COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW AND INTERNATIONAL LAW SECTIONS ON THE REFORMING COMPETITION AND CONSUMER POLICY PROPOSED BY THE GOVERNMENT OF THE UNITED KINGDOM

October 1, 2021

The views expressed herein are presented on behalf of the Antitrust Law and International Law Sections. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law and International Law Sections (the "Sections") of the American Bar Association ("ABA") respectfully submit these comments in response to the consultation paper "Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers" (the "Consultation") published by the Government of the United Kingdom ("Government") on July 20, 2021.[1] The Sections are available to provide additional comments or assistance in any other way that the Government may deem appropriate. These comments are based upon the extensive experience of the Sections' members in competition and consumer protection law around the world.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has

[1] *See* Dep't for Bus. Energy and Indus. Strategy, Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers, 2021, Cm. 488 (UK) [hereinafter Consultation], *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.

[2] Past comments of the Antitrust Law Section are available at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[4]

I. Executive Summary

The Sections commend the Government for seeking to improve, strengthen and clarify UK competition and consumer protection policy, as set out in the Consultation. The Consultation is far-reaching and includes discussion of possible institutional reforms that the Sections do not consider themselves to be well-placed to address. As such, the Sections have not responded to every question the Government has posed. Instead, they have addressed those questions for which their experience (particularly with respect to interpretation and application of US antitrust law and policy) enables them to contribute to the Government's reform efforts.

With respect to the Government's questions regarding competition policy, the thrust of the Sections' comments is that expansion of the CMA's jurisdiction, the adoption of measures to increase the speed and efficiency of the investigation and resolution of matters, and the addition of further investigative tools all are generally welcome initiatives. The Sections recommend, however, that any such measures be implemented with safeguards to ensure due process and to protect the rights of market participants who may be subject to investigation.

With respect to the Government's questions concerning consumer rights, the thrust of the Sections' comments is to encourage enhanced regulation only in areas where a business practice clearly harms consumers with no commensurate procompetitive and consumer benefits. There can be great consumer benefits and efficiencies in the case of access to subscriptions, ability to consult consumer reviews, and enhanced website design. Particularly in areas where practices evolve rapidly online, stepping in to ban or limit certain practices without thorough investigation of their effects may ultimately do more harm than good.

II. Contributions to the questions posed by the Paper

A. Chapter 1: Competition Policy

Consultation question 6: Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

The Sections believe that the test for interim orders applied in the market inquiry context should be consistent with the general principles for obtaining injunctive relief under English law, particularly the principle that interim relief should not constitute a pre-judgment or final determination of the matter in issue. In addition, the Sections consider that interim measures should be focused on protecting the CMA's ability to fashion a potential ultimate remedy. The Sections believe that, should the Government enable the CMA to impose interim measures in the market inquiry context, adopting the existing framework for obtaining injunctive relief is more likely to ensure that final determinations (which are more properly made after full consideration all relevant facts and law) are not made at an interim stage.

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[3] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

[4] Past comments of the International Law Section are available at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

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

The Sections believe that market inquiries would benefit if the CMA had the flexibility to accept commitments from interested firms at any time during the process, as long as such commitments can achieve "as comprehensive a solution as is reasonable and practicable" [5] with regard to the relevant adverse effect on competition and the resulting detrimental effects on customers.

The Sections appreciate that it may be difficult to identify such a comprehensive solution in the early stages of an inquiry, depending on the industry's context and market circumstances. Nevertheless, the Sections agree that the CMA and interested firms should be able to explore and adopt potential undertakings before the finalization of an inquiry when the source of the concern and the respective correction might be more easily identifiable.

The history of the use of consent decrees in US antitrust matters generally shows that enforcement agencies are more effective if they are provided with flexible instruments. If the CMA has sufficient confidence that the undertakings offered by the interested firms comprehensively resolve identified adverse effects on competition and consumers, then continuation of the market inquiry process until its final stages would not benefit consumers and would lead to an inefficient use of scarce agency resources.

Allowing the CMA to accept binding commitments at any stage of the market inquiry process does not appear to have significant downsides. For example, as indicated above, such commitments can be predicated upon the CMA's goals of achieving "as comprehensive a solution as is reasonable and practicable." Additionally, as the CMA has the powers to submit commitments to public consultation *before* their adoption, and to revise such commitments on an *on-going* basis, the risk of insufficient commitments being offered and accepted seems limited.[6]

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

The Sections welcome the Government's initiative to ensure that merger investigations are carried out as quickly and efficiently as possible.

