstations.

this market, there is a strong possibility (consistent with the position set out in the CMA's recently revised Merger Assessment Guidelines) that this kind of '4-to-3' transaction would give rise to significant consumer harm.[15] If both of the merging businesses generated just under £10 million each year, this transaction would fall under the proposed safe harbour provisions, even though the potential impact on consumers could be very significant and considerably outweigh the likely costs of a merger control investigation.

2.45 Accordingly, if a safe harbour provision were to be introduced, the CMA would propose setting the threshold at a lower (and more targeted) level, to apply where the merger parties' combined UK turnover does not exceed £10 million.

2.46 The CMA notes that the existing 'de minimis' exception (where the markets concerned in a merger are not of sufficient importance to justify a reference) already helps the CMA to focus its resources on transactions that are likely to have the most significant overall impact on UK consumers (and, in turn, often serves to limit the burden of merger control on smaller businesses). In practice, this exception is applied not only in formal investigations (resulting in mergers not being referred for a Phase 2 investigation) but also at the mergers monitoring stage (resulting in mergers not being 'called' in for a formal investigation at all).

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

2.47 The CMA does not consider that additional or alternative reforms to the current jurisdictional tests, beyond those set out in this consultation document and in the consultation on a new pro-competition regime for digital markets,[16] are necessary or desirable at this stage.

2.48 The CMA recognises that the introduction of a new jurisdictional threshold risks adding to the complexity of the UK merger control regime, which already includes several alternative threshold tests.[17] The CMA notes, in this regard, that there is an important balance to be struck in providing the

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[15] The CMA may be more likely to find an SLC if the merger involves the market leader and the number of significant competitors is reduced from four to three, *Merger Assessment Guidelines* (CMA129) at paragraph 2.18(a).

[16] For more information, please see the BEIS consultation 'A new pro-competition regime for digital markets' (CP489).

[17] Although certain of these alternative thresholds will be removed by operation of section 58 the National Security and Investment Act 2021, expected to come into effect on 4 January 2022.

CMA with the ability to scrutinise transactions that could harm UK consumers (and government with the ability to assess transactions that raise public interest concerns) and minimising unnecessary burdens on business, and that a simpler set of threshold tests would likely be less effective in achieving this balance. The CMA also notes that its merger investigations typically involve large businesses, involved in transactions of significant value, that are well-placed to obtain expert legal advice to inform their merger control obligations. Any potential impact on smaller businesses would also be further mitigated by the safe harbour provisions considered above.

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

2.49 The CMA strongly believes that merger control investigations should be conducted as efficiently as possible. The CMA believes, in particular, that it is important to ensure that the businesses involved in merger activity, and the wider market, are not affected for any longer than necessary by the disruption and uncertainty that these transactions can raise. It is, however, also critical to ensure that merger control investigations can continue to be effective, in order to ensure that the CMA is able to protect UK consumers.

Allowing the CMA to agree binding commitments earlier during Phase 2

2.50 The CMA supports the proposal to allow merger parties to offer commitments at any point during the Phase 2 investigation. The CMA notes, however, that any such mechanism would need to be carefully designed to avoid unintended adverse consequences that could result in harm to UK consumers or undermine the efficiency of merger control investigations.

2.51 In particular, the CMA's Phase 2 investigations are subject to strict statutory timelines, which reflect the time required to gather and analyse evidence, as well as consulting with interested parties. The CMA's decisions are subject to significant scrutiny and challenge (including before the CAT), which requires those decisions to have a sufficient basis in evidence and the process by which they are reached to be robust and fair. As the assessment of proposed commitments would inevitably divert CMA resources from its ongoing investigation, it is likely that some form of 'pause' would be necessary to ensure that the CMA is still able to investigate a transaction properly if binding commitments cannot ultimately be agreed. It would also be necessary to consider how to ensure that this mechanism would be used in good faith (i.e. as a genuine attempt to resolve competition concerns) rather than as a way of buying more time to

engage with the CMA's ongoing substantive investigation. Absent appropriate safeguards, there is some risk that this mechanism could actually result in longer investigations in some cases.

2.52 In addition, the CMA considers that merger parties who proposed commitments at an early stage of the Phase 2 investigation should be bound by the outcome of the case where the CMA accepts those commitments, giving up the right to appeal that decision. The potential benefits of such a mechanism would be materially undermined if the merging parties could later revoke their commitments by appealing the decision.[18]

A new 'fast track' merger route

2.53 The CMA strongly supports amendments to facilitate the use of the 'fast track' Phase 1 merger procedure.[19] In keeping with its interest in running efficient end-to-end merger control investigations, the CMA has generally sought to encourage the use of the existing fast track merger process wherever appropriate. The CMA's experience to date suggests, however, that certain of the statutory requirements that govern the existing fast track procedure significantly limit the use in practice of this mechanism.

2.54 First, merging parties are, in practice, sometimes reluctant to accept in writing that the test for reference is met (i.e. that there is sufficient evidence available to meet the CMA's statutory threshold for finding an SLC and making a reference at Phase 1). In particular, there may be some concern about how this concession could be interpreted in the CMA's subsequent Phase 2 investigation, or in merger control proceedings in other jurisdictions.

2.55 The requirement on the CMA to publish a sufficiently reasoned decision at the end of the Phase 1 proceedings also raises some difficulties in practice. Again, merging parties often have some concern about how the information included within this decision could be interpreted. The requirement to produce such a decision also imposes some administrative burden on the CMA (which could otherwise be devoting all of its efforts to the subsequent Phase 2 investigation).

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[18] This would be consistent with the proposed changes to the CMA's CMA8 *Guidance on Investigations Procedure in Competition Act 1998 Cases* aimed at ensuring finality in settlement cases which the CMA, consultation on which ended on 28 September 2021.

[19] As is currently required under the existing fast track procedure set out in CMA2 Revised *Mergers: Guidance on the CMA's Jurisdiction and Procedure*, paragraphs 7.14-7.17.

2.56 Further, the CMA is still under a statutory duty to consult stakeholders at Phase 1 regarding the effects of the merger.[20] Time has to be provided for these third parties to provide any relevant views, and for those views to be adequately taken into account.

2.57 The CMA therefore considers that legislative amendments that addressed these difficulties could have a significant beneficial impact on the use of the fast-track process (without the need for further changes).

2.58 Any further changes would need to be carefully considered to avoid unintended adverse consequences that could result in harm to UK consumers or risk reducing the efficiency of merger control investigations.

2.59 In particular, the CMA's experience to date with fast track cases is that the most efficient end-to-end process is typically achieved where the fast track procedure is initiated at an early stage in the investigation.[21] This allows the CMA to focus all of its efforts (in terms of information-gathering and engaging with third parties) on the in-depth investigation as early as possible, rather than having to devote time to the steps that would typically have to take place in a Phase 1 investigation.

2.60 The CMA therefore considers that there would be some benefit in continuing to incentivise merging parties to submit fast track requests as early as possible (for example, at an early stage of the pre-notification process). In any event, in order to ensure that the fast track procedure results in an efficient process, the CMA considers that merging parties should be required to submit any such request prior to, or at the time of, submitting their final merger notice, which would allow the CMA to move to the fast track procedure rather than initiating its normal Phase 1 review. Where a fast track request is made at this stage, the CMA agrees that some additional time (such as a three-week extension) would be appropriate to ensure that there is sufficient time for an appropriate level of information-gathering.

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[20] Section 107 of the Enterprise Act 2002. As a result of the requirement to publish a reasoned decision, the CMA must have evidence in its possession at an early stage in its investigation that it believes objectively justifies a believe that the test for reference is met in order to proceed with a fast track.

[21] To this end, the CMA's guidance on the current fast track procedure notes that the CMA may ask the merger parties to make a formal request for a fast-track procedure by a given point in the proceeding, noting that the CMA would be unlikely to be minded to grant any request for a fast-track procedure at a later date on the basis that it would not expect to be able to achieve the same administrative efficiencies. See CMA 2, paragraph 7.17.

Reducing unnecessary delays at Phase 2

2.61 The CMA fully supports the objective of running Phase 2 investigations as efficiently as possible and avoiding unnecessary delays. It is important to note that the CMA's ability to extend a Phase 2 investigation is already limited by statute. The CMA is only able to extend Phase 2 investigations (on a one-off basis by up to eight weeks where it considers that there are 'special reasons' to do so)[22] where necessary and proportionate, and operates subject to a duty of expedition specific to merger control investigations.[23] The CMA's ability to extend an investigation is therefore already more tightly constrained than in many other jurisdictions and the length of CMA Phase 2 investigation is not an outlier by international standards.[24]

2.62 Additional conditions on the CMA's existing ability to extend the statutory timetable (including that extensions require the consent of the merger parties) would risk prejudicing the CMA's ability to conduct effective investigations at Phase 2.

2.63 As noted above, the CMA's decisions are subject to significant scrutiny and challenge (including by merging parties and third parties that do not agree with the outcome of the CMA's case), and it is therefore critical that the CMA is able to gather and analyse the evidence required to produce robust decisions. It is important to recognise that the interests of the CMA and the merger parties may not always be aligned in this regard. While most merging parties engage fully and in good faith with CMA proceedings, it is critical that procedural mechanisms are sufficiently robust to accommodate all circumstances (including where merging parties seek to 'game' the system to their advantage). In this regard, the CMA is concerned that

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[22] Pursuant to section 39(3) of the Enterprise Act 2002.

[23] Pursuant to section 102 of the Enterprise Act 2002. For the avoidance of doubt this duty does not apply to the CMA's other functions, for which the CMA has also proposed a duty of expedition. See, for example, paragraph 1.8S above.

[24] In fact, the average duration of 'significant' merger investigations by the CMA (from announcement to either final report or UIL acceptance) in 2020/2021 was 11.9 months, below the average for EU and US authorities which was 14.9 and 11.4 months respectively. Data for US and EU from Dechert LLP, DAMITT 2020 Year in Review. A 'significant' US investigation '[includes] Hart-Scott-Rodino (HSR) Act reportable transactions for which the result of the investigation by the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice (DOJ) is a consent order, a complaint challenging the transaction, an official closing statement by the reviewing antitrust agency, or the abandonment of the transaction with the antitrust agency issuing a press release.' DAMITT defines 'significant' EU merger investigations to include transactions subject to the EU Merger Regulation and resulting in either a Phase 1 remedy or the initiation of a Phase 2 investigation.

requiring merger parties to consent to the extension of a merger control investigation could limit the CMA's ability to conduct a robust investigation.

2.64 In practice, the principal reason for the extension of Phase 2 proceedings is to allow for the consideration of remedies proposals submitted by merging parties at a late stage in the process. Accordingly, mechanisms that would provide an earlier 'cut-off' for the submission and consideration of remedy proposals (mirroring similar provisions in other jurisdictions, including the European Union[25]) could materially reduce the number of cases in which the Phase 2 timetable needs to be extended.

2.65 There can, however, also be other reasons why an extension is necessary – in particular where the CMA is required to take into account developments that occur during the course of its investigation in reaching a final decision.[26] For this reason, the CMA considers that it is important to retain the existing mechanism to extend an investigation where necessary and proportionate, even if a new 'cut-off' for the submission of remedies proposals were to be introduced.

Streamlining CMA Panel decision making

Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

2.66 The CMA considers that the Panel gives the CMA access to highly experienced leaders in a range of fields, including law and economics, business, finance, professional services, academia and consumer representation. A broad Panel also can help to bring diversity to the CMA's decision-making framework, including in respect of age, gender, ethnic and geographic diversity. These benefits allow for nimbleness in thinking in

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[25] Where the late submission of remedies automatically triggers an extension to the Phase 2 investigation.

[26] For example, in *Amazon/Deliveroo*, the merger parties submitted that Deliveroo was very close to exiting the market as a result of the impact of the coronavirus (COVID 19) pandemic, and that it was critical that the CMA deliver its provisional findings as soon as possible. The CMA took account of these submissions and issued provisional findings clearing the transaction on the basis that Deliveroo was a failing firm. However, Deliveroo's financial position improved significantly shortly following the provisional findings, which required the CMA to issue revised provisional findings. Had the CMA been precluded from extending the Phase 2 deadline in those circumstances, it would have lacked the flexibility either to respond to the needs of the merger parties or to properly assess the transaction's potential effect on competition and consumers.

response to changing circumstances, supporting the CMA's strong global position.

2.67 The CMA is concerned that these benefits risk being lost in the proposal for a smaller pool of dedicated Panel members whose work on the CMA's Panel is their primary employment. While a smaller paid Panel might help to increase age diversity, it could have negative consequences for other elements. In particular, although recruiting a smaller number of full time Panel members may arguably make the role more attractive for younger, less well-established applicants, it may make the role less attractive to others, such as academics or people with more of a business background. The Panel then risks being comprised primarily of traditional competition lawyers and economists, meaning the loss of wider business, consumer, financial and legal expertise. There is also the risk of losing the benefit of Panellists who have leadership roles outside of the CMA. Those outside interests provide value to the CMA and contribute to independence of members. The prior experience of members of a smaller, dedicated Panel could quickly become out of date, since those Panellists will inevitably be more closely tied to the CMA in their everyday work. Moreover, there may be questions as to how far a smaller, paid Panel would be attractive to high-calibre candidates in the early or middle stages of their careers when they are likely to be able to command much higher compensation than that available through the Panel.

