BEIS Consultation on Competition and Consumer Protection

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Comments from the BRC

(British Retail Consortium)

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The BRC

The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

Preliminary Comments

The Consultation

The BRC recognises that many of the issues proposed in this Command Paper have been the subject of discussions over some months if not years. However, a Command Paper tends to bring the discussion into sharper focus. In that context, it is a pity that for various reasons it has been necessary for the Consultation to take place over the summer holiday period - and has sat alongside so many other consultations.

Given that there are some Green edges to what might otherwise have been described as a White Paper, we trust that this timing will be remedied by some ongoing discussions with BEIS as their own thinking is developed.

The Competition Proposals

Retail is a highly competitive sector. Competition is not an end in itself but the best means by which to deliver the widest possible range and choice of goods and services to consumers at every price level. An efficient and effective competition regime is, therefore, of huge importance in providing the framework within which fair competition can thrive and enable innovation to prosper.

Although the Government, without any explanation, has not proceeded with the proposal to place consumers at the heart of the regime in a legislative sense, we trust that in fact they are at the heart of the regime in any case.

Effective and efficient competition relies on a competition regulator – the CMA – being able to target its resources on an examination of the most important mergers and to undertake market studies in a timely manner to reveal any issues that might restrict the capacity of the market to serve consumers and to innovate – and to identify potential solutions.

The regime must also be future proofed so it is capable of adapting to rapidly changing market conditions. We are also of the view that the regime should cover all businesses and be technologically neutral or blind. If the regime proposed for SMS digital businesses is regarded as being superior, then there is a good argument that it should be adopted for all businesses. There are many very large players in all sectors and using a whole range of technologies. To single out digital technology for special treatment – and within that just a few players – seems to undermine the system for other businesses who are subject to a regime with well understood concepts and expectations.

If the Government does decide to go ahead, as it seems to have done, it is important that inclusion as an SMS is based on – and for – specific activities that meet the criteria – as seems to be suggested.

In the case of retail, it is clear that while the market was once divided into online challengers and face to face retailers, the situation has changed so that there is now one single market made up of pure online sellers, platforms and marketplaces where individuals and small (and sometimes larger) businesses can find a way to build and extend their market, omni-channel

retailers, manufacturers selling direct to consumers both online and through retail outlets, and still some very successful face to face only retailers.

We are of the view that this means that in competition terms retail and the retail elements of larger businesses that may have other interests as well should be seen as a whole, with no one element selected for different treatment from another just because it uses a different channel.

Retailers should be judged against other retailers in terms of mergers, market studies and other competition activity. To subject the retail operations of any retailer to a different regime with different requirements would require a very good evidence-based reason - such as the very nature of its retail operation is such that it distorts competition to the detriment of consumers and this can only be corrected by a separate regime.

The Consumer Proposals

While the competition regime affects all businesses, the consumer protection regime is, of course, of particular interest to retailers. As such we have placed a particular focus on these proposals.

The BRC strongly supports balanced consumer rights and effective enforcement where these are ignored. That is necessary for a level playing field among retailers of all types.

With the exception of the proposal to move the CMA to an administrative enforcement regime, the paper appears largely as steady as she goes with little that is radical. To a large extent retailers prefer continuity to change in this area in the belief that consumers and retail workers are more likely to understand their rights and obligations when they are kept steady over a period of time.

That is not the reason, however, why we question once again as we did in 2014 the proposal for the CMA to move to an administrative system – and at the very least require key safeguards be built into any legislation as we did then. Justice does require efficient delivery but it also requires fairness and due process not just administrative convenience.

We note that there are some open-ended questions – but we do believe that the Paper would have benefited from some discussion of some of these issues. We realise it is unlikely that additional measures would be included in any Bill if they do not appear in the Paper.

The key omissions in terms of discussion and sometimes open-ended questions are the Trading Standards enforcement regime and its lack of resources for effective enforcement online or face to face and the lack of an effective capacity for dealing with consumer complaints, especially online, and reliance on consumers doing it themselves. In the absence of effective enforcement and redress, consumer rights are of far less value than they would otherwise be and from a retail view there is no level playing field and no advantage in compliance. Plans for dealing with fake reviews and so called subscription traps will be totally undermined if they are not enforced.