Based on the Sections' experience under US antitrust laws and in line with the recommendations of the International Competition Network (ICN), the Sections welcome initiatives to allow the merging parties and the CMA greater flexibility in shortening investigations within the statutory timelines for merger review. The Sections believe specifically that merging parties should have greater flexibility to propose commitments in earlier stages of the review.

The U.S. antitrust agencies' general use of consent decrees, including at earlier stages of review vis-à-vis the CMA, demonstrates that enforcement agencies can be more effective if they are provided with such flexible instruments. The U.S. antitrust agencies and other agencies around the world, such as Canada, may enter consent decrees at any time in the merger review processes, where the agencies have gathered sufficient information to be able to evaluate the impact of the transaction on competition and the effectiveness of proposed remedies, and a consent is deemed appropriate.[7] These agencies can rely on

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[5] *Supra*. note 1 at § 1.77.

[6] *See* Antitrust Procedures and Penalties Act, 15 USC §§ 16(b)–(h) and 2(b) for U.S. agency practice on public comments.

[7] *See, e.g.*, Model Timing Agreement for Merger Reviews involving Efficiencies (May 21, 2020), *available at* https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04531.html ("At any time, the Merging Parties may, on a without prejudice basis, propose remedies to address any or all of the Bureau's concerns.").

consent decrees to resolve problematic transactions efficiently and effectively. This is especially true for merger cases, where for example, investigations into the market impact of complex transactions can be resource-intensive, involving dozens of relevant markets. Flexibility to propose commitments in earlier stages of its review would allow the CMA to redeploy resources away from markets in which the parties are willing to resolve potential concerns, to focus on more complex (or more disputed) concerns.

An additional advantage of flexibility to agree to binding commitments at earlier stages of the merger review process is that it allows the CMA to better coordinate merger remedies with its international peers reviewing the same multi-jurisdictional mergers. As the ICN[8] and the Organization for Economic Co-operation and Development[9] have noted, alignment between competition authorities of different jurisdictions with respect to the timing of the merger review process mitigates the risks of potentially divergent or incompatible merger remedies.

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?

The Sections believe there is value in reforming the jurisdictional requirements of UK competition law to bring them into greater conformity with international practice, notably that of the US and the EU. Under US law, the antitrust agencies may exercise jurisdiction where foreign conduct has a "direct, substantial, and reasonably foreseeable effect"[10] within the United States and "gives rise to" a claim under the antitrust laws—that is, there must be an adverse effect on US commerce that is the proximate cause of the plaintiff's antitrust injury.[11] The potential reform of the jurisdictional requirements of the Chapter I and II prohibitions would therefore bring UK competition law jurisdictional standards closer to US standards.

Consultation question Q 17: Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation[s]? 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?

Reforms aimed at providing holders of full immunity in the public enforcement process with additional immunity from liability for damages would bring UK law closer to US antitrust law. The Sections recognize that parties suffering harm should have an opportunity to be made whole for any damages caused by leniency applicants, a fact which must be balanced with the need to incentivize leniency applications. US law may provide a model to balance these interests. On October 1, 2020, then-President Donald Trump signed the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act, which

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[8] ICN Merger Working Group, Merger Remedies Guide (2016), at 6, *available at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

[9] OECD's Recommendation of the Council on Merger Review, *available at* https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333 (Section B(1), *in fine*.). *See also* OECD's Remedies in Merger Cases (2011): "In the implementation and enforcement of a remedy, co-ordination can also prove useful. Aligning timelines can save costs to the parties, in some cases by allowing them to use a common trustee. If a divestiture is called for, authorities will need to agree on a purchaser for the assets. These are the kinds of issues that arise in cross-border mergers and which call for co-operation between the relevant authorities."

[10] *See id*. at 22 ("The "reasonable foreseeability" requirement is an objective test, requiring that the effect be foreseeable to "a reasonable person making practical business judgments.").

[11] *See*, *e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), *available at* https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf at Ch. 3. *See also* 15 U.S.C. § 6a (Sherman Act); 15 U.S.C. § 45(a)(3) (FTC Act).

reauthorized and made permanent provisions of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)[12] Under ACPERA, leniency applicants may receive some liability protection in follow-on civil litigation. Specifically, where civil defendants in US antitrust suits may generally be subject to treble damages allowing plaintiffs to recover three times the money they lost, leniency applicants may be protected from liability for treble damages and reduce their exposure to actual, or direct, damages.[13] As explained by the US Department of Justice, "While treble damages liability can be an important deterrent for engaging in anti-competitive behavior, civil exposure also can deter self-reporting of criminal wrongdoing."