2.68 The CMA is also concerned that the proposal for a smaller dedicated Panel will not in practice deliver the intended increases in speed. In particular, having fewer Panel members working on more cases might create more rather, than less diary clashes, which can already be a problem. There would likely also be practical challenges of managing what can be a heavy workload, since by definition there will be less Panellists across cases. Such concerns may be compounded by the need to deal with conflicts of interest, which might for some cases rule out the already limited number of Panellists that would be available.

2.69 The CMA nevertheless agrees that there are benefits in having a core of panellists whose work for the CMA is their primary employment, ones who can work regularly on a wide range of cases and leverage the experience gained from doing so. The CMA therefore would suggest a 'hybrid' Panel model, where there is a smaller group of Panel members who work primarily for the CMA, supplemented by a larger pool of part-time Panel members who can bring a broader set of skills and experience. In practice, this would likely mean a smaller number of Panellists overall compared to the present. In the CMA's view, this strikes the right balance between the

benefits of the model proposed in the Consultation and the benefits of the current model.

2.70 The CMA does not however agree that the role of Panellists should be limited only to making decisions on theories of harm and remedies. In order to make decisions effectively, Panellists must be familiar with the entire case. It risks creating delays to the case if Panellists have to decide upon theories of harm and remedies having only joined the case at a late stage, since they will need to take considerable time to learn the facts of the case, review representations and form their own views of the case. Further, the decision whether the CMA has jurisdiction over a transaction can in some cases involve complex, and disputed, questions of fact and law which are equally significant to the parties as decisions on theories of harm and remedies. If the concern is that Panellists are causing delay by too often being involved in non-key decision making in cases, there might, for example, be some decisions of an administrative nature that can increasingly be delegated from Panellists to staff, without the need for legislative change. Moreover, as noted above at for example paragraph 2.21, the CMA considers that there may be additional legislative opportunities to increase the pace of the markets process even further, without limiting groups of Panellists merely to a role of deciding on theories of harm and remedies.

Stronger and faster enforcement against illegal anticompetitive conduct

Q15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

Q16. If the immunity thresholds for 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 is 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?

2.71 The CMA strongly supports the proposal to lower the Chapter I small agreements and Chapter II conduct of minor significance penalty immunity thresholds to £10m. This is necessary in order to ensure effective deterrence in smaller markets, especially where vulnerable consumers are involved. The CMA has encountered cases in small markets and affecting vulnerable consumers in which it could not impose financial penalties because of the current small-agreements immunity thresholds.

2.72 With respect to the Chapter I prohibition, the CMA would encourage the government to implement option b), which is to say that the penalties immunity applies only to agreements to which all the businesses that are a party have an annual turnover of less than £10m.

2.73 The CMA considers that this is necessary in order to preserve the deterrent effect of the financial penalties under the Chapter I prohibition. The CMA consider this to be a particular risk is agreements relating to growing markets (such as digital) and/or in situations akin to 'pay for delay' agreements. For example, a digital Large Co with turnover of hundreds of millions of pounds per year might pay or otherwise transfer value to Small Co (or indeed a number of Small Cos) with annual turnover of less than £10m in order to induce that Small Co not to commercialise actual or potential competing technology. The only penalty risk would fall on Large Co, meaning that deterrence is not optimal, especially in view of the transfer of value to Small Co.

2.74 The CMA considers that Chapter I small agreements immunity should pertain to the agreeing parties' combined turnover, which is in keeping with the original intention of this immunity. Indeed, much of the impact of a competitive impact of the agreement is usually the result of the combined market positions of the parties to the agreement. This is different from the Chapter II position, whose immunity threshold is rightly concerned with the dominant firm's turnover, since that prohibition concerns unilateral conduct. The CMA does not consider that the benefits of certainty for small businesses in such situations outweigh the public interest in deterring anti-competitive activity.

2.75 If the government was to take forward option a) when lowering the small agreements threshold, then the CMA would encourage the government to expand the categories of agreement that are currently excluded from small agreements immunity. Currently, price-fixing agreements are the only category of agreement excluded from the small agreements immunity.[27] The CMA would suggest that under such a change, the small agreements immunity should also not apply to market-sharing agreements.

2.76 The CMA has similar concerns with how the proposed revisions of the 'safe harbour' for merger control will operate. These are discussed above.

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[27] See section 39(1) CA98.

Q17. Will the reforms being considered by the 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?

2.77 The CMA considers that providing undertakings benefitting from full immunity under CA98 with additional immunity from liability for damages caused by the cartel would create a further incentive – at least for cartels with a UK focus – for undertakings to apply for immunity, in addition to the significant existing incentives discussed in the Consultation. The Consultation suggests that immunity from damages would be limited to full immunity beneficiaries. The CMA considers that such a limitation is important in order not to undermine the availability of private redress against other members of the cartel.

2.78 It will be very important that such protection be limited to those undertakings that have entered into an immunity agreement with the CMA and which continue to abide by the terms of that agreement. This seems appropriate, as it would effectively focus the scope of protection to follow-on private actions in cartel cases, where immunity parties may have the greatest concerns about private actions, and where the public has benefitted from enforcement action and the continuing compliance by the immunity party with its immunity obligations. This will also provide greater certainty as to when such damages immunity would apply.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

2.79 The CMA fully supports the government's aim of bringing Chapter II CA98 cases to a close more efficiently. However, the CMA notes in contrast to this Early Resolution Agreements proposal, that under a Deferred Prosecution Agreements for economic crime, a company agrees to a number of terms, such as paying a financial penalty, paying compensation and co-operating with future prosecutions of individuals. If the company does not honour the conditions, the prosecution may resume. Arrangements for monitoring compliance with the conditions are set out in the terms of the DPA. It is not clear that the proposal for Early Resolution Agreements under Chapter II contains any requirement for compensation of victims. The absence of any binding CA98 infringement decision means that the victims of conduct covered by the Early Resolution Agreement may

have very limited avenues for obtaining redress, given the complexity of having to prove a Chapter II infringement in private redress proceedings.

2.80 Moreover, it is unclear under this proposal how breach of an Early Resolution Agreement in a CA98 would be addressed.

2.81 There is also the question as to how penalties would be calculated under this scheme, including whether the CMA's *Guidance as to the Appropriate Amount of the Penalty* would apply.

2.82 Finally, the CMA considers that requiring CAT approval for Early Resolution Agreements would undermine the objective of resolving cases more efficiently, given the need to prepare for such proceedings. Court approval of a DPA takes place in a very different, court-based criminal enforcement process, in comparison to the CA98 administrative enforcement system.

2.83 The CMA would encourage the government to consider the above points in respect of the Early Resolution Agreements proposal.

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

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

Q26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

2.84 The CMA considers it axiomatic that there should be a robust system for appeals of the its decisions. Checks and balances are an essential part of the administrative system for the enforcement of competition law. The CMA should have to account for its decisions before an impartial tribunal and the rights of defence of parties need to be maintained. The CMA also acknowledges that there is widespread support for and confidence in the 'full merits' standard of review among those businesses and advisers who come into contact with the CA98 regime.

2.85 The CMA nevertheless notes that one of the CAT's key objectives when it was first established was to be a 'tightly controlled procedural regime in which cases are actively managed'. This was confirmed in evidence given to the House of Lords Select Committee on Constitution in 2003, in which the Registrar of the CAT explained that this was intended to 'minimise the traditional difficulties presented by competition cases – those of byzantine complexity of issues, hypertrophic growth of documentation and evidence and inordinate duration of proceedings'.[28]

2.86 The CMA is also aware that Ofcom appeals to CAT under the Communications Act 2003 changed from a 'full merits' to 'judicial review' standard in 2017.[29] In his report on the future of competition and consumer regimes *Power to the People,* John Penrose said that this new standard appears to have worked well in the eyes of most people, creating a faster and more predictably certain process without losing quality and that it was a potential template for civil law appeals from other regulators as well.[30]

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[28] Memorandum by the CAT, 26 June 2003, submitted in evidence to the Lords Select Committee on Constitution, paragraph 23.
[29] Communication Act 2003 as amended in 2017, and Article 4 of the 2002 EU Framework Directive.
[30] See page 19 of the Penrose Report.

Having regard to these considerations, the CMA would encourage the government to give further thought to appeal standard reform, either now or in the future, taking into account the emerging experience of appeals against post-Brexit CA98 cases of higher magnitude, as they work through the system. Consistent with the approach taken in other areas of the judicial system, the CMA also considers, whatever the level of judicial scrutiny for CA98 decisions, that there is scope for targeted reform to the CAT's procedures in order to meet the above objectives for the CAT, and achieve greater efficiency and better equip the CAT to deal with the increased pressures it is facing. The CMA has set out some initial suggestions in its response to the *Post-Implementation Review of the Competition Appeal Tribunal Rules 2015*. These include suggestions for how better to control the volume and range of evidence strictly necessary to decide the issues in the case as well the admission of new evidence in appeals, as well as extending the use of the fast-track procedure for appeals under CA98 and the Enterprise Act 2002 ('EA02').

Stronger investigative and enforcement powers across competition tools

Q27. Will the new investigative powers proposed by the government help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps in the right place. Are there other reforms to the CMA's enforcement powers which government should be considering?

2.87 The CMA considers that the new investigative powers and enforcement powers proposed by the government will help the CMA to conclude its investigations more quickly and that the proposed penalty caps are set at the right level.

2.88 However, as noted at paragraph 1.8 the CMA would encourage the government to reconsider its decision not to create a new statutory duty of expedition for the CMA that would apply across its functions. The CMA remains of the view that such a duty would help the CMA to conduct its investigations and complete its work as swiftly as possible, while giving due consideration to parties' rights of defence. A major benefit of this duty will be to give the courts greater grounds to support the CMA's actions and decisions which are aimed at expediting the conduct of its investigations, for example, in relation to requests by parties for deadline extensions. The CMA considers that the courts would in effect be required to 'stand in the

shoes' of the CMA and have proper regard to the expedition duty under which the CMA operates.

2.89 In view of the considerable range of proposals in the Consultation designed to bolster the strength, speed and flexibility of the CA98 regime, the CMA has no further comments to make on CA98 reform at this time.

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

2.90 The CMA welcomes proposals 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.

2.91 The CMA appreciates the need for certain safeguards in relation to such powers. It is important that such safeguards are proportionate however, both in terms of the burden they impose on the CMA and the extent to which they constrain the CMA's operational flexibility. If the balance is wrong, new powers will be of little practical benefit and are unlikely to be much used. The CMA would favour sensible safeguards that offer it the greatest degree of operational freedom and agility. The CMA considers that this is critical in a world of increasingly global markets, where international cooperation is of growing importance.

Chapter 2: Consumer Rights

Thematic response on Substantive law

Proactive Platform duty

2.92 The CMA has recently acted across a range of digital consumer markets using its existing powers, which are limited. This includes securing agreements from a number of key online traders and platforms,[31] social media endorsements,[32] secondary tickets, car rental and hotel booking.[33] These actions, together with other CMA work in the digital space in relation

[31] CMA investigates misleading online reviews - GOV.UK (www.gov.uk)
[32] Social Media Endorsements - GOV.UK (www.gov.uk)
[33] Online hotel booking - GOV.UK (www.gov.uk)

to automatically renewing online subscriptions,[34] have been successful in reducing detriment and setting clear expectations with online traders. This work, often in close collaboration with key industry players, has been vital in building an understanding of the meaning of crucial principles in existing consumer law such as *professional diligence* and *material information*.[35]

2.93 At the same time the e-commerce sector continues to grow at a rapid pace as technological advancements drive market changes. Central to further successful growth is the confidence consumers place in online markets. The CMA believes that such trust now requires additional clarity and certainty in relation to how the existing law applies in key areas, especially considering the potential for overlaps with the government's Draft Online Safety Bill.[36]

2.94 For example, platforms and other online intermediaries play a crucial gatekeeping role in online markets, having the ability to determine the framework (or choice architecture) through which consumers will navigate and transact. These crucial bodies can, for example, determine the relative prominence of competing products, whether products appear at all, and how commercial offers are presented. They do not merely 'host' offers, but curate their presentation and in some cases determine what the consumer sees.

