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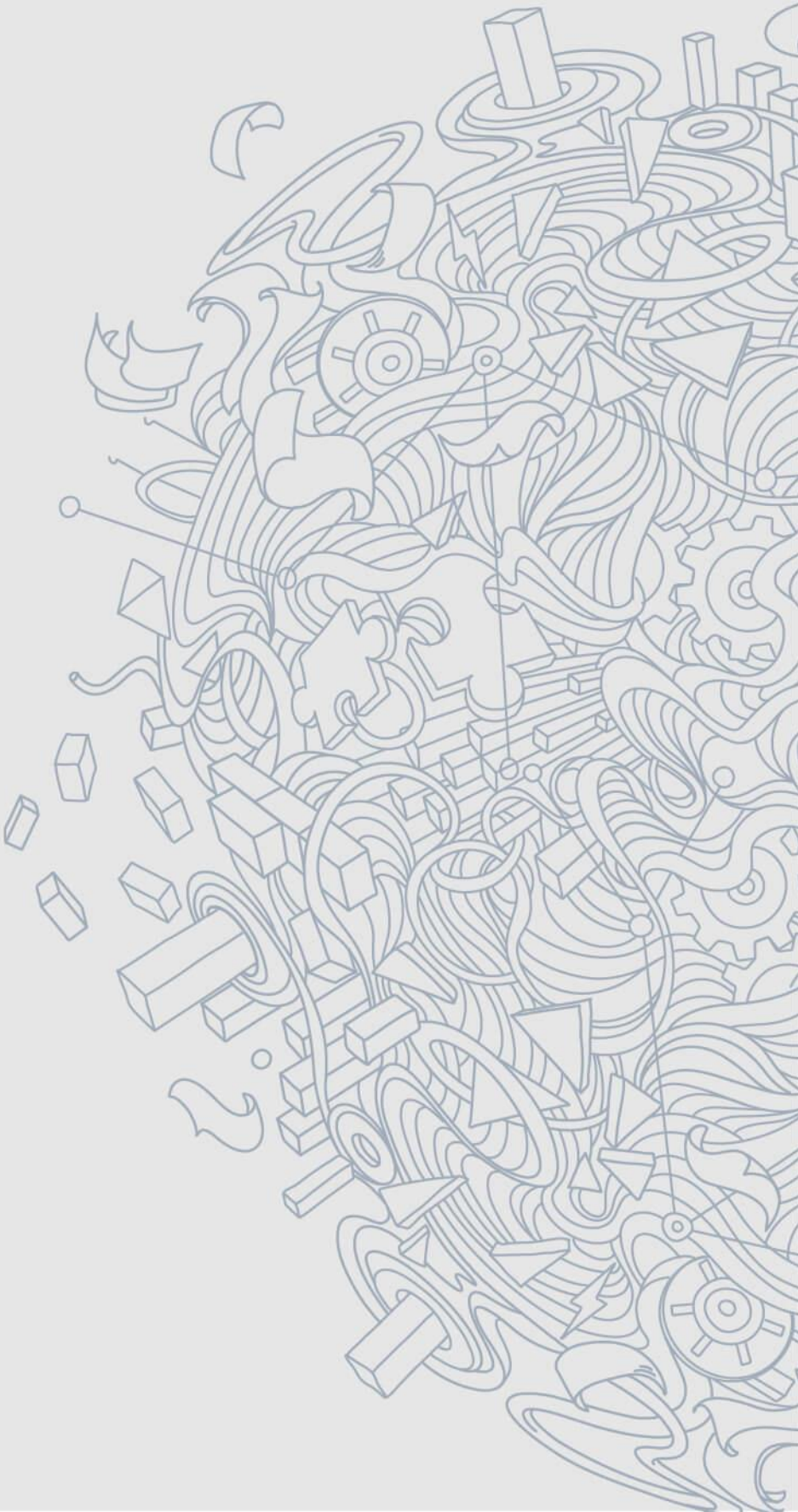
REFORMING COMPETITION AND CONSUMER POLICY – RESPONSE TO CONSULTATION



1 OCTOBER 2021

REFORMING COMPETITION AND CONSUMER POLICY (CP488) – RESPONSE TO BEIS CONSULTATION

We welcome the opportunity to comment on the government's proposals for competition and consumer law reform (CP 488). Given the range of measures under consideration, we have focused our comments on the proposals which would have the greatest impact on our clients and where additional guidance and clarity would be helpful.