Issues such as the following need to be considered:

- Whether the lack of Trading Standards requires radical change such as a national TS

service albeit delivered locally or a strengthened national trading standards body

- The need for a radical rethink about online enforcement at a level below that delivered by the CMA – the need to deal with scams, rip offs and failure to provide consumers with their rights which when unenforced distorts any sense of a level playing field. There are proposals for new offences – but no indication of how they can be enforced or by whom.
- The lack of any new proposals to help consumers get their complaints resolved when an irresponsible retailer fails to even engage – as opposed to just telling busy consumers how to do it themselves if they can get the retailer to engage at all. There is for example no reevaluation of the consumer advocate suggestion of some years ago.

Other 'omissions'/lack of discussion include:

- Potential for any deregulation – the Paper largely proposes additional regulation
- The balance between, and desirability of, principled regulation versus specific regulation – the paper proposes some additional specific regulation which runs counter to proposals in the Better Regulation consultation for the reverse
- The deterrent value of very high fines compared with a more co-operative approach and seeking redress.
- The excessive amount of information requirements and whether they serve any useful purpose and whether they can ever be used effectively on a mobile phone or voice ordering technology
- The lack of balance between the information a consumer is presented with online compared to face to face and whether this is still necessary given the growth in online sales has familiarized most people with the technology
- The potential to review EU inherited legislation with a view to potential amendment
- The extent to which reporting requirements, information requirements, voluntary codes etc. are alternatives to regulation
- Any discussion re the disjoint between online consumer rights and information requirements – and rights – and those available face to face. Is it any longer clear why a consumer making an online purchase is presented with a whole raft of terms and conditions and information whereas in a shop they just make the purchase – and given the omnichannel approach to modern shopping how do these interact. A consumer going into a shop can buy a washing machine but has no rights if it works and is as described. A consumer purchasing the same machine online from the same retailer has a raft of rights including withdrawal. Is this still a viable approach?

These are missed opportunities. Although stakeholders can raise them, that is never the same as if the Paper itself presents the arguments and issues.

We have answered those questions in the paper where we believe we have a specific perspective and interest. Given the nature of retail our focus has been on the consumer section – though not exclusively. We can support the CBI comments on the Competition aspects of the paper where we have not commented.

Competition

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?

We would expect that the CMA would wish to obtain evidence for its role in advising government on the state of competition in the UK – just as any body tasked with the function of advising the government on any issue might wish to do.

However, we do not see any need for this to go above and beyond the normal procedures for gathering evidence in order to provide advice. If it needs additional powers to do that, we have no objection.

However, we would strongly object if these included any of the fining powers for failure to provide any requested information or for delays to its provision that are being sought in the context of its other enforcement functions. Such an approach would be entirely inappropriate in this context.

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

The CMA has thrived as an independent regulator – a non Ministerial government department - working within an overall steer but essentially determining its own priorities on which it consults each year in its Annual Plan. The Government (whoever that may be) has plenty of opportunity to express its views as to what those priorities should be and the CMA is perfectly capable of understanding the Government's priorities. The Government also has the power to direct the CMA to take action or advise on a specific matter.

We do not believe that this independence should be compromised by further formal strategic steers and assessments which would inevitably tend to favour current political concerns and have all the potential for knee-jerk reactions to events and problems. The CMA serves competition and consumers best by standing a little above the political fray while understanding the overall context within which it works.

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

Market studies are designed to be assessments of the overall state of the market. While they may result in recommendations or guidance or even undertakings or actual enforcement action, we do not think that the process in general provides sufficient time or specific in depth analysis to enable market wide remedies to be imposed rather than guidance or recommendations issued. In particular, it would be unwise to impose structural remedies given that studies are unlikely to have the time to assess the best possible solutions to any problems that have been identified.