2.95 The CMA contends that platforms therefore need to have explicit, legal duties in respect of consumer law, to build on, update and clarify the existing responsibilities contained in consumer law.[37] This is important to avoid contentious arguments about the meaning and application of the existing legal duties, which can delay effective enforcement and create an imbalanced playing field, not only between consumers and platforms, but also between traders who have differing appetites for pushing at the boundaries of legislation and using behavioural insights to channel consumer behaviour to their advantage. Principles-based legislation is vital to enable flexible responses by enforcers and traders to changing markets, but this flexibility must not come at the expense of certainty or effective consumer protection.

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[34] CMA secures refund rights for McAfee customers - GOV.UK (www.gov.uk)

[35] In the Consumer Protection from Unfair Trading Regulations 2008.

[36] Draft Online Safety Bill - GOV.UK (www.gov.uk)

[37] Crucially the duty 'not to trade unfairly' in the Consumer Protection from Unfair Trading Regulations 2008 but also the other provisions of consumer law such as the need to avoid unfair contract terms in Part 2 of the Consumer Rights Act 2015.

2.96 The CMA therefore recommends that online intermediaries, including platforms, be given an explicit legal duty to take responsibility for minimising consumer harm.[38] This could be achieved through a duty to take reasonable and proportionate steps – including proactive steps - to design their systems such that it that allows information gathering to effectively detect, avoid and remove economically harmful content from their websites, applications and platforms. This duty could perhaps most simply be achieved by augmenting the definition of professional diligence.[39] Alternately a free-standing duty could be added to the Consumer Protection from Unfair Trading Regulations 2008. The duty could also be enforced by expanding on the Online Interface Orders provisions in Part 8 of the EA02 (see further our comments on the administrative enforcement model below). The CMA looks forward to developing guidance or other materials to explain how this will work in practice.

Simplification / Clarity of consumer law

2.97 Generally speaking, as product complexity increases consumers need higher levels of protection, not lower. One of the most crucial theoretical and practical justifications for consumer protection is the impact of informational and power asymmetries between consumers and traders. For example, traders are more likely to be familiar with the products they are selling than their users.

2.98 Fast-moving online markets bring tremendous benefits in terms of speed, choice and efficiency, but they also carry increased risks and (in particular) increased asymmetries. Traders are better placed to optimise their channels to maximise their sales and revenues rather than giving choice and control to consumers. Online, traders can increasingly choose what information and options are presented to consumers. They can also can easily hide the less positive aspects of the product or offer and use technological means and behavioural insights to pressurise consumers to complete transactions quickly. Traders can make it difficult or even impossible for consumers to cancel, obtain refunds or to simply make enquiries about products. Further, online platforms generally are in a position to hold key information about the sellers using their services (such as their identity, whether they *are* in fact a trader, etc.) when this may be concealed from consumers. This all potentially leads to increased

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[38] This builds on the Digital Task Force recommendations, especially 13b and 13c in Appendix G: A modern competition and consumer regime for digital markets (publishing.service.gov.uk)
[39] See The Consumer Protection from Unfair Trading Regulations 2008 (legislation.gov.uk)

consumer detriment, higher search costs, and greater incentives for firms to compete on obfuscation (or other illegality) rather than the price and quality of their products.

2.99 These potential and often real asymmetries, combined with the fast pace of modern life and ever-accelerating product complexity, mean that we are all potentially vulnerable to exploitation by unfair practices and behavioural manipulation online.

2.100 Principles-based legislation is helpful, because it is flexible and therefore can be applied to a wide range of practices and circumstances. However, to ensure consistency, clarity and certainty (especially for businesses) it needs to be possible to turn these principles into practical, clear rules where harm is widespread. The CMA is well placed, alongside other expert sectoral regulators, to apply these principles to problematic practices after a period of detailed investigation such as a market study into the sector or practices

2.101 However, the slow timetable for civil court-based decisions is not best suited to gaining swift, consistent outcomes that give markets clarity and support for innovation and investment. Delays in ensuring effective protection for consumers (for example those seen in the CMA's action against viagogo[40]) also incentivises businesses to continue to exploit asymmetries of power and information, consumer vulnerabilities or behavioural biases. A firm has every incentive to resist a weak enforcement process, frustrate information notice requests or offer undertakings in the knowledge that they can continue the potentially harmful practice and make unfair profits in the interim. This is a key reason why an administrative model for consumer law enforcement is recommended.

2.102 In terms of future legislative change, it is important to consider issues around convergence and divergence with EU consumer and other law, especially on digital regulation which is partially addressed in the Trade and Co-operation Agreement.[41] In general the CMA would encourage government to look at the benefits of convergence for consumers (certainty around levels of protection) and traders (who can export to the EU and sell to UK consumers without the need for different standards, packaging or practices). The CMA would recommend serious consideration of adopting most of the changes to the consumer *acquis*, where these would improve consumer protection in the UK, as well as engagement with the digital

[40] Secondary ticketing websites - GOV.UK (www.gov.uk)
[41] The EU-UK Trade and Cooperation Agreement | European Commission (europa.eu)

focus of new legislative proposals from the European Commission around digital markets.

Delegated power for list of banned practices[42]

2.103 The CMA broadly supports the proposed changes to fake reviews, subscription traps, drip-pricing, and the non-disclosure of paid-for search results. Please see the specific question answers in Annex 1 for more detailed comments on these areas.

2.104 Further to the discussion above on the crucial role of higher levels of consumer protection, it is also important to consider the relative pace of legal and technological change. Giving the rapid development of online markets in particular, the CMA considers that an ability to add rapidly to the existing list of 31 practices banned outright (the list of banned practices) would be of great benefit to consumers and fair-dealing businesses.

2.105 The list of banned practices is an important addition to the flexible principles in the CPRs and has not changed since introduced in the UK in 2008 as part of the implementation of the Unfair Commercial Practices Directive. Although this was an EU directive, it was heavily driven by the UK, including the creation of the list of banned practices which strongly corresponds to UK consumer protection concerns at the time. However, it could usefully be updated as well as creating an easier route to make such amendments in the future. Recent EU developments have seen useful additions to the list of banned practices (e.g. fake reviews, ranking disclosure) which have not yet been implemented in the UK.

2.106 While still a member of the EU, the UK was not able to unilaterally add to the list of banned practices due to the maximum harmonisation nature of the Directive. However, since 2008 considerable experience has been gained by UK enforcers as to the changing nature of 'automatically unfair' commercial practices. In the view of the CMA it is important to create a legislative route to add to the CPRs list of banned practices without having to wait many years until a suitable opportunity to update the legislation arises.

[42] The list of commercial practices in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008 that are in all circumstances considered unfair, sometimes known as the 'banned list'.

2.107 There are various solutions to the inherent difficulty of tracking rapid technological and market changes with legislation. In particular, there could be a BEIS Secretary of State or a CMA secondary legislative power[43] to make amendments to the Annex. Such changes to the list of banned practices could be triggered by CMA market study or enforcement work, and there are a range of options to ensure appropriate governance including amending the Schedules to EA02 to permit such powers to be exercised following a market investigation, or simply requiring consultation (see product safety delegated power) - although it is worth noting that consultation is not a requirement of the existing Consumer Rights Act 2015 power to add to the grey list.

2.108 Some good examples of conduct which requires closer regulation, perhaps by means of amending the banned list, are drip pricing and use of unlabelled advertising (such as paid-for search). Both of these have a distortive effect on upfront competition and search costs for consumers. Likewise the CMA has concerns about the use of manipulative techniques in framing information presented to consumers which are honed by real time online experiments (A/B testing) in order to influence consumer behaviour in a way which is detrimental to consumers' best interests ('dark patterns'). Examples include use of messages, webpage loading times and dripping of information to dissuade consumers from comparing products from other traders, and use of defaults to persuade consumers to agree to automatic renewal of contracts, when it may not be in the consumer's best interests to do so.

2.109 In the future, the CMA is likely to look more closely at online choice architecture, AI and algorithms (among other things) in order to better quantify harms and identify proportionate remedies. This could be a useful prompt and source of evidence for any changes made using this secondary legislative power.

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[43] There are strong precedents for this approach – the power in the *Consumer Rights Act 2015* for BEIS' Secretary of State to add to the Schedule to Part 2 of the act by use of Statutory Instrument which lists terms which may be considered unfair, the so-called 'grey list' of unfair terms. There is also a power in the Consumer Protection Act 1987 section 11 whereby urgent product safety issues can be tackled through statutory instrument by the relevant Minister. The consultation itself also acknowledges the need to give flexible powers by amending the CRA 2015 to tackle prepayment schemes such as Christmas clubs – paragraph 256. In addition, the CMA currently has the power to draft legislation where it has completed a Market Investigation, and the CMA exercises this power regularly.

Q30. Do you agree with the proposed definition of a subscription contract? How could this description be improved?

2.110 The definition refers to the provision of a service etc 'over a period of time' which may be problematic since it gives the impression that a subscription is for a period (12 months) rather than that it can be ongoing unless the consumer chooses that it should not renew, or later takes action to prevent renewal. It might be better to tie the definition to a contract which provides for payments to be taken in more than one *billing period* in exchange for the supply of any product during the billing period - this being a term and concept which is already used in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

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

2.111 Improved clarity of pre-contract information will lead to higher levels of consumer satisfaction through a better understanding of the agreement. It may also lead to a reduction in costs to business from dealing with customer service issues and reputational damage from association with a business model that places obstacles in the way of consumer choice. It is likely to lead to some disruption in business models, but overall the CMA considers this would be positive, as traders who rely on subscription-based revenue models would need to work harder to retain their customers. There would also be more scope for competitors to offer products which are cheaper or better suited to consumers' needs. Further, businesses would have greater confidence that they were treating consumers fairly, and thereby complying with their duties of professional diligence (and other consumer law requirements), and that they will not face unexpected claims for refunds from consumers.

2.112 Consumers need to be given transparent and timely pre-contract information in order to make informed choices on whether or not to enter a contract with auto-renewal, including the amount of the price on renewal; the circumstances in which the renewal fee might increase and how any price rise would be calculated; the nature and timing of steps the consumer must take to stop the renewal;[44] and any refund rights. Consumers can only provide their informed consent or properly acknowledge the

[44] For instance, in the CMA's work on cloud storage Cloud storage: consumer compliance review - GOV.UK (www.gov.uk),one issue was that consumers were not given sufficient time to exercise their rights in practice, since price and other variation information was not given to them sufficiently early to save and transfer their data in time to enable effective switching of accounts.

implications of entering a contract that is set to automatically renew, where they understand their contractual rights and ongoing obligations. Clear pre-contract information requirements would help ensure that this is the case.

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

2.113 The change would make compliance more straightforward, as it would be clearer what traders are obliged to provide. This clarity, combined with empowering consumers to make the choices that suit them, will mean traders are far less likely to be subject to complaints from consumers, private legal action or public enforcement and regulatory challenge from bodies such as the CMA.

Q33. How would expressly requiring giving consumers the choice upfront to take a subscription contract without autorenewal or rollover impact on traders?

2.114 There is some potential to lead to less revenue if fewer customers sign up – consumers who do not want auto-renewal are able to sign up on a fixed term basis only and do not subsequently choose to renew. However, it would be positive for those reputable businesses who want to avoid signing customers up for services they don't want or having to rely on dark nudge or sludge practices to compete. Since the option of auto-renewal would also be available, businesses would end up with a better-off customer base, with those wishing the benefits of autorenewal able to sign up on that basis. Businesses may also offer attractive incentives to encourage consumers to agree to auto-renewal. Greater ease of exit would encourage businesses to focus on the quality of their product and service level, in order to persuade their customers to continue subscribing.

2.115 Overall, the CMA considers it would lead to more competitive markets, which is good for consumers and fair dealing businesses. There is already a precedent for this kind of legislative approach – in the US state of Vermont, a statute applies to contracts between a consumer and seller with an initial term of one year or longer that automatically renews for a subsequent term that is longer than one month. Consumers must affirmatively opt-in to the automatic renewal provision in addition to accepting the other terms of the trader's contract or terms and conditions.

Q34. Should the reminder requirement apply where; (a) the contract will auto-renew or roll-over, at the end of the minimum commitment period, onto a new fixed term only, or (b) The contract will auto-renew or roll-over at the end of the minimum commitment period?

2.116 The CMA considers the reminder requirement should apply to both types of contract, because in both types the trader will be taking a fresh payment from the consumer, and it is important that people are aware when money is being taken from their account. There may be other features which make a reminder especially important in addition, such as where the price rate increases on renewal, the product changes, or there is a fresh minimum lock in period. Further, once a payment has been taken and the contract has been renewed, it is important that the consumer is sent a further confirmation.