CHAPTER 1: COMPETITION POLICY

MORE EFFECTIVE MARKET INQUIRIES

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

1 We recognise that from end to end the market investigations process can be lengthy and that where there are opportunities to shorten that process, then the legislation should facilitate it. However, the remedies available under the markets regime are capable of being intrusive and should not be imposed without the appropriate checks and balances.

2 We have real concerns as to how Proposal 1 might operate in practice. Remedies under the markets regime are legislative/quasi-legislative in nature. They can be imposed even where there is no allegation of a competition law infringement or unlawful conduct. They are frequently onerous on the parties and have, as intended, broader effects on the sector involved. These factors explain why remedies are currently only possible at the end of a full 'Phase 2' market investigation process (which, in practice, is usually also preceded by a full 'Phase 1' market study process). Procedural fairness requires that powers to impose these remedies be accompanied by appropriate procedural safeguards and transparency, permitting full and open scrutiny. Curtailing these processes risks poor decision-making and remedies that are inappropriate or even damaging, imposing undue cost on the sector.

3 We would prefer to see greater use of binding commitments during a market study (see Q7 below). However, if the CMA is to be given 'Phase 1' remedies powers, the types of remedy that might be imposed should be tightly circumscribed. The more complex, intrusive remedies (which are not limited to structural remedies) should only be available at the end of a 'Phase 2' market investigation. These remedies, especially, cannot and should not be rushed through at the end of a Phase 1 market study, even if the statutory timetable is extended by three or six months as suggested. Experience of remedies under the markets regime prior to the Enterprise Act showed that insufficient focus on remedy design could result in unintended consequences and/or ineffective remedies.

4 Proposals on remedies should be open for full consultation and affected parties need to be given sufficient opportunity to represent their views to the decision-maker before the final decision is made. Giving the role of Phase 1 decision-maker to the CMA Board risks compromising these processes. It may also invite hasty interventions with the temptation to use remedies at Phase 1 to shorten the overall inquiry process, rather than open a Phase 2 market investigation. This would increase the potential for inappropriate or even damaging remedies. If Proposal 1 is adopted, with the CMA Board as decision-maker, robust procedural safeguards will be necessary. This includes giving affected parties a sufficient level of access to the decision maker before final decisions are taken, so that their views can be properly taken into account. It would also include providing parties with full rights of appeal on the merits in cases where remedies are imposed at the end of a market study.

Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool ('Proposal 2')?

5 We do not agree with Proposal 2 to replace the current two-stage process with a single stage process. Our overall concern is that condensing market inquiries into a single stage would lead to longer procedures for all inquiries and a loss of efficiency in the markets regime as a whole. More importantly, from a fairness perspective it would weaken essential checks and balances at key stages. Most notably, involving CMA panel members only at provisional findings stage if binding remedies are being considered will limit their independence and effectiveness, as they will not have had the benefit of direct access to evidence and key stakeholders during the earlier stages. We also consider that the versatility of a two-stage process, which allows the CMA's review to be 'flexed' according to the complexity and seriousness of the issues uncovered by its initial inquiries, is valuable in a market inquiry context just as it is in other contexts (e.g. merger control).

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

6 We do not support this proposal. The use of interim measures from the beginning of a market inquiry is undesirable and disproportionate, whether the powers are to be used in a market study or investigation. The value of the markets regime

is that it permits the CMA to conduct an in-depth analysis of how effectively a market is working, even where there is no allegation of unlawful conduct, and to design suitable remedies to address any harms that can be clearly identified from the full body of evidence and analysis. Early intervention with interim measures aimed at possible harms that are later shown to be groundless risks causing immediate harm and may make the imposition of final remedies more difficult. Early interim measures may be a useful tool for Competition Act enforcement cases to target specific, clearly identifiable, harmful behaviour, but they are disproportionate in a regime that has fundamentally different aims and where interventions are liable to have more intrusive and widespread effects.

7 Interim measures powers also raise issues of procedural fairness similar to those outlined in our response to question 4. The Phase 1 market study process does not provide the level of transparency, nor the checks and balances, needed for interim measures and we cannot see how sufficient safeguards can be assured without considerably extending the statutory timescales.

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

8 Yes, we agree with the proposal to enable the CMA to accept binding commitments at any stage in a market study or investigation.

9 We also consider there is merit in giving the CMA power to review remedies at periodic intervals without launching a new market investigation. There have been instances where there has been a clear need to revisit remedies because they have been poorly designed or drafted. A simpler process for review is desirable. However it would also increase uncertainties for business and impose extra burdens on business in responding to further reviews; the design of any ongoing review power would need to strike a workable balance that addresses business concerns in this regard.