In addition, the sort of information that is necessary and provided for a market study is different from that necessary for imposing remedies – and businesses involved in the latter would need to be able to assess with the CMA the impact and likely effectiveness of any remedies proposed

without necessarily having the basis for those suggestions at hand.

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

We do not believe that this is an alternative to imposing remedies at the end of a market study. It is rather a different approach altogether.

As the paper makes clear, market studies and market investigations have two distinct purposes. Market studies play a useful role in assessing whether markets are in fact working well for consumers. They can either conclude that they are; that they are with some adjustments; or that they are not and a market investigation is necessary. That investigation can then go into more depth in terms of potential remedies targeted at the specific issues identified.

While it would be possible simply to roll the one into the other and give it a different name we believe it is valuable to keep the two separate and to look instead to removing any overlap and streamlining the need for consultation on whether to launch an investigation.

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

A market study can result in enforcement action if that is deemed necessary. This should have the capacity to deal with any immediate discovery of unlawful activity. The need to impose interim measures from the beginning of a market inquiry which is not an investigation into wrongdoing per se by a company or companies should be unnecessary and could lead to the wrong measures being imposed due to lack of evidence.

However, we would not entirely oppose a capacity to impose measures in extremis once it has been decided an investigation is necessary and will proceed – which would in effect be measures imposed as a result of evidence obtained in the market study. The power to impose such interim measures would need to be strictly circumscribed and the measures should be reversible.

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

Acceptance of commitments at an early stage could help to address some of the reasoning behind the proposal for interim measures – they could provide a way to deal with issues in co-operation with affected businesses without necessarily going through a whole Inquiry.

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

The Government proposals for implementation trials could work for specific types of remedies but not others while reviews and monitoring of remedies with a view to varying them where appropriate would appear to be a sensible approach to any changes.

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

We always believe that where a regulator can exercise administrative powers, a full merits judicial review is necessary to maintain confidence in the system. A review only of the processes is not satisfactory where an appellant believes the actual outcome based on the evidence is at fault or the interpretation of the law is at fault. Such appeals also provide reassurance that the CMA is indeed making decisions as it should that are 'gold plated'.

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?

The same level should apply as in Q24 above.

Consumer Rights

Subscription contracts

Subscription contracts be they face to face; via apps; or sign up via a unique website play a useful role in enabling consumers to receive a regular service or supply of goods, sometimes for a lower price than separate orders (which reflects in part the reduced cost of setting up and fulfilling an order each time) without having to constantly proactively reorder. In many ways they are a modern extension of signing up for regular deliveries of a newspaper with a newsagent. To see them as subscription 'traps' starts from the wrong base.

The Paper suggests there are issues with subscriptions including a loyalty penalty; automatic renewal or rollover; misleading claims or advertising; unclear information in lengthy terms and conditions; difficulties in resolving complaints or cancelling.

We do not challenge that these may exist with some subscriptions – though what is seen as a loyalty penalty from one perspective may be seen as a good introductory offer to the consumer from another. We believe that there are already general rules on information requirements and prominence of key points in terms and conditions that can be used to deal with all these matters. The problem is that they are not enforced and there is often nowhere consumers can go to get them enforced and to obtain redress. There is only any value in seeking to address these specifically in relation to subscription contracts if the specific rules are going to be enforced better than the existing. Unfortunately, there do not seem to be any proposals in the Paper to do that.

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?

We agree with the description – it could be improved by making it clear whether this applies to both free subscriptions (potentially paid for with personal data) and paid for subscriptions. We are inclined to the view that if introduced they should be limited to paid for subscriptions.

At some point it should also be clear whether this only applies online or also to face to face transactions.

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

We believe that in many ways traders are required to provide this information in any case in one form or another prior to the consumer placing the order – and would normally wish to do so in order to seal the deal. The proposal seems to suggest that the information should be provided twice – once at an early stage (undefined) in the process and once immediately before the customer places the order.

It may not be possible to provide the information at a very early stage because the customer may not have decided which particular offer to take or for how long. The key is that they should know before making a final commitment. However, even that has some difficulties. In the case of orders made on a mobile phone (and in some cases over 75% of orders are placed in this way) or in the future by voice other than direct to an agent there will be very little room to provide all this information – together with all the other information that is required in distance selling.