2.117 The CMA also considers that it is very important that the reminder is effective in engaging the consumer's attention, and so is made clearly distinguishable from marketing. A single email reminder may be easily missed and might be presented in a way which does not highlight the importance of the message. The trader may also become aware (for example from a bounce-back message) that an email has not been delivered. Therefore, sending several reminders, using a variety of communication methods (such as SMS, pop-ups and in-app notifications as well as email), and continuing to remind consumers of the subscription at regular (3 monthly) intervals when billing periods are short are important further measures to consider. In relation to the content of the reminder, the CMA thinks it should also include:

- the date when the automatic renewal payment will be taken (i.e. the timing of the renewal payment);
- the consumer's right to terminate the contract and obtain a refund (where applicable); and
- in the case of an email reminder, clear and prominent links to the mechanism(s) to cancel the automatic renewal e.g. to the customer's online account and the refund policy.

Q35. How would the reminder requirement impact traders?

2.118 Overall, sending communications to consumers by email or SMS is not expensive, and many traders already do this regularly to build engagement with their customers (as well as to solicit business in the first place). However, it is important that traders should ensure reminder communications they send are effective to achieve the important purpose of enabling the customer to consider whether they want to continue with their subscription. This may not be in the trader's interest, so the trader

may need to work especially hard to make sure that the communication title is clear and unambiguous and adequate to highlight to consumers that it contains important information about renewal.

Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a 'full or higher price' ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the trial period ends?

2.119 As the CMA has commented elsewhere in our response, we consider that the consumer should be offered the choice to take a free trial or introductory offer without auto renewal or rollover. Assuming this is done, we envisage that the trader will obtain the consumer's explicit and active consent either when they first sign up for the offer, or, if the consumer decides later on to turn on auto renewal, before any further payment is taken. Where the consumer has already agreed to automatic renewal (on the basis of a free choice whether to take the product for the offer period only) we would consider a later reminder (before payment is taken) is sufficient -because the consumer has already agreed to the renewal. It is important however that any offer is not made conditional on the consumer agreeing to further payments being taken automatically, not least because it is hard to see how such an offer can really be 'free' if the default is that payment will be taken. In the case of a 'free' offer we think it would be better if the consumer is not even asked to enter their payment details, so that they can be confident that it really is free, and they are exposed to fewer risks. Payment details should only be required when a payment is actually being taken.

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

2.120 The CMA considers that the chief impact is likely to be that consumers would be far less likely to end up paying for products they do not want or need, and businesses will have to work harder to retain customers beyond offering free trials and discounted offers.

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

2.121 One year of inactivity is likely to be a reasonable timeframe which ought to trigger suspension of payments both due to the prevalence of annual subscriptions, and because people find the concept of 1 year easy to comprehend. Generally, we think a 12-month inactivity trigger would balance the certainty required for businesses with consumers' rights to

receive a service or product in return for their payment. In the case of contracts where a feature of the consumer's use of the product is that they store progress or personalised data, it is likely to be appropriate for the business to suspend the consumer's account for a further 12 months, such that the consumer can reactivate their account and recover their saved data if they choose to do so within this period.

2.122 It should also be possible for this data to be transferred to another consumer, who chooses to subscribe, in the case where the original subscriber has died. Also, changes need to make clear that there are lots of other circumstances where inactivity might arise – for example, lost or broken equipment, parents purchasing for a child and losing track, buying for a partner and the relationship then breaks down etc.

Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?

2.123 Yes, this is the current state of affairs, but it should not be so. It should be no more difficult to exit a contract than signing up. The CMA set out further views on this in its response to the Loyalty Penalty Supercomplaint.[45]

Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?

2.124 Yes, because this would prevent consumers being locked into contracts they no longer want or need. This is profoundly pro-competitive and pro-consumer choice. Both the mechanism for cancelling automatic renewal and the mechanism for requesting a refund need to be simple and easy to find. We agree that there should be a simple automated online process for turning off automatic renewal and for requesting a refund. The customer should be able to cancel automatic renewal and request a refund online through an automated process with the trader, without needing to contact the trader through another channel (e.g. via a phone call, email or web chat). However, traders should continue to support other channels for customer service, including facilitating cancellation and refund requests, in addition to an online automated route, one route for exiting the contract should be that which the trader used to get the customer to sign up.

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[45] 'Loyalty penalty' super-complaint - GOV.UK (www.gov.uk)

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

2.125 Possibly home and car insurance contracts, given the especially negative consequences for consumers in not being insured, but this is primarily an issue for the FCA given their supervision of the insurance market.

Q42. Should government ban the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?

2.126 There is a valid distinction between commissioning fake reviews and encouraging consumers to give a review. Banning the commissioning of consumer reviews in all circumstances requires careful thought; this may prohibit some practices which are potentially legitimate - for example, incentive schemes that encourage consumers to share their honest and genuine experience of a product they have bought or used; reviews by product testers who get to keep the product; and reviews posted by endorsers getting paid or rewarded for talking about a product on their social media account. However, in order to avoid misleading consumers reading online reviews, incentivised reviews must always be clearly and prominently labelled. Further, if published on a review site, the host platform must be able to distinguish the incentivised review from other reviews, so it is able to take appropriate steps to prevent it distorting the product's overall review score and ranking, thereby misleading consumers.

2.127 The CMA supports a ban on commissioning or incentivising fake reviews. However, we consider that this should extend to practices that are intended to commission or incentivise other misleading reviews. It is critical that 'fake' is clearly defined so it covers not just those reviews that do not reflect a consumer's honest and impartial opinion of a product, but also those commissioned/incentivised reviews that will not be clearly labelled and distinguishable to consumers reading online reviews.

Q43. What impact would the reforms mentioned in Q42 have on i) small and micro businesses, both offline and online ii) large online businesses and iii) consumers?

2.128 The CMA does not consider that a ban on practices that are likely to lead to consumer harm or prevent consumers from taking informed decisions would affect businesses' legitimate interests. We have encountered practices involving smaller businesses who engage search engine optimisation specialists, as well as practices of businesses of all sizes,

which involve marketers writing or commissioning fake reviews and hidden advertising. One result of this is to improve the trader's search results, so they are more readily found by potential customers. A clear ban on this practice would therefore have an impact on marketing endeavours of businesses which are wanting to improve their search rankings. However the CMA does not consider this is a legitimate concern, since search rankings which are influenced by fake reviews or hidden advertising are deceptive to consumers and unfair to other businesses.

Q44. What 'reasonable and proportionate' steps should be taken by businesses to ensure consumer reviews hosted on their sites are 'genuine'? What would be the cost of such steps for businesses?

2.129 While the proposed practice may be useful as a means of explicitly confirming that platform operators have a legal responsibility to take certain reasonable and proportionate steps to effectively tackle harmful review content, as currently worded, it does not extend to those misleading reviews where a consumer has used a product (including those described above). As such, its usefulness to enforcers in effectively tackling harmful review content may be limited.

2.130 In terms of steps/measures, while there is no 'one size fits all', the CMA considers that the law requires platform operators to adopt risk-based and proportionate approaches to effectively protect consumers, having regard to, for example, the platform's business model, content and systemic risks. Appropriate measures that the CMA would expect operators to take include (but are not limited to):

(a) Taking proactive steps to effectively identify and assess the risks of fake and misleading review content on the platform.

(b) Implementing effective reporting and flagging mechanisms to make it easy for consumers, businesses and other parties – e.g. law enforcement - to report potentially harmful content.

(c) Implementing specific proactive measures to identify such content and effectively mitigate its effects. For example, subject to the nature and extent of the risks posed to consumers, this is likely to include implementing appropriate automated and manual moderation systems to effectively identify and remove this content and respond to evolving threats or abuse.

(d) On becoming aware of the presence of potential fake and misleading review content - whether through notifications or by its own proactive means - investigating promptly and removing it where appropriate.

(e) Taking additional reasonable steps to effectively mitigate the risks of harm to consumers by identifying and removing similar content, e.g. checking other online content posted by the same user.

(f) Applying appropriate and effective sanctions to deter this content/activity in future - such as banning repeat offenders – and keeping records of sanctions.

(g) Proactively ensuring that its systems, policies and processes for the prevention, detection and removal of this content remain effective and keep pace with evolving threats/patterns of abuse. For example, through regular testing, reviewing and updating systems and processes – including any automated detection technology – when operators receive or become aware of new information (whether through notifications or their own proactive means).

Q45. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?

2.131 Yes. The CMA considers that traders should be expressly banned from offering or advertising to submit, commission or facilitate fake reviews (subject to being clear on the definition of 'fake' – see answers above).

Q46. Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?

2.132 The CMA welcomes BEIS's focus on behavioural techniques to influence choice ("choice architecture practices") which can affect purchasing decisions and may be harmful. This is an active area of work for the CMA. The CMA is currently gathering research and evidence to understand the harm from online choice architecture practices and we are considering further work in this area.

2.133 As noted in the consultation document, the CMA's market study into online platforms and digital advertising found evidence of the use of defaults and of deceptive or manipulative practices which exploit consumer behaviour to influence choice[46]. The use of these practices to distort consumers'

[46] Online platforms and digital advertising market study

decision making has also been the subject of significant academic research and discussion as well as international attention[47].

2.134 The CMA considers that such practices are harmful to consumers and are capable of distorting their decisions even where they might be aware of them[48].

Q47. Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?

2.135 The CMA welcomes the Government's proposals to make mandatory charges fully transparent from the beginning of the consumer's purchasing journey online. The CMA considers that both of these provisions should be directly added to the list of banned practices in Schedule 1 of the *Consumer Protection of Unfair Trading Regulations* 2008.

2.136 However, the CMA considers that the proposals should also apply irrespective of the medium through which the product is advertised and sold – for example where the goods or services are advertised to consumers online but where the consumer then completes the transaction offline, following a meeting in person with the trader; or where the product is advertised offline and the consumer goes on to complete the transaction online or in a shop. This would ensure that the consumer has all relevant pricing information at the time when the consumer might be shortlisting different purchasing options on factors including price. Where additional fees and charges are not options and the sale cannot proceed without their addition, we do not consider there is any legitimate reason for them not to be disclosed up front. Consumers should rightly expect to be provided with an accurate price in all circumstances. Adding drip pricing to the list of banned practices would facilitate swifter enforcement action in this area by removing any potential complications arising from the transactional decision element of the more general CPR provisions.

2.137 The final (true) price to be paid for goods and services is one of the most fundamental pieces of information consumers need upfront to make confident purchases. Previous CMA (and OFT) research and enforcement

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[47] Deception by Design by Lauren E. Willis :: SSRNDark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites (princeton.edu)
Underlagsrapport 2021:1 Barriers to a well-functioning digital market - Publikationer - Konsumentverket
[48] Underlagsrapport 2021:1 Barriers to a well-functioning digital market - Publikationer -

has established that drip pricing causes real detriment to consumers.[49] For example, the Advertising of Prices market study concluded that of a series of different price framing practices, drip pricing was clearly the most harmful frame for consumers in terms of purchasing and search errors, and that raised levels of consumer learning did not fully mitigate issues with the practice.[50] Lengthy transaction processes associated with drip pricing can ensure consumers gain a greater sense of ownership of a product and are less likely consider other offers once additional costs are revealed.[51] As such, drip pricing can lead consumers to under-search for the best deal and to underestimate the total price of a good or service.[52]

2.138 With regards to undisclosed paid-for search results, the CMA has previously intervened to ensure online platforms clearly explain where search rankings have been affected by payments or commissions received, for example in the principles published following the CMA's online hotel booking investigation.[53] Moreover, the CMA's digital comparison tools ('DCT') market study established that consumers often view comparison sites as 'unbiased' aggregators, and that comparison sites may breach the CPRs if they do not provide clear information upfront about the effects of any commercial relationships on the ranking of results.[54] Without clear explanations, consumers may make transactional decisions without sufficient knowledge of the commercial relationships underpinning their search rankings.[55] Consumers trust sponsored/paid-for results less than organic links, and are less likely to buy from sponsored vendors.[56] It is a particular concern, then, where unlabelled paid-for results appear first, as consumer choice has been shown to be strongly influenced by search

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[49] For instance, in the car rental intermediary market, the CMA has worked to ensure that all mandatory charges are included in the headline price at the start of the booking process. During 2011-12, the OFT secured formal undertakings or changes in lieu of undertakings from a series of airlines that resulted in debit card charges being included in all headline prices.
[50] OFT (2010). Advertising of Prices (OFT1291), paragraphs. 2.17, 3.22, 3.31-33.
[51] OFT (2012). Payment surcharges: Response to Which? super-complaint (OFT1349resp), para 6.21.
[52] OFT (2010). The impact of price frames on consumer decision making (OFT1226), paragraph 5.33, 5.61; OFT1291, paragraph 3.9.
[53] See Online hotel booking: principles for businesses; the European Commission has also worked to ensure that online platforms clearly set 'out a description of […] paid ranking possibilities and of the effects of such remuneration on ranking', see Regulation (EU) 2019/115, Art.5.
[54] Digital Comparison Tools Market Study: Final Report, paragraphs 4.13-4.16; CMA (2017) Paper C: The application of the law and regulation to DCTs, paragraph 37
[55] Online hotel booking: principles for businesses.
[56] Z. Ma, L. Xin., and T Hossain. (2013), 'Effect of sponsored search on consumer trust and choice.' *International Journal of Electronic Business Management* 11, pp.227-237.

ranking order – 75% of consumers, for example, will choose one of the first four results of an online search.[57]

Q48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?