10 However, periodic reviews would also increase uncertainty and impose extra burdens on business in responding to further reviews; as such, the design of any ongoing review power would need to strike a workable balance that addresses these concerns. This proposal should also be properly calibrated with the proposal at Q28, which would give the CMA powers to issue fines for failures to comply with its Orders – businesses should need to be given appropriate time to adjust to any changes in the CMA's Orders before risking fines for non-compliance.

REBALANCED MERGER CONTROL

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?

11 Yes. The uplift in the current turnover threshold to take account of inflation should be uncontroversial and the introduction of a new *de minimis* safe harbour is sensible though the proposed threshold, based on worldwide turnover seems likely to be too low to benefit many mergers. A new threshold is also desirable to catch potentially harmful mergers that, under current rules, can only be scrutinised if they can be squeezed into the share of supply test. A further threshold, as described, would give the CMA a simpler and less challenge-prone test for asserting jurisdiction and, we hope, permit greater clarity and predictability in the application of the share of supply test in future.

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

12 Having the option of offering binding commitments earlier in Phase 2 is sensible, giving flexibility to pursue remedies discussions that may have been timed-out at Phase 1.

13 We do not support the proposal on narrowing the scope of Phase 2 investigations. Artificially restricting what can be considered at Phase 2 could all too easily lead to gaps in the merger analysis and development of any remedies, and the risk of unintended consequences.

14 Revising the fast-track route to make it more appealing to parties is sensible is helpful and may make a difference to some parties, but on the whole is likely to make limited practical difference in many such cases. i. Given that one of the key advantages of a fast-track system to merger parties is likely to be the ability to conclude the merger control process more quickly, our view is that any extension to the existing Phase 2 timetable should be as short as feasibly possible and it must be ensured that the pre-notification period is not used to compensate for the lack of a Phase 1 period.

STRONGER AND FASTER ENFORCEMENT AGAINST ILLEGAL ANTICOMPETITIVE CONDUCT

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or

have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

15 Yes, we agree that the competition regime needs to adapt to the increasingly global scope of business activities and markets, and greater potential for actions outside UK to cause competitive harm within the UK. Extending jurisdiction to these cases would align the UK regime with other competition regimes and provide greater protections for UK businesses and consumers.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

16 This proposal raises significant policy questions and would be a significant departure from the usual tort law principles that enable someone who has suffered loss as a result of unlawful activity to sue the tortfeasor in damages.

17 While additional immunity from damages will be beneficial for individual leniency applicants, it may not have a material impact on the overall number of leniency applications. Private damages claims are but one of a number of factors that may be disincentivising leniency applications. The decision matrix when considering leniency is complex and involves a balancing of various risks and considerations. These include potential damage to on-going business relationships, the burden on and uncertainty faced by the leniency applicant through the entirety of the investigation process as well as the requirement to keep rogue employees in employment contrary to internal policy. As a minimum, this proposal should only be considered if it can be justified, on the basis of good evidence, as a way to materially increase the number of leniency applications.

18 A key question will be how would immunity from liability for damages work in practice? Would third parties be prevented from bring claims against the immunity applicant or would the other cartel participants be jointly and severally liable for damages that could have otherwise been awarded against the immunity applicant? If so, how would these be determined if the immunity applicant is not a party to the proceedings (or would there be an ongoing duty to cooperate with the court)? The reality of granting immunity from damages claims will be that either: (i) victims of the cartel receive less compensation; or (ii) the other cartelists have to bear the immunity applicant's "share" of damages (however calculated). Indeed, the two may amount to the same thing where the immunity applicant is significantly larger than other participants in the behaviour. If those smaller participants are asked to bear the larger participant's share of the damages, it could push them into liquidation – reducing the compensation available in any event,

19 Importantly, a key consideration for business will continue to be potential claims in other jurisdictions. So, to the extent that the cartel behaviour has any effects beyond the UK, immunity from UK damages claims will not be persuasive.

20 Finally, on the proposals for greater protections for whistle blowers: We do not consider these proposals will materially alter the decision for individuals considering whether to blow the whistle. From an individual's perspective, they can still be named if their evidence cannot be corroborated. That risk of being named is likely to lead them to err on the side of caution.

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

21 We would agree that that public enforcement of interim measures should play an important part of competition law enforcement particularly since private enforcement, particularly for small individual businesses, frequently is not a viable option.

22 However, Interim measures have the ability to cause significant business harm over a prolonged period of time and can, in certain cases, be irreversible. We do not think, in those circumstances, reducing rights of defence through limitations of access to evidence, or rights of appeal would be appropriate. We would also question how effective these two proposals would be. If access to the file is removed, it is inevitable that there will be an immediate appeal and demands for disclosure of the file.