Because treble damages are not available in the UK, there is perhaps not an option for as readily limiting civil exposure as there is under US law. Nevertheless, the Government may wish to consider allowing some level of financial exposure to full immunity holders where this may be necessary to provide reasonable compensation to those who have suffered harm. A countervailing consideration is that that eliminating or reducing exposure to civil damage claims is likely to incentivize and therefore result in an increase in leniency applications.[14]

Consultation question 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?

The Consultation proposes expanding evidence-gathering tools for Competition Act investigations in a number of ways, including instituting tougher penalties for obstruction of such investigations, broadening the power to interview individuals, implementing a legal duty for businesses to preserve evidence, and expanding the CMA's seize-and-sift powers to include investigations of domestic as well as business premises.

The Sections recognize the importance for agencies to have the necessary tools to carry out competition investigations in a timely and effective manner. Whereas the CMA already has certain of these tools, their expansion raises potential concerns with respect to procedural fairness and the rights of entities or individuals under investigation by the CMA. For example, the Sections suggest that expansion of the authority to interview individuals should be accompanied by protections for interviewees against potential self-incrimination. Similarly, the Sections recommend that any expansion of the CMA's seize-and-sift powers to domestic premises searched with a warrant should consider and safeguard the rights of individuals to retain counsel when under such investigation.

Moreover, the Sections believe that the Government should include clear and consistent standards for ensuring that entities under investigation are made aware of ongoing investigations, before expanding evidence retention and preservation requirements and increased penalties for obstruction of Competition Act investigations. While the foregoing examples are illustrative rather than comprehensive, they highlight the importance of due process to the proposed expansion of the CMA's evidence-gathering tools.

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[12] Press Release, U.S. Dep't of Justice, Department Of Justice Applauds President Trump's Authorization Of The Antitrust Criminal Penalty Enhancement And Reform Permanent Extension Act (Oct. 1, 2020), *available at* justice.gov/opa/pr/department-justice-applauds-president-trump-s-authorization-antitrust-criminal-penalty. Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004), as amended by Pub. L. No. 111-190, 124 Stat. 1275 (June 9, 2010), codified as amended at 15 U.S.C. § 1.

[13] *Id.*; *see also* Bryan Koenig, Antitrust 'Leniency' Incentive Made Permanent (Oct. 1, 2020), *available at* https://www.law360.com/articles/1316004/antitrust-leniency-incentive-made-permanent.

[14] International Competition Network, *Good practices for incentivising leniency applications* (Apr. 30, 2019), *available at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf.

Consultation question Q 20: Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

The proposed reforms to settlement processes for complex Chapter II cases and the establishment of standards for Early Resolution Agreements could provide the CMA with valuable tools for quickly resolving complex cases while at the same time ensuring that settlement payments are sufficiently substantial to deter potential future anticompetitive behavior by firms. US antitrust authorities have made use of settlements, which include the imposition of certain behavioral conditions to avoid the need for protracted investigations or litigation while at the same time ensuring robust enforcement of the antitrust laws.[15]

The Sections appreciate the Government's attention to adopting appropriate safeguards for such a system in the interest of justice, but do not believe they are well positioned to comment on the form of safeguards to be adopted in the UK context.

Consultation question Q21: Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

The Government's proposals aim to avoid situations in which businesses refrain from engaging in voluntary redress schemes because documents prepared to seek approval for a voluntary redress scheme could be subject to discovery in private litigation. The Sections agree that the proposed reforms will help to allay such concerns. The exact impact of the reforms is, of course, difficult to predict. Nevertheless, based on the Sections' experience, we would expect that the proposed reforms would remove a significant barrier to the implementation of these redress schemes.

Consultation question 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?

The Sections agree that access to investigatory evidence is important and appreciate the benefits of streamlining the process by which businesses gain access to such evidence in preparing a meaningful defense. The Sections believe that the Government's proposed modification of the use of confidentiality rings, in conjunction with an expansion of available sanctions for breaches of such confidentiality rings, can help balance the need for a speedier access-to-file process without sacrificing the level of confidentiality that the CMA seeks to maintain.