The key is not to prescribe exactly where the information is provided or when – but that it is in fact provided before the end of any period during which the customer can cancel the order. This may be immediately before it is provided in the case of an order for instant access to a service but may also be via an email confirmation after the order is placed.

The information could also be presented on a website with links to the various offers which the consumer has to scroll through in order to see the offer in which he is interested.

In addition, if the consumer is to be given the option whether to auto-renew or not, there might need to be two different prices and sets of terms and conditions. An intention to auto-renew means that the costs of setting up the contract each time are reduced and ideally these might be reflected in the cost of the contract. This is seen when retailers may offer reduced prices for a product that is delivered regularly compared with the same product in a series of one off sales.

Having said all that, the real issue is not so much the impact on traders but whether the whole process is likely to be of benefit to consumers. All the evidence available is that consumers do not read lots of terms and conditions and that most consumer information requirements fail for that reason. If the rules are not enforced on the one hand – and consumers often ignore them on the other - there has to be a real question mark over whether they are truly worthwhile.

At the very least, any new regulation should make absolutely clear which information requirement takes precedence in the limited amount of space on a mobile phone or the home page or product page of a website.

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

As indicated in the answer to Q31 the actual provision of the information as such should not make it harder for traders to comply – if it is clear how the trader can do this in the various ways people use to sign up of and if the observations above about timing etc are taken into account.

If the question is more about whether it makes it easier or not for traders to comply with what is said, then clearly any requirement to offer a choice of auto-renewal or rollover would complicate record keeping and the actual presentation of the offer. It would also be necessary to explain that without auto-renewal the consumer may lose access to the product or service at the end of the period if he fails to renew in time (which could be inconvenient in the case of, for example, a digital service such as broadband) or it may only be available at a different price – and that the consumer may need to start the whole process of signing up again.

Q33. How would expressly requiring consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?

The BRC believes that governments should leave businesses to run their business and choose their business model without setting detailed rules. Competition is the best way of offering the maximum number of choices. Consumers can shop around and if they object to auto renewal or rollover go to a competitor who offers a fixed term contract, presumably without a free introductory period. Businesses will react to the market and consumer trends and if it is clear consumers prefer the option, then some will offer that as part of their competitive positioning. By forcing traders to give consumers the choice, traders would be forced on a very detailed point into a straitjacket rather than free to compete for custom.

As indicated above, the main financial impact for traders would be the additional cost of keeping records of decisions made; the additional cost of setting up new contracts for those who chose not to accept auto-renewal each time the period was up for review; the need to provide clearly any difference in price; and the need to contact the consumer to find out if he wished to continue the contract at the end of the fixed period which in some cases may be just a week or month after the initial contract is signed.

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

Much depends here on the contract term. A weekly or monthly rolling contract is rather different from an annual rolling contract. A contract for goods is rather different from a

contract for services – especially a digitally supplied service. A consumer is unlikely to forget about a contract for goods that are delivered every week or every month, for example – and the same is true for services supplied in person. Indeed a consumer is likely to notice the charge for any type of rolling contract on his card each month.

Where consumers have the option to cancel at any time as opposed to being moved to a fixed term or after a minimum contract period, there is little case for requiring very frequent reminders unless there is a change in price. If anything, in that case the requirement should be limited to an annual or 2 yearly reminders.

If there is to be a reminder requirement in the circumstances mentioned above in the question, we would suggest that the obligation should be to provide it in the same form the order was made and to the same address/email address.

Q35. How would the reminder requirement impact traders?

The main impact would be the additional cost of setting up systems for recording the date for and actually sending out the reminder and ensuring the consumer's choice following the reminder was implemented. To some extent this will mean that the supplier will need to keep more personal data about the consumer on record. Clearly this is more expensive than setting up the renewal and then placing the obligation on the consumer to cancel.