23 We also consider it is imperative that government policy on interim measures is considered in tandem with policy on interim injunctions. It is important to recognise that, as the process for injunctions has been streamlined in recent years and funding options have become more readily available, interim measures have naturally become less attractive – which may partly explain their relative rarity. Continuing to find mechanisms to better use the courts for interim relief appears to us to be the better route.

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

24 The proposed new powers to gather evidence impose an additional disproportionate burden on business and individuals. Compulsory interviews cause individuals anxiety and stress, particularly those employees with less experience of legal process or corporate management. Given that businesses who have a genuine complaint will make employees readily available for interview, there seems little need to make third party interviews compulsory. Equally, document preservation in a large organisation is a mammoth undertaking and any obligation imposed by the CMA concerning document preservation needs to be clearly defined; "relevant to an investigation" does not allow for clear instructions to be communicated quickly throughout an organisation.

25 Similarly, we consider the use of "seize and sift" powers during inspections at domestic premises is not warranted. Not only would this be unduly intrusive for the person subjected to the inspection, but it also carries a greater risk that the CMA seize private property belonging to others living at the premises.

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

26 We support the government's efforts to streamline access to file and believe that there are merits in improving the procedure for confidentiality rings. We would however have concerns were the CMA to rely too heavily on the confidentiality ring rather than making efforts to consider the nature of the materials claimed to be confidential.

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

27 The government proposal that the CMA should have autonomy to determine the most effective internal decision-making is a backwards step and runs counter to the previous efforts made to implement procedural safeguards to ensure at least some degree of independence between investigator and decision maker. A balance needs to be struck between quicker decisions versus more robust decisions. The current system, with a fuller role for the CMA Panel and explicit requirements for fresh reconsideration of the case before a final decision is taken, ensures robust review of the CMA's investigatory process and the proposed removal of express requirements in the CMA Rules regarding Case Decision Groups needs careful consideration.

CHAPTER 2: CONSUMER RIGHTS

We agree that increased policy focus on the interests of consumers matters. Whilst effective competition policy should ensure that markets are effective in delivering for consumers, fairness for individual consumers is critical, not least so that everyone has confidence in the system. In an environment where the way in which businesses interact with consumers is changing, it is right to periodically look at both the substance of which consumer rights are protected and also, importantly, how they are enforced. Changes in technology that have changed how consumers and businesses interact make this timely.

We have set out below a limited number of comments on a small number of the specific proposals set out in the consultation. As a general observation however, we note that the proliferation of complex consumer laws adds complexity and needs to be looked at in the round with the CMA's markets regime – which is capable of introducing measures to address new developments that harm consumers, tailored to the specific circumstances of a relevant market. The proposals to strengthen the markets regime, discussed above, would give the CMA flexible and powerful tools to address consumer harms in a targeted way, where they arise, with the ability to take meaningful action against non-compliance.

MODERNISING CONSUMER RIGHTS AND SUBSCRIPTION CONTRACTS

Q42. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?

28 Measures to counteract fake reviews need to place proportionate obligations on businesses of a different size and set the bar at a level that is reasonable and fair for new and smaller traders and platforms that host reviews. These businesses stand to gain from more prescriptive requirements around fake or misleading reviews, but obligations designed to address the power of "platform giants" may be disproportionate for them and do little to address imbalances in advertising strength and spend. On balance, we would favour a variation of the above options that would (effectively)

ban commissioning of fake consumer reviews in all circumstances, but permit incentivising consumer reviews from customers who have bought goods or a service provided there is no attempt to influence the content of the review. This would strike a better balance between addressing fake reviews, without inadvertently chilling legitimate use of reviews as a tool for promotion.

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

29 See comments in response to Q42 above. A prohibition on commissioning consumer reviews in all circumstances or effectively deterring incentives to encourage (legitimate) consumer reviews has potential to stifle important and legitimate opportunities for smaller businesses to promote themselves effectively and reach consumers who may otherwise be unable to find them.

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?

30 There are a range of considerations that should be taken into account in assessing "reasonable and proportionate" steps:

(a) how should the scale of the site and the number of consumers it reaches impact on the level of verification required? Ultimately costs and steps to verify reviews need to link to the potential harm of a fake review on the relevant side.

(b) is the site selling products or services direct to consumers or it a platform that allows consumers to access third party services? If the latter, what is the right allocation of responsibility between the seller and the platform taking into account who is better placed to conduct verification cost effectively?

(c) how quickly does verification need to happen and what is the right approach to reviews in advance of verification? There is consumer benefit from rapid access to reviews, but excessively complex or rapid verification processes imply cost and complexity that may be disproportionate to the benefit of quick visibility of the review.