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

Consultation question Q28: Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

Among other reforms, the Government proposes to expand investigatory and enforcement powers to punish obstruction of CMA investigations and expand prohibitions against provision of false information, expand

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[15] *See*, *e.g.*, Press Release, US Dep't of Justice, *Justice Department Files Antitrust Case and Simultaneous Settlement Requiring National Association of Realtors® To Repeal and Modify Certain Anticompetitive Rules* (Nov. 19, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-national.

personal and individual accountability for the provision of false or misleading evidence, impose additional penalties for failure to comply with CMA remedies, and expand international cooperation between the CMA and other competition authorities by allowing the CMA to engage in investigations of UK entities on behalf of other competition authorities.

With respect to Questions 27 and 28, the Sections agree that obstruction of investigations, tampering with evidence, and the provision of false or misleading information are serious offenses. Because we are not well positioned to evaluate the effectiveness of the current UK penalty regime for these offenses, the Sections respectfully refrain from taking a position as to the appropriateness of any individual reform proposal. The Sections do believe, however, that process and fairness considerations with respect to the implementation of such reforms are important. For example, the Sections believe that penalties to be imposed in connection with the expansion of the CMA's investigatory and enforcement powers should be reasonably proportionate to the alleged violation. Similarly, the Sections believe that expanded investigatory powers should account for due process rights of entities or individuals under investigation, including through meaningful access to counsel and robust protections of the privilege against self-incrimination.

Consultation question Q 29: What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

With respect to Question 29, the Sections applaud the Government's recognition that international cooperation in competition investigations and enforcement is increasingly the norm[16] and agree that effective cooperation between the CMA and its international peers is beneficial, so long as it appropriately considers party rights. Any expansion of international investigative assistance therefore should ensure the protection of the due process rights and jurisdictional protections of any individuals and any entities under investigation.

B. Chapter 2: Consumer Rights

1. Maintaining strong consumer rights and business competitiveness

The Sections applaud the introductory recognition that, in reexamining consumer rights in the context of subscription contracts, consumer reviews and other areas, there is a critical balance to be struck between consumer rights and business competitiveness. These twin pillars are not mutually exclusive but work in harmony to ensure a well-run transparent and fair marketplace. The FTC Act and the United States' approach to consumer protection mirrors the same balance recognized in the Consultation. Section 5(a) of the Federal Trade Commission Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[17] Deceptive practices involve a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.[18] A practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[19] The Sections respectfully suggest that the Government keep this balance in mind when assessing next steps to avoid outlawing conduct that provides meaningful benefit to consumers and enhances competition, particularly

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[16] *See*, *e.g.*, US Dep't of Justice, *Continued Commitment to International Enforcement* (Mar. 24, 2021), *available at* https://www.justice.gov/atr/division-operations/division-update-spring-2021/continued-commitment-international-enforcement.
[17] 15 U.S.C. §45(a)(4)(A).
[18] FTC Policy Statement on Deception, appended to *Cliffdate Associates, Inc.* 103 F.T.C. 110, 174 (1984), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
[19] 15 U.S.C. §45(n).

as several of the Consultation's questions appear to focus on the potential for harm to consumers without necessarily considering potential pro-consumer benefits of the same practice.

2. Modernising consumer rights and subscription contracts

As an overarching framework for regulating subscriptions, the Sections encourage a focus on clear initial notice and consent, a proportionately easy method of cancellation, and affirmative consent to subscriptions at the end of trial periods. This is the framework the United States has adopted in its Restore Online Shopper's Confidence Act ("ROSCA"), which has worked well to balance the pro-consumer benefits of offering ongoing subscription programs with protections to limit the potential for abuse.[20] These rules would address broadly harmful, and well understood, practices. Given the wide and evolving range of subscription products that currently exist and may develop, we recommend against developing regulations that need exemptions and special rules to apply to particular goods, services or content to avoid blocking practices that benefit consumers. Those more complex rules are also harder for stakeholders to understand and navigate, and more likely to create opportunities for harmful gaming.

Consultation question Q30: Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?

As written, the description appears to take contracting "over a period of time" as the central defining characteristic of a subscription. In the Sections' view, this broad definition includes a variety of products or services that do not seem to be subject to the concerns being addressed by the Consultation and would likely create costs and frictions in some markets without providing any benefit to consumers. For example, a holiday car rental is generally contracted over a period of time, but consumers are unlikely to benefit from the recommendations given here because those rentals are typically not recurring. Demand typically has a definite end, instead of the a priori indefinite periods of consumption associated with the examples given in the definition. Contracts for goods like these are typically structured to reflect that limited time demand.

To overcome this concern, the Sections suggest that the definition could be amended with the clause in italics below.