2.139 Most of the UK's consumer protection legal framework was implemented and developed during the last two decades of our EU membership. The 'principles based' concepts upon which the law is founded can be flexible in some areas, but can also lead to real difficulties in application and interpretation in others.

2.140 For example, under the CPRs a key limb to proving a breach is establishing that an action or omission was likely to cause '*the average consumer to take a transactional decision'* they would not have taken otherwise. Such definitions can be very difficult to establish with certainty according to the facts and characteristics of certain sectors or cases. This in turn leads to a lack of confidence for businesses, consumers *and* enforcers as to the legal consequences of certain commercial practices. This is also true of other key concepts under the CPRs, such as what constitutes 'material information', and when a practice might 'be contrary professional diligence' or be considered 'aggressive'.

2.141 This can also be true of the CCRs, which, as an amalgamation of information and procedural requirements for consumer contracts formed at a distance or on the doorstep, can prove difficult to interpret and apply with confidence. For example, the exclusion from cancellation of 'clearly personalised goods' or 'those made to the customer's specifications' has been interpreted by some businesses as a means of denying important consumer cancellation rights for prefabricated goods, such as double-glazing products.

2.142 The ability for the CMA to lead with authoritative business guidance on such issues will greatly assist in providing necessary clarity, as too will the CMA's first instance decisions under an administrative model of consumer enforcement, especially if backed by an appeal forum dedicated to developing consistent consumer law interpretation and precedent.

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[57] See the Dutch ACM's Protection of the online consumer: Boundaries of online persuasion (2020), pp.42-43.

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

2.143 The UK's body of consumer law protection is strong and flexible enough (in principle) to cover most consumer interactions, transactions and unfair trading practices. Nevertheless, strong consumer laws without adequately resourced, positioned and coordinated enforcers will lead to ineffective protections in practice. The government's proposals to strengthen enforcement procedures and sanctions within this consultation are very welcome, however, the opportunity should not be lost to clarify landscape leadership and coordination roles with plans to resource an effective system at all levels.

2.144 For example, we recommend government amends the strategic steer to allow the CMA to give leadership on key interpretations of the CPRs, CCRs and aspects of the CRA. This will avoid conflict with business and give certainty for landscape partners such as concurrent regulators, trading standards services and those who provide assured advice under Primary Authority Relationships.

Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?

2.145 The CMA is unaware of unnecessarily burdensome information requirements under consumer law. The confidence of consumers is based on their ability to have clear, timely and materially relevant information on all aspects of their interactions with businesses. This is especially true in complex markets (such as digital) or where consumers are likely to be vulnerable – or where they are subject to informational asymmetries that affect their ability to make informed choices.

Q51. Do you agree that these powers should be used to protect those using 'savings' clubs that are not currently within scope of financial protection laws and regulators?

2.146 The CMA agrees and supports the government's proposals (and the Law Commission's recommendations) for better protections for certain categories of consumers that make prepayments.[58] Most consumers will be unaware of the risks to their savings from the insolvency of a savings

[58] BEIS (2018) *Law Commission Report on consumer prepayments on retailer insolvency: government response*

scheme provider that is not regulated by the Financial Conduct Authority. Consumers should have a reasonable expectation that, much like traditional financial products, their investment in 'savings clubs' are protected in law. This is especially true for those who may be vulnerable and those who seek to save for special or particular events, such as Christmas savings clubs.

2.147 The CMA also supports the proposals to amend the Consumer Rights Act 2015 such that a flexible power can be introduced allowing for the protection of product (or market) prepayments through the means or insurance, bond or trust accounts. Such a power should also be flexible enough to deal with problems that arise from short term 'buy now pay later' schemes that fall beyond the scope of regulated agreements and financial regulators.

Q52. What other sectors might these powers be usefully applied to?

2.148 The CMA believes there is a strong case that these protections should be afforded to any sector where significant consumer prepayments are at risk of being lost upon the insolvency of the business or savings scheme provider. These are likely to be those offering expensive gift cards or vouchers but particularly those that take large prepayments or deposits for furniture or home improvements such as bathrooms or fitted kitchens.[59] Where a consumer has purchased goods that remain the trader's possession at the point of their insolvency, or has otherwise deposited goods with a trader who becomes insolvent, the consumer should have an absolute right to the return of those goods.

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

2.149 The CMA is aware of the existence of terms in online markets that seek to delay the formation of a sales contract until the point that the goods leave the sellers' warehouse and the consumer is informed as such, perhaps by email confirmation. However, the CMA is at present unaware of how widespread or common the use of such terms is in practice.

[59] Law Commission (2016). *Consumer Prepayments on Retailer Insolvency: Summary* (LC368)

Q54. Does the practice of using terms and conditions to delay the formation of a sales contract actually cause, or have the potential to cause, detriment to consumers?

2.150 Yes, at least potentially. In practical terms, many consumers expect to have entered into a binding contract once they have confirmed the purchase and entered their payment details. Further, many consumers will expect to have a binding contract where they have subsequently received a confirmation or acknowledgement of their order from the trader. Accordingly, should the trader be unable to supply the purchased product at the agreed price – or be unable to supply the product within the agreed timeframes - the consumer would normally expect the trader to be in breach of contract, and, accordingly, that they the consumer would expect to be entitled to some form of compensation where appropriate. This is especially important where the consumer's payment has actually been taken up front.

2.151 In the CMA's view, terms that state that the contract is only formed when the goods are dispatched are of significant suspicion of failing the fairness test under Part 2 (section 62) of the Consumer Rights Act 2015. In the CMA's view, terms that state that the contract is only formed when the goods are dispatched are, in many cases, at risk of failing the fairness test under Part 2 (section 62) of the Consumer Rights Act 2015. This is on the basis that they are likely to cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumers, contrary to the requirements of good faith.

2.152 Such terms, at least in some cases, appear to change the common law position or remove (or at best delay) valuable statutory or other consumer protections to the detriment of consumers. Such protections include claims under section 75 of the Consumer Credit Act 1974, or the requirements under section 28 of the Consumer Rights Act 2015 (CRA) for (in the absence of a term agreeing a delivery period) goods to be delivered to the consumer without undue delay, and in any event not more than 30 days after the contract has been formed.

2.153 It is also unlikely that terms delaying formation of the contract are sufficiently brought to consumers' attention by retailers. It is likely that consumers, having placed an order and paid (or having provided payment details) would reasonably expect that they have entered into an agreement with the retailer - yet under such a term the trader is left with no obligation to form the contract or deliver the goods. Even if consumers are aware of the term, the CMA doubts that they will appreciate its full significance in the absence of very clear and specific language. It is also unclear what benefits such a term provides for consumers and why they could reasonably be

expected to sign up to it even if they fully understood the consequences of doing so. It is questionable therefore whether such terms meet the principle of good faith - requiring fair and open dealing with consumers, or the more general principles of transparency and prominence for terms that are unfavourable to consumers.

2.154 In practice such terms have the potential to place consumer payments at risk. This is because sellers, having taken money up front, are left with no obligation to enter a contract on the terms understood by the average consumer. Potentially such actions could also be considered an unfair commercial practice under the Consumer Protection from Unfair Trading Regulations 2008 (and arguably leave consumers open to bait advertising, or bait and switch practices).

2.155 The CMA would welcome further discussions on the use of delayed contract formation terms with relevant representative trade bodies. This will help policy makers facilitate a greater understanding of their prevalence, the reasons for their inclusion, and the extent of their importance (or potential alternatives) for traders that rely upon them.

Chapter 3: Consumer Law Enforcement

Thematic response on public law enforcement

Introducing an administrative model for the enforcement of consumer protection legislation

2.156 The CMA strongly supports the introduction of an administrative model for consumer enforcement. Such a model will promote swifter resolution of cases and improve deterrence against breaches of consumer law and greater clarity for fair-dealing businesses. It would also create some useful consistency with sectoral regulators' licensing and administrative enforcement regimes.[60] As mentioned above, initial CMA decisions under the proposed model (supported by guidance and appropriate appeal mechanisms) will be vital in promoting consistency and clarity for businesses, to support the development of well-functioning markets.

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[60] The CMA has had substantial experience of operating a similar enforcement model for more than twenty years, as well as the historic Office of Fair Trading's experience of administrative licensing decisions under the Consumer Credit Act and the Estate Agents Act, so the new model will not be unfamiliar.

2.157 The proposed turnover-based financial penalties are an essential part of the new enforcement process – this will bring deterrence in line with CA98 fining powers as well as tough fining powers held by major international counterparts. Strong financial deterrence against non-compliance will force traders to take consumer law compliance more seriously and will hopefully remove the existing financial incentives to break the law, persist in non-compliance and even to obstruct the effect of enforcement altogether. In several recent cases the CMA has come across parties who view non-compliance with consumer law as a genuine business strategy, partly because of the lack of consequences for breach. Non-compliance must be made financially unattractive and turnover-based fines are the key step in making them so.

2.158 As well as this administrative model being added as an additional enforcement option for the CMA (to complement existing civil enforcement powers under Part 8 of EA02 and criminal enforcement under the Consumer Protection from Unfair Trading Regulations 2008), the CMA considers that these additional powers could also be available for all existing Designated Enforcers, mostly sectoral regulators such as the FCA, Ofcom and the CAA (should they wish to make use of them). Given the partnership nature of the UK consumer enforcement landscape, it is important to ensure that effective consumer enforcement is also enabled in the regulated sectors that these bodies supervise.

2.159 Any new administrative model will need to replicate many if not all of the existing functional elements of the civil enforcement system – in particular the power to order the cessation of infringements, make online interface orders and secure redress and all the other explicit remedy powers contained in the Enhanced Consumer Measures added to Part 8 in 2015. It is important too to retain the provisions around notifications, consultation and concurrency. The CMA is ready to assist with the detailed development of specific draft legislation in this regard. Consumer enforcement has a large element of future-looking detriment prevention, so it is important that enforcers can hold traders to account for any illegal conduct, for example by some form of direction or other subsequently enforceable requirements.

2.160 Although the CMA strongly supports these proposals, which will improve the ability of the landscape to respond to challenges and detrimental breaches of consumer law, it also considers that several minor amendments could be made which would further enhance the swift and effective delivery of cases, whether by formal decision or voluntary outcomes agreed by traders.

2.161 It is critical that any promises (settlement, undertakings, agreement) the trader enters into on a voluntary basis can subsequently be enforced, as otherwise unscrupulous traders may unfairly gain an advantage over fair-dealing competitors by deliberately 'gaming' the process, by making promises they do not intend to keep. Where enforcers end or curtail their enforcement action based on those promises, these will need to be directly enforceable. Swift action can then be taken by enforcers on any breach of promise without a reasonable explanation. The CMA considers that this is a reasonable request as firms who do not intend to abide by their promises should not make them in the first place.

2.162 The CMA considers that an effective appeal route needs to be built into the process, to ensure that a trader who does not agree with the final decision by an enforcer has some recourse to law. The CMA believes that judicial review of administrative decisions could be a suitable standard, but, understands that there may well be calls for a full merits standard where financial penalties are imposable.

Enhanced Civil Enforcement of Consumer Protection Legislation

2.163 The CMA welcomes the improvements to civil consumer enforcement, including the long-overdue introduction of civil fining powers, proposed in the 2018 government green paper, Modernising Consumer Markets, and confirmed by government statements in 2019.[61] The CMA notes that it is essential to make these improvements to the existing civil system in parallel to any new administrative model, as local authority trading standards services and other enforcers are likely to continue to use civil powers, especially in relation to consumer legislation where no criminal sanctions are directly available (for example most of the Consumer Rights Act 2015).

2.164 The CMA also considers that it will need to retain access to the powers contained in Part 8 EA02, for the purposes of co-ordination and management of any issues arising from the complex concurrency arrangements (e.g. section 216) – these are important as otherwise traders might find themselves subject to overlapping enforcement approaches by different consumer enforcers at the same time. The CMA is ready to support BEIS as required in relation to the detailed revisions of Part 8 as well as the landscape interactions.

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[61] For example New powers to fine firms that exploit consumer loyalty - GOV.UK (www.gov.uk)

2.165 More specifically, in addition to the much-needed civil fining powers, the CMA considers that direct sanctions need to be made available for breaches of undertakings by traders. In the absence of these, the only power currently available is to escalate the matter to court – which is precisely the sanction the trader avoided in the first place by offering undertakings acceptable to the enforcer. Without directly enforceable undertakings traders may continue to prolong enforcement discussions, potentially 'buying' themselves several months of anti-competitive, (and profitable) non-compliance before they can be held to account.