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?

31 Yes, this would be helpful and add clarity.

PREVENTING ONLINE EXPLOITATION OF CONSUMER BEHAVIOUR

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?

32 Levels of awareness and concern will vary depending on the nature of the consumer and the practice.

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?

33 Whether such techniques are problematic or benign will be dependent on the nature of the relevant technique and the market context. For example, techniques that point consumers to information or offers that are more relevant to them than others might well be efficient and beneficial to consumers in some circumstances. Our views is that such practices continue to be best addressed through the CMA's markets regime.

CHAPTER 3: CONSUMER LAW ENFORCEMENT

STRENGTHENING ENFORCEMENT BY THE COMPETITION AND MARKETS AUTHORITY AND OTHER ENFORCERS

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

34 Yes. Effective enforcement powers are as necessary in the consumer protection context as they are in the competition regime. It makes sense for the CMA to have equivalent administrative powers in consumer cases, to make it simpler and

faster to bring infringement to an end. It should also have the benefit of increasing deterrence. The key issue here is ensuring that the administrative system is quick and efficient – an outcome that has not always been achieved in competition enforcement cases.

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?

35 We do not see reasons in principle to change the scope of the CMA's direct enforcement powers, as a consequence of moving from an administrative to a court based system.

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

36 The decision making model outlined in the consultation appears sensible and draws on a well understood framework from its competition enforcement powers. There would need to be further consultation on the detail and guidance from the CMA on how it would manage the process (cf its procedural guidance on competition matters.). That consultation will need to consider processes that are proportionate and appropriate to the decisions at stake.

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?

37 If consumer enforcement is moving to an administrative enforcement system that is quasi-penal in nature, (administrative fining powers for infringements and procedural breaches) appeal from infringement decisions would need to be on a full merits basis (ability for the appeal body to review issues of fact and law and substitute its own decision for that of the CMA). This would be consistent with the approach for competition enforcement.

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?

38 We believe the benefits of each system are finely balanced in this context. Questions of fairness are potentially well suited to a generalist court. However, on balance, we would favour a specialist chamber that could build consistency and relevant expertise that would permit better and faster through-put of cases.

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?

39 Our experience of the recent practice of imposing such fines in the competition law context suggests that these powers do incentivise compliance. However, in some cases they result in the imposition of disproportionate costs, as businesses concerned about inadvertent breaches undertake rigorous search to ensure compliance. Some considerations of proportionality in the context of consumer law should be considered.

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?

40 The powers and processes contemplated by questions 62 – 64 should be broadly comparable with equivalent powers for enforcement of undertakings in the markets regime.

SUPPORTING CONSUMERS ENFORCING THEIR RIGHTS INDEPENDENTLY

41 It is in the interests of both consumers and businesses that disputes are resolved efficiently and expeditiously. We are supportive of ADR as a means to achieve this.

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?

42 In those sectors where there will be mandatory ADR and the prospect of increased costs for business as a result, we would favour retaining a longer period to resolve disputes before recourse to ADR.

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

43 The cost of ADR providers can be high which reduces confidence and engagement from businesses. The process to complete ADR requirements needs to be as easy as possible for consumers (e.g. consistency in the format of different ADR schemes).

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?

44 We can see benefits in mandatory ADR in these sectors. However, it is important in doing so the costs of the system are borne fairly. In particular:

- costs of ADR for any given business should, in broad terms, reflect the costs it imposes;
- businesses should not be penalised for vexatious ADR cases;
- the risk of responsible users of the system perversely carrying costs of others should be guarded against – for example if a number of businesses do not pay their fees such that overhead costs and per user fees rise, to be borne by others
- compulsory ADR is likely to increase complaint volumes. It would be important to ensure there is sufficient resource to bear the cost of increased levels of complaint.

45 We do not have a principled view on how this is best achieved, but it may well be the case that a combination of subscription paid by all businesses, accompanied by a per case element may be best calibrated to achieve the right balance.

46 If ADR were to become mandatory, we think it would be important for clarity to be provided in relation to the repercussions of a business not taking part or not paying the cost of ADR and how this would be enforced. Clarity would also be helpful as to whether a consumer would be expected to pay the ADR cost in the event that a claim would be found to rule in favour of trade.

Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement? Q71. How can government best encourage businesses to comply with these changes?

47 A nominal fee to be paid by a consumer, together with a lower limit on the value of claim would go some way to mitigating the risks of poor quality or vexatious use of the ADR system. Clarity would be helpful in relation to whether there would be a maximum value of case appropriate for ADR.