"What is a Subscription contract? The term "subscription" is used in the Consultation to mean a contract between a consumer and trader over a period of time for the supply of goods (magazines, beauty products, food boxes) a service (gym membership, online dating site membership, web hosting) or digital content (digital music, eBooks, computer games)," *where demand for that supply, service or content is a priori indefinite, leading to an unknown, but possibly multiple, number of renewals of the contract.*

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

The Sections recommend requiring either explicit consent or a clear reminder (with instructions on how to cancel) immediately before a consumer transitions from a trial period to an ongoing, paid subscription. The offer of a trial period suggests that a well-intentioned firm believes that at least some consumers will see the value of the offered product or service and will be happy to continue with a subscription if asked or reminded at the conclusion of the trial. The cost of asking for consent at that stage is that some consumers

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[20] 15 U.S.C. §§8401-84-5, *available at* http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter110&edition=prelim.

that liked the product may forget (or just do not make the time) to click their consent – which suggests their valuation of the product, and thus loss of use, is relatively low. The benefit is that none of the consumers that would not have wanted to continue, do. Some of those will likely have found zero value from the product. In contrast, a reminder that the consumer is about to start a full price contract will catch some of these zero (and low) value consumers into a recurring contract that they do not want. This cost may be greater than the cost to insufficiently attentive consumers that would have preferred to begin the subscription immediately, but would have to take proactive steps to restart once they realized their mistake.

The Sections see clear consumer benefit in some form of clear notice to consumers that they are transitioning from a free or lower cost trial to a higher cost subscription period. It is not clear that in every case requiring reaffirmation of interest is necessary to protect consumers and may harm legitimate business interests.

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

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

The Sections are concerned about the effect on consumers of creating regulatory requirements triggered by "inactivity," such as requiring notice of suspension and ceasing to charge for the subscription.

While some subscriptions are both actively used and easily reestablished if mistakenly disrupted – many of the examples given in Figure 8, for example – others, including road protection towing services, appliance repair services or other occasional use subscriptions may be unused for long periods, over multiple renewals before being used, but be valuable as fail-safe services. The costs to consumers of inadvertent suspension of these kinds of services could be significant.

Consultation question Q41: Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?

Rather than exempt certain services or goods from the rules proposed, the Sections recommend focusing the proposal on practices that are most likely to be problematic for consumers. Given the rapidly evolving marketplace for subscription services, goods, and content, it seems likely that product specific exemptions could easily become outdated, either because they did not account for new products, or did not account for the evaluation of existing products.

While practices will evolve as well, the Sections believe the Consultation has articulated a number of longstanding issues with particular practices that could be addressed, such as a focus on free trials and clear notice before charging for a renewed term, with significant, and well-understood, benefit to consumers.

3. Fake Reviews

The United States has considered reviews under the framework of the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "FTC Endorsement Guides").[21] Based on experience with the FTC Endorsement Guides, the Sections believe it is important to recognize the benefits of consumer reviews for online shoppers, assuming the reviews are truthful and reflect the actual experience

[21] 16 CFR Part 225, *available at* https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf.

of the reviewer and any incentives provided in exchange for the review are clearly disclosed. As discussed in more detail below, the Sections are of the view that banning entirely all incentivized reviews would deprive consumers of meaningful information and have a negative effect on small businesses and new entrants in the marketplace seeking to compete with incumbent brands.

Consultation question 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 incentivizing any person to write and/or submit a fake consumer review of goods or services?

The Sections encourage the Government to add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (c) commissioning or incentivizing any person to write and/or submit a fake review or a review that does not reflect actual consumer experience with a good or service, based on the definitions of the words "commission" and "incentivize" provided.

Fake reviews have a serious and detrimental impact on competition and consumer trust. With the rise of, and increase in, online sales, the impact of consumer reviews also is increasing, with reviews serving a key role in customers' decisions, both because ratings often factor into display algorithms and because consumers often seek out that information. Consumers increasingly rely on "star ratings" and consumer reviews to help them decide between products and direct their spending. Fake reviews mislead consumers and harm bona fide businesses through lost sales and reputational damage. The Sections believe that amending the CPRs to add to the list of unfair practices the act of commissioning or incentivizing a person to write and/or submit a fake review will help curb expansion of the growing industry of creating and selling fake reviews, and serve to protect legitimate competition and preserve consumer trust. When addressing the issue of fake reviews, the Sections believe that it is critical to include as separate possible offenses the act of requesting a fake review ("commissioning") or offering a form of payment or incentive for a fake review ("incentivizing"). Limiting any such ban to merely requesting fake reviews (option b above) and not incentivizing them will likely fail to address the full scope of the problem.