2.166 The CMA also considers that the court should be given specific power to fine traders substantially for any material breach of a court order (or undertaking given to the court). At this time the only remedy is for the enforcer to pursue the trader for contempt of court, however, this route tends to restrict actions only to breaches which are ongoing at the date of the hearing for contempt, and in addition the sanctions available where the contempt is brought to an end by then tend to be low.

2.167 Additionally, the CMA believes there is merit in examining whether all sectoral regulators and enforcers with consumer responsibilities should have the tools to protect consumers by becoming Part 8 Designated Enforcers. This would be an important change, allowing those bodies with the relevant sectoral expertise to tackle the consumer problems that may be unique to their sector. (For example, this might include the Gambling Commission and the Office for Students). The CMA appreciates this may not be straightforward as other Ministerial Departments may require consultation over such a change. The CMA's experience across several markets in the last decade suggests this would significantly enhance consumer protection, allow for swifter action in regulated sectors, as well as free up CMA (and trading standards) resources for priority areas that perhaps lack a specific regulator. Such a change would enhance and build upon the toolkit of enforcement options available to sectoral regulators.

2.168 The CMA also believes there may be cases that will require a very rapid enforcement power to change behaviour and protect consumers from harm. That could include, for example, cases where the trader's actions raise serious and immediate concerns about risks to public health. In such cases, where the trader is unwilling to immediately cease the infringing behaviour (perhaps refuting fault), it may be necessary for the CMA to adopt a precautionary principle approach and intervene urgently, pending a fuller investigation. Accordingly, the CMA believes that a form of interim measures power will be helpful to provide immediate protections pending the conclusion of such cases, including the imposition of any fine. The CMA

notes that enforcers currently have the ability to seek interim injunctions in appropriate cases using their Part 8 enforcement powers.

Landscape Issues

2.169 The UK's system for consumer law enforcement is complex, interconnected and reliant on the strength and cooperation of its individual parts. The most recent significant assessment of the system was the National Audit Office's ('NAO') report in 2016. [62] That report found that although landscape coordination had improved, it also noted that consumers were inadequately protected due to reduced capacity and gaps in coverage at the local level.[63] The government's 2018 green paper acknowledged concerns about the sustainability of the system,[64] and gaps were further highlighted in a 2021 NAO report on product safety.[65]

2.170 The consultation asks an open question relating to trading standards national agencies and *criminal* cases. In the CMA's view any opportunities for reform must also take into account consumer *civil* enforcement alongside the interdependence of the entire consumer protection system. This is important given the significant changes being proposed such as the CMA directly enforcing consumer law and the upgrades to the civil enforcement regime under Part 8 of EA02.

2.171 The CMA also considers that improvements could be usefully made to the existing case notification system (currently provided by the National Anti-Fraud Network website) and the systems of co-ordination to address the key areas of consumer detriment provided for by the Consumer Protection Partnership. With some modest investment of resources by BEIS and HMG, the functionality of the whole system could be enhanced, for example by enabling the production of reports within the NAFN system[66] or creating a more joined-up UK-wide approach to the resourcing and prioritisation of initiatives to address consumer detriment through the extensive knowledge and expertise of CPP members.

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[62] National Audit Office (2016) *Protecting consumers from scams, unfair trading and unsafe goods*
[63] Ibid, paragraph 13
[64] BEIS (2018) *Modernising consumer markets: Consumer Green Paper*
[65] NAO (2021) *Protecting consumers from unsafe products (Summary) ,* -see paragraph 21.
[66] Which were possible under the Consumer Regulations Website, a system created and run by the Office of Fair Trading but removed as part of the 2014 reforms. See page 36 following of the withdrawn OFT guidance on consumer enforcement: Enforcement of consumer protection legislation (publishing.service.gov.uk)

2.172 The CMA's consumer enforcement role was defined following the 2012 landscape reforms 'to promote competition for the benefit of consumers'. The review gave the CMA a leadership role on unfair terms interpretation and enforcement and a coordination role within the consumer landscape.[67] Guidance has been issued on how the CMA uses its enforcement powers[68] and investigation outcomes are published on its case pages.[69]

2.173 The CMA's investigations predominantly involve larger firms with significant market power, and often result in them being brought into compliance with redress for affected consumers. However, in order to secure market-wide outcomes, follow-up business advice and enforcement actions are necessary from trading standards services to achieve a fair playing field and protection for local businesses and consumer.

2.174 For example, during the Covid-19 pandemic, the CMA's investigations into unfair practices and cancellations returned more than £200million in redress for consumers in the package travel, holiday lets and weddings sectors. These actions (alongside open letters and sectoral advice) also facilitated coordinated intelligence sharing and enforcement by trading standards to deliver positive consumer outcomes across the markets. Local trading standards services are therefore a vital landscape partner for the CMA, a force multiplier that ensures national, regional and local outcomes are achieved by coordination, partnership working and information sharing.

2.175 It is important therefore to view the consumer enforcement landscape as an interconnected network of stakeholders, each with distinct but contingent roles in the success of the others and an overall effective system of protection for consumers. In the case of consumer protection actions in response to the Covid-19 crisis, this also included operative partnership working with all other sectoral regulators and consumer bodies such as the Advertising Standards Authority.

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[67] Consumer Rights Act 2015 (legislation.gov.uk)
[68] CMA58: Consumer protection - enforcement guidance (publishing.service.gov.uk)
[69] Competition and Markets Authority cases - GOV.UK (www.gov.uk)

CMA Leadership within the consumer landscape

2.176 Key to the success of these relationships is the ability for the CMA to lead with authoritative interpretations of consumer fair trading law.[70] In practice consumer enforcement cases involve core unfair trading laws, especially the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs') and often the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('CCRs'). The CMA's targeted application of the CPRs and the CCRs[71] to sectoral issues through the publication of advice and open letters[72] was crucial to the success of the Covid-19 cancellations and refunds work (and the follow-on actions by other enforcers such as trading standards services).

2.177 The CMA therefore recommends that its leadership role[73] for consumer law is explicitly and formally extended to the interpretation of the CPRs and CCRs through the government's strategic steer. This will become especially important as part of the reforms whereby the CMA will enforce consumer law directly on an administrative basis and retain a leading role in the coordination of Part 8 enforcement actions. It would allow the CMA to clearly set out how it considers the law applies to businesses in relevant sectors before any enforcement under its administrative or Part 8 roles. Such a change would not require a major recasting of landscape responsibilities and would allow a much more effective system to support actions by trading standards.

Successful Criminal and Civil Enforcement

2.178 The creation of National Trading Standards has significantly improved the enforcement of larger scale criminal cases that were not previously prosecuted due to cross (local authority) border, resource and scale issues. Such an arrangement allows for enforcement funding to be directly

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[70] For example, as the Financial Conduct Authority leads on consumer credit, the Civil Aviation Authority on flight cancellations, etc.

[71] Statement on coronavirus (COVID-19), consumer contracts, cancellation and refunds - GOV.UK (www.gov.uk)

[72] CMA open letter to package travel sector - GOV.UK (www.gov.uk)

[73] It is important to note that this leadership role does not mean CMA would take all the cases in these areas, just as CMA does not take all the unfair contract terms cases under its existing role.

commissioned by local trading standards services and national teams to tackle specialist areas.[74]

2.179 Despite this, NTS funding does not resolve the issues created by the greater than 50% cut in resources and professional staff suffered by local trading standards over the last ten years or more.[75] The NAO report in 2016 highlights that local trading standards remain the primary consumer enforcer and receive the majority of funding at the local level,[76] however, damaging losses to local capacity undermines the entire system's ability for intelligence sharing, coordination and follow-on enforcement actions

2.180 The NAO report recommended that government work with relevant Departments including the Department of Housing Communities and Local Government to ensure that consumer protection skills and capacity are strategically deployed.[77] The CMA would support government proposals that sets priorities and improves enforcement coordination and resources for local trading standards - alongside reducing the barriers to successful NTS criminal cases and workstreams.

2.181 While criminal enforcement sanctions are important in cases where rogue traders should be pursued and punished, they are not the only tool available to local trading standards services. Any proposals for reform must include those that allow local services to better utilise their flexible civil enforcement powers.[78] This is especially important in light of the government's proposals to add significant fining powers to the Part 8 regime (alongside the recent introduction of enhanced consumer measures). The CMA will also work wherever possible to offer leadership, guidance and support to local services in order to overcome any barriers to using civil enforcement tools to their fullest.

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[74] In areas such as eCrime, Feed, Regional Investigations, Estate Agency, Intelligence and Scams.
[75] https://www.tradingstandards.uk/news-policy/vision-and-strategy-1/workforce-survey
[76] National Audit Office (2016) *Protecting consumers from scams, unfair trading and unsafe goods,* p.7: , key findings 'Local Trading Standards services, funded at the local level, received £124 million. The Department funds Trading Standards at the national level (£14.8 million), as well as Citizens Advice (£18 million). HM Treasury funds the Competition and Markets Authority, which spent £6 million on its consumer protection work in 2015-16'
[77] Formerly the Department for Communities and Local Government.
[78] For example, the government might consider capping the costs in such actions or examining the means by which local services access appropriate legal expertise.

Devolved Enforcement Landscape

2.182 In Scotland, local trading standards services continue to report criminal cases and undertake civil enforcement actions (on occasion supported by Trading Standards Scotland 'TSScot'). The CMA's discussions with the Society of Chief Officers of Trading Standards in Scotland (SCOTSS) and TSScot suggest criminal cases can be challenging, in part driven by the fact that the Crown Office and Procurator Fiscal Service unilaterally decide whether to prosecute cases reported from specialist agencies (such as trading standards). Prosecutions are not always progressed which means the ability to undertake civil cases becomes increasingly important. Any consideration of system reform must accurately reflect the very different enforcement issues and funding arrangements in Scotland between the nationally arranged teams (TSScot and NTS), the very acute resource challenges[79] and the arrival of Consumer Scotland's role developing within the landscape.[80]

2.183 In Northern Ireland (since leaving the EU) the consumer landscape has been complicated by the Northern Ireland Protocol.[81] The CMA's partners include the Consumer Council for Northern Ireland and Northern Ireland Trading Standards Service. As Northern Ireland does not operate with a dual-tier of local and national consumer law enforcers, partnership working on key issues (such as the CMA's Covid-19 cancellations work) has been of key importance in securing UK-wide outcomes for consumers.

2.184 In Wales the CMA works closely with the Wales Heads of Trading Standards, representing the 20 Local Authority Trading Standards services across Wales (through their National Co-ordinator and Chair) and Citizens Advice Cymru (through the Wales Director and Senior Campaigns & Advocacy Officer).[82] As with Northern Ireland, partnership working on key

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[79] See Audit Scotland Report Protecting consumers (audit-scotland.gov.uk)

[80] Consumer Scotland Act 2020 (legislation.gov.uk)

[81] The Protocol impacts on aspects in trade in goods between Northern Ireland and the rest of the United Kingdom in order to retain no physical border infrastructure between Northern Ireland and Ireland (as the land border with the EU).

[82] Consumer groups in Wales have formed an informal partnership as the Wales Consumer Protection Partnership facilitated by Citizens Advice Cymru and involving Trading Standards, the ASA, Consumer Council for Water, Passenger Focus, Older Peoples Commission.

issues such as the Covid-19 response has been important as has work on EV Charging, Funerals, Care Homes and Misleading Green Claims.

Single Trader Cases

2.185 On occasion the CMA's 'market-wide' role can be limiting when there may only be one trader engaging in practices that create significant detriment within a market. (Illegal pricing practices for example.) The actions of such traders may not always meet the NTS thresholds for serious criminality yet may also perhaps be too risky in scale for a local authority to act.

2.186 In order to more comprehensively address consumer detriment at a national or regional level, the CMA recommends that BEIS amend the strategic steer for the CMA to take on such 'single trader' cases (working closely with Primary Authorities and others within TS as relevant). Any cases would need to be strategically significant and capable of 'sending a signal' to the market - but might also address precedent setting points of law or emerging areas of bad business practice.

Business Guidance

2.187 The CMA's official role in providing business guidance is currently restricted to unfair terms legislation and sector specific guidance as part of a consumer enforcement and compliance projects. Responsibility for all other business guidance on consumer protection law was moved to the Chartered Trading Standards Institute (CTSI) as part of the 2012 consumer landscape changes.

2.188 However, when producing sector-specific guidance the CMA is drawn into issues relating to the CPRs as many of the issues cut across both unfair contract terms and business practices – such as misleading advertising or pressure selling. Sector specific guidance in the CMA's IVF[83] and draft Misleading Environmental Claims[84] projects have necessarily had to address unfair terms *and* the CPRs in their assessments of the fairness of certain practices.