Given the importance of consumer reviews in the shopping experience, the Sections would *not* recommend banning the commissioning of all consumer reviews; such a ban should be limited to commissioning or incentivizing *fake* reviews. As noted by the Government, the ability to commission fair consumer reviews is important for the ability of smaller companies to compete, many of whom likely have limited advertising budgets. Commissioning reviews through, perhaps the offer of a coupon or discount, can help enable small companies to accumulate reviews and better compete. However, the Sections believe that such incentives should not be predicated on the substance of the review itself. Companies should not condition an incentive on a positive review or specific "star rating" as such a practice would improperly skew the public's opinion of the product.

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

The Sections believe that banning the commissioning and/or incentivizing of fake reviews would mitigate the erosion of consumers' faith in reviews and trust in online shopping. We expect that it likely would also positively benefit offline (or in person) shopping as many consumers who purchase in person still look to and rely on reviews posted online about products. Such a ban would harm otherwise legitimate companies with high value products relying on a campaign of fake reviews to break through in a crowded and noisy

market,[22] but the Sections believe that a ban would benefit competition generally if such reforms could be applied uniformly across all market actors as it would create a more transparent, fair marketplace.

Consultation question 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?

When evaluating potential steps for businesses to ensure consumer reviews on their websites are genuine, the Sections suggest that it is important to consider the impact on smaller businesses. While it is important to ensure that reviews are genuine and not fake, proactively verifying reviews can be time consuming and cost prohibitive for smaller businesses. The specific cost involved would likely differ by company based on its technical capabilities. While the Sections believe that businesses should be encouraged to verify that reviews are genuine, we recommend that companies be instructed to take "reasonable and proportionate" steps to do so, as opposed to specific actions, given that the burden associated with specific tasks is impossible to know.

Consultation question 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?

The Sections agree that this could be beneficial but note that the benefit will depend on the specific language defining the unfair practice and standard of liability. In particular, determining whether a review is fake can be difficult, and the standard for liability may have negative implications for small businesses, as suggested above, and may require firms to remove or flag ambiguous, but ultimately legitimate reviews in order to avoid prosecution. This could potentially reduce the intended benefit of the proposed reforms.

4. Preventing online exploitation of consumer behavior

The Consultation examines dark patterns or design techniques employed in website design to exploit consumer behavior to influence choice. The U.S. Federal Trade Commission's April 29, 2021 open workshop explored dark patterns, and the Sections believe that it provides helpful background. The workshop included hearing presentations by researchers, consumer advocates, and industry professionals, and invited public comment.[23] Similarly, the FTC has a long enforcement history of ensuring that products are described truthfully online, and has provided business with guidance on defining what constitutes a clear and conspicuous disclosure of material information on the internet.[24] The Sections applaud the Consultation for highlighting the "valuable opportunity to carry out substantive research" in these areas. We encourage the Government to undertake such investigation, including discussion with experts and stakeholders to better understand what dark patterns are clearly unfair or deceptive to all reasonable consumers and to focus its efforts on banning these practices, while not over-regulating and banning design choices that simply "nudge" or encourage consumers to make certain decisions.

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[22] The FTC has brought enforcement actions in such cases, including in the case of Sunday Riley Modern Skincare in which a high-end cosmetic company allegedly asked its employees to create fake profiles on a cosmetic retail platform to leave 5-star reviews for new products. *See In re Sunday Riley Modern Skincare, LLC,* FTC No, 192 3008 (Oct. 2019), *available at* https://www.ftc.gov/enforcement/cases-proceedings/192-3008/sunday-riley-modern-skincare-llc-matter.

[23] Transcripts from the workshop and videos of the panels are available at https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop.

[24] *See* Fed. Trade Comm'n, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), *available at* https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

Consultation question 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?

Marketers and resellers have long worked to influence consumer choice, and in most cases there is nothing nefarious about such practices, including offering a pop up to advertise a discount when purchasing multiple products or when signing up to receive marketing texts. There is a significant difference between knowing deception to *force* consumers to make choices that only harm them and *steering* consumers to select an option that is more beneficial to the marketer but may also have consumer benefits (e.g., a greater discount). The Sections encourage the Government to undertake thorough additional investigation before generally banning dark patterns or even adding dark patterns to the list in Schedule 1 of the CPRs of practices that should always be considered unfair without additional investigation and information gathering.

C. **Conclusion**

The Sections appreciate this opportunity to provide their views on the Regime and remain available to answer any further questions that the Government may have.