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[83] Guidance for Fertility Clinics on consumer law (publishing.service.gov.uk)

[84] Draft guidance on environmental claims on goods and services (publishing.service.gov.uk)

2.189 The CMA has a high level of experience and expertise on the CPRs and has provided training for trading standards services in this area. As such it is well placed to take on responsibility for CPRs guidance (having written the original OFT/BERR Guidance in 2008).[85]

2.190 Also, (as stated above) the proposals to move to a direct model for consumer enforcement will necessitate a landscape position whereby the CMA can, in the first instance, authoritatively set out its views to businesses on how consumer law applies to certain practices across relevant markets.

2.191 In addition, there are cross-cutting issues relevant to the CMA's work for which there is either no business guidance or where what has been produced does not cover the specific issues required. Similarly, there are likely to be other areas, particularly in relation to emerging online behaviour driven by algorithms and machine learning (such as listing and ranking issues) where the CMA might welcome the opportunity to produce business guidance.

2.192 In consideration of this extension, the CMA would also welcome a discussion to heighten the status of guidance produced, i.e. whether it should be given an enhanced statutory footing with a duty for it to be followed akin to that produced by Primary Authorities. This would give the guidance an authoritative basis and allow for consistency for businesses, concurrent regulators and fellow enforcement partners such as trading standards.

2.193 The CMA recommends that BEIS extends the CMA's business guidance role, both in status and scope, in particular to cover the CPRs and CCRs, but also on cross-cutting consumer law issues relevant to a particular investigation or market interest. Such a change would not preclude the CMA from working with CTSI in relevant areas, allowing for authoritative, proportionate and targeted guidance to reach businesses on important matters of consumer law.

Thematic response on Private Redress

2.194 The CMA considers it is important to substantially enhance consumer empowerment in an increasing complex and global market. This is critical because however well-resourced enforcement agencies such as the CMA

[85] Consumer protection from unfair trading - guidance - oft1008 (publishing.service.gov.uk)

and Trading Standards are, the sheer range of consumer protection issues confronted by consumers is likely to mean not every case can be resolved through public enforcement. While the CMA will continue to make best use of its resources by prioritising the most important issues, it is crucial that consumers are given more effective tools for seeking their own resolution and redress. Please see the CMA's previous response on ADR and redress.[86]

2.195 Effective, cheap, swift and accessible redress is the cornerstone of empowerment. Empowered consumers drive efficient, competitive markets and are also willing to take risks, for example on new products or unfamiliar traders, because they are confident that their rights (and money) will be effectively protected when things go wrong. Most consumers want to resolve the problem informally – but formal systems are the best way to guarantee this, because the existence of effective formal redress processes will drive better, pro-consumer informal resolution – traders will know they are likely to have to award redress where they have erred, so they will prefer to resolve informally. Improved redress systems are therefore a good way of minimising the costs and burdens on the court system and will drive sensible conversations between consumers and traders to reach sensible conclusions.

2.196 To ensure effective progress on redress, it is essential to retain the useful Enhanced Consumer Measures currently contained in Part 8 of EA02 and to map this over into any new administrative consumer enforcement process.

2.197 In relation to Alternative Dispute Resolution systems, the CMA agrees that essential markets need mandatory ADR. This mandatory ADR needs to have outcomes that are binding on traders (but not consumers, as this would contradict some the requirements of the Consumer Rights Act 2015). The CMA would also suggest the inclusion of air travel, given the difficulties encountered in this sector in recent years.

2.198 Markets for products and services that raise particular challenges for vulnerable consumers (especially where these are complex products or services) should be subject to a mandatory ADR scheme accessible to all consumers.

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[86] Modernising consumer markets green paper: CMA response to Government consultation - GOV.UK (www.gov.uk)

2.199 For example, through its work in the sector, the CMA considers the self-funded IVF market to be a very complicated consumer market and is concerned that certain fertility clinics have opaque pricing structures and misleading information on success rates[87]. There are also instances where consumers (who are naturally anxious to maximise their success in having a child) are sold expensive 'add-on' treatments', some of which have little or no evidence as to their efficacy. Even though the IVF sector is regulated[88] and patients are clearly vulnerable, there is no mandatory ADR for self-funding IVF consumers who wish to pursue complaints against clinics. Further examples can be found in private healthcare product markets, such as the recent call for CMA to investigate and take action[89] against consumer law breaches being committed by companies carrying out private COVID PCR testing.[90]

2.200 The CMA recommends that where more than one ADR scheme is open to a particular sector, the consumer chooses which one is used rather than the trader, because of historic negative experiences with several schemes in the past taking overwhelming pro-business decisions. Based on experience with several markets, in particular gambling but also housing, the CMA recommends that ADR and ombudsman bodies are given the explicit power to disapply unfair contract terms, as well as an explicit duty to consider whether any term relied on by the trader is unfair, as otherwise these processes may end up effectively enforcing bad contracts on behalf of traders (and risking inconsistencies with enforcement actions on similar terms, whether in the same or a different sector). This would bring ADR schemes in line with the duty and powers of the courts in respect of unfair terms.

2.201 In relation to improving existing private collective redress procedures, it is important to protect the compensation given to claimants. Where private claims management get involved, it's important to protect the balance – it might be possible to limit the total % of the compensation paid in 'no win, no fee' cases. Ideally, however, redress systems should be funded by taxation or a specific sectoral levy.

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[87] Self-funded IVF: consumer law guidance - GOV.UK (www.gov.uk)
[88] HFEA: UK fertility regulator | Human Fertilisation and Embryology Authority
[89] CMA publishes recommendations to improve PCR testing market - GOV.UK (www.gov.uk)
90 See Letter from the Health and Social Care Secretary to the CMA: 6 August 2021 - GOV.UK (www.gov.uk). This sort of request from Ministers would be easier to deliver if the CMA had more effective enforcement tools such as those laid out in the administrative and fining proposals discussed above.

2.202 The key issue with collective redress is that many illegal practices create high levels of overall total detriment but small amounts to individual consumers. This means it is desirable in principle to assist public bodies and others to bring such collective cases. Given the FCA's role in supervising aspects of claims management, the CMA recommends that BEIS, FCA and CMA meet to discuss how best private claims management might be appropriately given a larger role in collective claims.

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

2.203 The CMA strongly agrees with this proposal. The CMA has extensive expertise in understanding and applying consumer protection law and is therefore especially well placed to apply it consistently, accurately and effectively across sectors. Overall, it will increase compliance across markets and enhance deterrence from infringements through a necessarily stronger consumer enforcement model. In particular, it will allow the CMA to control the timetable for investigations and not be subject to firms willing to exploit weak processes without sanction. It will also bring an end to infringements sooner and balance proportionate penalties with redress for consumers.

Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

2.204 There are considerable benefits to the CMA retaining powers to enforce the current broad scope of legislation under Part 8. Consumer issues can be wide-ranging and complex and don't always fall neatly within core fair trading legislation such as the CPRs and CRA. For example, the CMA's recent Covid-19 cancellations enforcement work required action under the Package Travel and Linked Travel Arrangements 2018 and the common law of frustration, returning more than £200milion in refunds for affected consumers. A limited scope for enforcement of legislation may have precluded these successes. It is therefore also important that any administrative model provides for the CMA not only to issue fines, but also to direct changes to business practices to bring about the cessation of infringements, as well as to improve compliance and choice, to secure redress for consumers, and to make online interface orders -all as currently provided for under Part 8 (albeit with such amendments to improve their operation as we have explained elsewhere).

Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

2.205 The CMA considers that establishing the right processes and procedures will be critical to the success of introducing a new administrative enforcement model. While much can be borrowed from existing administrative enforcement models, the CMA is not convinced it would be appropriate to simply adopt one of the existing models for a new consumer enforcement regime. An effective and efficient regime is likely to be one that is appropriately tailored to the extremely wide range of potential breaches, the range of traders involved, as well as the variety of different outcomes that are likely to be required.

2.206 The CMA notes that for some cases, there will be a particular need to deliver a swift change in behaviour; while in others, consumer redress, the need to clarify the law, or perhaps the need for deterrence (for example) will be the key driving forces. The available process and procedures should incentivise settlement in appropriate cases and ensure contested cases can be resolved promptly while providing appropriate procedural protections for traders. In particular:

(i) The CMA would not envisage it would be necessary to issue a provisional decision in all cases. While the relevant business will need to understand the enforcer's concerns in sufficient detail, in most cases this can be achieved through appropriate engagement with the party(s).

(ii) Instead provisional decisions will be most suitable for cases where, for example, the trader is unwilling to settle or where the particular conduct of concern means a settled outcome is inappropriate.

(iii) Some of the safeguards which seek to provide procedural protections for traders under investigation need only be engaged in non-settled cases. Such safeguards could include, for example, separate decision makers between a provisional and final decision and access to the key evidence of relevance to the enforcer's case

(iv) Settled outcomes could include outcomes relating to future behaviour and consumer redress (as is currently the case under the existing Part 8 enforcement model). The CMA sees no reason in principle why settled outcomes could not include discounted financial penalties. Such outcomes should be supported by the publication of information about the action, as is appropriate in the circumstances, to provide guidance to others.

(v) The above is likely to lead to a process built around two main phases:

Phase 1, focused on identifying where enforcement action is necessary and, where it is, whether it will be appropriate or feasible to resolve the matter through a settled outcome; and

Phase 2, following on from Phase 1 in appropriate cases, and focused on delivering an imposed decision and/or directions. While the CMA can see the potential for some settled outcomes once Phase 2 has commenced, it would not expect this to be commonplace

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

2.207 The consultation explores the balances required in deciding the appropriate appeals framework for CMA administrative decisions - contrasting between competition and consumer law decisions; the parity with criminal law in *consumer* decisions; the need for robust procedural rights; oversight of CMA decision-making; and, the inclusion of penalties, all being key factors.

2.208 In the view of the CMA, it would not be advantageous to have a full-merits review on every aspect of a CMA decision (though the CMA understands that there may well be calls for a full-merits standard of appeal in consumer cases where penalties are imposed) . Appeals on full merits in every case may discourage settlement at earlier stages. It may also discourage concurrent regulators from using the administrative model over regulatory enforcement which would predominantly be subject to a judicial review standard of appeal. Thought should be given in particular to the suitability of a standard of appeal equivalent to that applied to certain of Ofcom's decisions in the communications sector before the CAT.

2.209 The CMA considers that, given the broad scope of consumer law and the benefits of specialist familiarity in reaching swift and just decisions, there is merit in ensuring experts familiar with consumer law are involved in cases.

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?

2.210 The CMA would contend that, regardless of the forum chosen to hear appeals from its administrative decisions, the fundamental requirement is that it contains expertise (and experience) in consumer protection law. This will allow for the development of consistent and authoritative decisions compatible with public policy intentions and consumer law policy and

practice. Consumer law is a specialist field, requiring insight into consumer behaviour, market dynamics and business economics more generally. As such, decision making should ideally be carried out by a forum comprising expertise in these matters.[91] The CMA can see the merits in each of the options outlined by government and agrees that the forum should integrate effectively with our current system of public enforcement and private litigation of consumer law. The CMA looks forward to working with government to help choose the most suitable forum, one that provides robust oversight of CMA decisions and greater consistency in the interpretation and application of key consumer law definitions and concepts.

Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

2.211 The CMA would support reform such that those sector regulators who wish to enforce consumer law through an administrative model can do so. It would enable swifter decisions and more effective deterrence, given the relative lack of consequences for legal breaches under the existing Part 8 system. It will be necessary to balance the incentives to ensure sector regulators see an administrative model as an effective, swift and proportionate enforcement tool alongside regulatory or licensing powers. If time constraints and different departmental priorities make broader inclusion challenging, the CMA considers that a process similar to the existing Ministerial designation of additional enforcers in Part 8 of the EA02 could provide a useful bridging position.[92]

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

2.212 The CMA supports the proposal to introduce the option of fines where traders flout or fail to fully comply with the terms of information requests. Under the current system, such requests can ultimately only be enforced through court actions (without penalty). This can incentivise negotiation by some firms on the terms, timing and depth of their returns in the full

[91] For example, similar to the very effective cross-disciplinary expertise found in the CAT, which also has the unique advantage of being a forum overseeing decisions across the whole UK.
[92] Section 213(2) of the Enterprise Act 2002.

knowledge of the significant hurdles faced by enforcers. Such a change would bring strong incentives for speedy and full submissions to information requests, and enable fines to be issued where appropriate, including for blatant or egregious examples of non-compliance. However, it is important that there is an accompanying power to order the trader to comply with the information notice, and that the fining level is sufficiently high to incentivise proper compliance (because delays in obtaining information will ultimately delay and/or frustrate enforcement action). Satellite court actions on such matters may still prove necessary, but they are likely to be very infrequent.

Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

2.213 The CMA supports the direct enforcement of any undertakings given, such that penalties may be imposed for what is effectively a breach of a promise by a trader without reasonable excuse. In the absence of this, non-compliant firms can gain more time by offering undertakings they have no intention of upholding. This penalises fair-dealing traders who do comply as well as consumers who may continue to suffer detriment.

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

2.214 While settled outcomes involving an admission of liability may be routinely expected in the context of an administrative enforcement model, the CMA would be concerned if an admission of liability were to be mandated in every case. In the CMA's experience, traders are likely to be more willing to settle – and to do so promptly – where there is no admission of liability. As such a mandatory requirement for an admission of liability may inhibit the swift resolution of cases in situations where, for example, a prompt change in behaviour is of paramount importance.

2.215 The CMA considers the ability to secure a settled outcome efficiently needs to be a core part of any consumer enforcement model. Accordingly, careful consideration will be needed in the design of the regime to ensure traders are appropriately incentivised to reach such outcomes in appropriate cases. In cases where a penalty is warranted, appropriate incentives are likely to include (but not be limited to) meaningful discounts in terms of financial penalties.

Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?

2.216 These undertakings need to be directly enforceable, whether secured through agreed outcomes under an administrative enforcement system, or the existing undertakings available as a possible resolution under the civil system in Part 8 of EA02. Additional fines for dishonest or abuse of practice on top of fines for breach of the substantive law to remove the incentive for 'gaming' the undertaking offer.

Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

2.217 The CMA considers that reducing barriers to participation in ADR schemes, for example ensuring they are zero- or low- cost and that accessibility and advice are prioritised, may be helpful in improving participation for vulnerable consumers. The CMA also suggests that further consideration of a single unified front-end for consumer complaints and redress across all sectors would help consumers navigate the complexity of the redress landscape. Such a landing page could, if properly resourced, also allow for some useful functionality such as enabling consumers to 'track' their complaint, giving them great transparency on which organisation was currently responsible and expected next steps. Several countries are experimenting with such an approach, especially for online complaints, for example Brazil and Russia.

Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

2.218 The CMA agrees that tighter time limits for firms to resolve complaints before proceeding to mandatory ADR may be a good way of achieving the right balance. However, CMA would encourage BEIS to speak to the relevant sectoral regulators who are closer to the detail on this subject.

2.219 More broadly, if consumers have effective rights that will kick in once formal processes are triggered, this will substantially improve business incentives to resolve most cases by mutual agreement before additional court or ADR costs are incurred by both parties.

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

2.220 The CMA considers that it is vital to get the incentives right when establishing competent authorities and designated ADR systems for particular products or sectors. If there is competition among ADR bodies in a sector then businesses must not be allowed to simply choose the one with the most pro-trader decisions. Where choice exists, the CMA considers it would be better to give that choice to the consumer to ensure that the bodies compete more broadly in relation to the quality of the service provided and help facilitate consumer engagement.

Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?

2.221 Requiring mandatory ADR participation would improve coverage. Requiring the system to be focused on the choice and needs of the consumer would provide a further improvement to consumer confidence. If consumers are confident they will have some redress when things go wrong, they are likely to have more confidence to take risks and try new providers, assisting a consumer-led recovery.

Q69. Do you agree that government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

2.222 Yes, but the CMA does not consider mandatory ADR should be limited to these sectors and would suggest it is introduced across all essential markets including air travel and those sectors where consumers are hugely vulnerable due to informational asymmetries such as IVF or specialist private health care. Please see our previous response on ADRweand also regarding air travel in aviation strategy discussions.[93]

Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors impact business and consumer take-up? How else can government encourage the take-up of ADR?

2.223 A fee would discourage some of the most vulnerable consumers from claiming, and therefore potentially render ADR ineffective where the

[93] CMA response to Aviation 2050 (publishing.service.gov.uk)

monetary sum at stake is low. It is likely that generally consumer disputes will be for relatively small sums of money, and the problem currently is that the cost (not only in time, but also in fees) of pursuing these in the courts means much detriment remains unresolved. The best way to encourage ADR would be to make it mandatory for businesses to join a scheme.

Q71. How can government encourage and incentivise businesses to comply with these changes?

2.224 Perhaps the easiest solution would be to legally mandate ADR, particularly in the specific sectors mentioned by BEIS. Some alternative solutions could include direct financial incentives to participate, or financial disincentives to not participate, which might be more effective – for example it might be possible for traders to have increased fines, reduced liability protections or damages multipliers if they do not take part in ADR.

Q72. 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?

2.225 Ensuring consumers have appropriate access to redress when things go wrong is a crucial step to ensuring greater consumer empowerment. In the face of increasingly complex and global markets, improving consumer empowerment is critical. Generally speaking, resources for public enforcement of consumer law are not adequate[94] to take the range of potential problems that arise. Consumers need to be able to take effective action to secure their rights short of going to court, which can be long and expensive. Opening up further routes to private collective redress could be an important aspect to help facilitate effective redress, although care will be needed in the design of such systems to ensure, in particular, the right incentives are created and consumers retain an appropriate proportion of the amount due to them.

Q73. 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?

2.226 Broadly speaking the impact would be likely to be positive, given the lack of public resource to hold deep-pocketed traders to account across the full range of potential issues and the difficulties of individual consumers bringing their own cases.

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[94] Protecting consumers from unsafe products - National Audit Office (NAO) Report

Q74. 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?

2.227 The CMA would support proposals that improve the whole system of public consumer enforcement in terms of leadership, coordination and cooperation across criminal *and civil* enforcement tools. The success of the system is contingent on suitably empowered and resourced enforcers at national and local level. A priority for any proposals should be to ensure that local trading standards services are better supported. In the absence of this, any tenable foundation for future national enforcement is placed in jeopardy. See thematic response on the consumer landscape (above).

Q75. 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?

2.228 Business guidance on consumer law should be authoritative, accessible and targeted on key issues. This will allow businesses to manage their commercial practices and understand the circumstances under which the law might be infringed. The CMA believes that the strategic steer from government should be amended to give the CMA a leadership role on key consumer protection laws such as the CPRs, CCRs and aspects of the CRA. This would allow for enforcement partners, such as CTSI, to retain leadership in other regulatory areas mainly enforced by trading standards. The CMA's leadership role in fair trading business guidance will be key in allowing for successful follow-on enforcement actions under the admin. model or Part 8. See thematic response on the consumer landscape (above).

3. ANNEX: Additional text on online consumer protection

Online consumer protection: Fake reviews and misleading reviews

3.1 Over recent years, the CMA has dedicated significant resource to enforcement aimed at protecting consumers from harmful online reviews.[95] In our experience there are two broad categories of reviews with potential to harm consumers' economic interests:

3.2 Firstly, **fake reviews**. These are reviews that do not reflect an actual consumer's honest and impartial opinion or genuine experience of a product. We took action to stop a search engine optimisation company from writing fake reviews about its clients' products. We also required eBay to take steps to take down and prevent listings from businesses offering reviews for sale.[96]

3.3 Secondly, **other types of reviews that are likely to mislead consumers**. We are concerned about consumers being offered refunds, significant discounts or other product-related incentives on condition that they leave a review for a product on a review site, without the review site's knowledge.[97] We consider that these reviews are more likely to be favourable. The review itself has the potential to mislead the reader, unless the fact that the reviewer has been commissioned/incentivised is clearly and prominently disclosed. Further, such reviews may also contribute to products' overall ratings and rankings – and risk misleading consumers, unless those reviews are distinguished by the review site. As a result, platforms typically prohibit these types of reviews and such reviews tend to be posted without platforms' knowledge and consent. We have taken the view through our enforcement that incentivised reviews submitted and published in these circumstances are likely to mislead consumers and that commissioning or incentivising them is likely to infringe the CPRs. Similarly, it is problematic where truthful but negative reviews are held back from publication by a review site, since this results in consumers getting an overly positive impression of products, which is likely to distort their decision making.[98]

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[95] Online reviews - GOV.UK (www.gov.uk)

[96] See Fake online reviews and CMA expects Facebook and eBay to tackle sale of fake reviews

[97] See Facebook and eBay pledge to combat trading in fake reviews and CMA intervention leads to further Facebook action on fake reviews .

[98] See Trusted trader and care home review sites: improvement of practices; see also Retailer hosting reviews on its website: improvement of practices.

3.4 A further widespread harmful practice is the posting of **hidden advertising** by influencers and other endorsements for which they have been paid, but not clearly labelled as advertising. We took action to require a social media platform to put important measures in place to reduce the risk of hidden advertising appearing on their site, as well as requiring a number of influencers to label advertising which they post.[99]

3.5 It is important that, as far as possible, any new banned practices – including those aimed at review site operators – effectively protect consumers from the full range of misleading reviews described above.

Online consumer protection: Subscription traps

3.6 The CMA fully supports the additional steps proposed to tackle this long-standing problem. The CMA has been active in this area – including responding to the loyalty penalty super complaint,[100] anti-virus software enforcement,[101] cloud storage,[102] online dating[103] and a range of European and global co-ordinated actions and projects.[104]

3.7 Although ongoing subscriptions can provide convenience for consumers, they can also be severely exploitative and lock consumers into paying for products they no longer want or need. Where this is the case, not only can individual consumers be seriously harmed by being forced to pay for something they no longer want or need, but also competition itself can be harmed, as better, cheaper or more appropriate products are locked-out while consumers are locked-in.

3.8 The CMA agrees that there should be an express requirement for traders to offer the consumer a genuine choice, at the pre-contract stage, to take the subscription without auto-renewal or rollover (ie the consumer must freely and actively 'opt-in' to auto-renewal). The CMA considers that a focus on the **explicit upfront consent** is the most important proposed change to clarify the existing rules. The CMA also agrees it is important that consumers are given transparent and timely pre-contract information to enable them to make an informed choice on whether or not to take the

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[99] Social Media Endorsements - GOV.UK (www.gov.uk)
[100] 'Loyalty penalty' super-complaint - GOV.UK (www.gov.uk)
[101] CMA secures refund rights for McAfee customers - GOV.UK (www.gov.uk) Norton extends refund rights after CMA action
[102] Letter from the CMA to cloud storage providers on consumer law - GOV.UK (www.gov.uk)
[103] Online dating services - GOV.UK (www.gov.uk)
[104] For example see Consumer frequent traps and scams | European Commission (europa.eu)

contract with auto-renewal, including the amount of the renewal fee, the circumstances in which the renewal fee might increase and how any price rise would be calculated, the nature and timing of steps the consumer must take to stop the renewal, and refund rights if renewal takes place. These proposals add crucial levels of detail to the provisions which already exist in UK law such as regulation 40 of the *Consumer Contracts (Information, Cancellation and Additional Payments) Regulations* 2013.

3.9 Based on our experience of consumer complaints, discussions with a range of digital subscription providers and exposure to wider global concerns about subscription 'traps', the CMA is also of the opinion that traders should not be able actually to take payments without the consumer explicitly and actively agreeing to it, in addition to agreeing to their subscription renewing, preferably by means of their payment scheme provider requesting their express consent to the payment, or at least notifying them clearly that the payment is a recurring one (and providing a clear and straightforward method to prevent future payments from being taken).

3.10 In addition to explicit upfront consent, the CMA considers that it is also important that during the lifetime of the subscription the business should remind the consumer at an appropriate time of the fact of and timings of renewals and how the consumer can stop them occurring. In order for such reminders to be effective, they should be delivered using a form of communication that is likely to come to the consumer's attention. We also think reminder obligations should apply to subscription contracts of all lengths, such that consumers are effectively reminded that their contract will renew before each renewal (with the exception that if the billing period of their contract is less than 3 months, that they are reminded every 3 months). This will reduce the risk of consumers disengaging with the product and consequently paying for a product which they are not using.

3.11 Further, to prevent consumers from being tied indefinitely into subscription contracts the CMA considers that there should be a simple, straightforward and accessible way to cancel the contract - it should be at least as easy to exit a contract as it was to sign up. This should mean that after every renewal there should be a reasonable cooling off period whereby the consumer can cancel the subscription and obtain a full refund, and in cases of billing periods of longer than 6 months, the consumer should be able to obtain a pro-rata refund where they choose to cancel their renewed subscription after the initial cooling off period.

3.12 Finally, in order to protect consumers who are not using their contracts, for example where the consumer has forgotten about them or where the

consumer has died, the CMA considers that after a certain period of inactivity, the business should no longer be permitted to take any further automatic renewal payments from the consumer, without the consumer's explicit consent to do so. An appropriate period of inactivity is likely to be 12 months, both due to the prevalence of annual subscriptions, and because people find the concept of one year easy to comprehend. Generally, a 12-month inactivity trigger would balance the certainty required for businesses with consumers' rights to receive a service or product in return for their payment. In the case of contracts where a feature of the consumer's use of the product is that they store progress or personalised data, it is likely to be appropriate for the business to suspend or 'freeze' the consumer's account for a further 12 months, such that the consumer can reactivate their account and recover their saved data if they choose to do so within this period. It should also be possible for this data to be transferred to another consumer, who chooses to subscribe, in the case where the original subscriber has died, although this would need to be checked with the Information Commissioner's Office for any data protection issues.