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 obligation to provide a reminder about a change to a requirement to pay for the subscription would seem to mirror the requirement above about a rollover and be subject to similar considerations. To require a consumer to give explicit consent to continuing the subscription – possibly after just one month - could lead to problems in some circumstances where an interruption to the service or supply of goods would create a problem – such as a mobile or broadband contract or a supply of goods to someone housebound. It would be more practical and preferable to require the end date of the free trial to be specifically set out in the information upfront and a reminder be sent as proposed.

To require a business to enter into a contract twice for the same thing could result in consumer detriment if businesses decide it is easier just to withdraw free trials – which can be a valuable way of testing a product.

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

It would be difficult to determine what a long term is in each individual case. For example, with a monthly subscription long term might be seen as 3 months while with an annual subscription it might be more like 3 years or more.

The introduction of automatic suspension or cancellation – which often occurs much to the

annoyance of customers in airline loyalty systems – would require further retention of personal data about the use made of a service and when – for example where a service is provided passively without the need for the provider to record its use, together with a notification of cancellation system.

It might be preferable to simply require a reminder every 3 years or so that a service is being provided for a fee and information on how to cancel and thus remind the consumer without the need to cancel on his behalf. In that way the consumer would retain the choice to continue the service with or without using it and detailed records of use would not need to be made.

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

As indicated above the timeframe for inactivity is problematic as it relates to how often the service is provided and whether it is a one off every so often or a rolling service accessed by the consumer as and when he wishes. For this reason, we prefer a reminder be sent of the provision of the service after a set period where no other reminder has needed to be sent.

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)?

This would vary from one trader to another and on the method of payment. For example, a consumer paying by debit card or direct debit can cancel a subscription more easily than payment by credit card. Likewise with many traders it will be easy, with others difficult especially if it is an online trader located outside the UK or even EU. Once again the issue of enforcement arises and of consumers being able to complain to an enforcer who will act on the complaint and get redress.

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?

The BRC fully supports making exiting a contract in accordance with its terms and conditions simple and straightforward. We are not convinced there should be a requirement for it to be automated as it may be better in some cases for a consumer to access an agent and this may be the only way some smaller businesses can process the request. The information required should be the minimum necessary to identify the person making the cancellation and ensure it is a legitimate request from the person with the contract - with any refund paid in the form the payment is made.

As we have said throughout – and what happens to ensure all this happens and what if it does not? Who will check? Who will receive and follow up consumer complaints? And how will this apply to businesses with apps outside the UK?

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

Exemptions from any cessation of service should be made for goods, services and digital

contracts where, as the consultation states, there would be serious harm to consumer welfare. We question the use of the term serious as requiring a subjective assessment. In our view the exemption regarding cancellation etc should apply to any contract where an interruption of service would potentially create a problem for a consumer. This does not just apply to medicines and financial services but also services such as mobile phones and broadband, for example, where an interruption of service would mean a consumer could not even communicate with the supplier! Likewise, interruption of a maintenance service or regular provision of goods to a housebound consumer could be problematic and even in certain cases dangerous.

Fake Reviews

The BRC is totally opposed to fake reviews – the problem we have is defining the term fake.

The proposal here raises two issues in particular – how to determine whether a review is fake and second whether introducing an absolute ban will make any difference in this case and indeed whether specific regulations are in general better than principled legislation. There is also a question of whether any regulation would apply to only online reviews or those commissioned by a newspaper or that appear in a trader's leaflet or advertisement.

Emotionally, anyone would want to stamp out fake reviews that distort a fair view of a product or service or business – finding an objective description of when a review is fake and even if that is found enforcing the prohibition is not easy. Who is going to check? Who is going to determine whether the view expressed is genuine or not? Who is going to follow up consumer or business complaints?

Everyone who writes a misleading review knows it is not really genuine – but how can anyone externally judge whether the author is genuine in his comments or not.

The fact that a particular review stands out from the others as different does not in itself make it fake. It is a different point of view and it is expected that all reviews should be published.

The fact that someone has been paid or commissioned to write a review is not in itself an indication it is fake. As the paper says they are not fake if they reflect the person's genuine experience of a product or service or an impartial opinion. It also points out that innovative new businesses may need to ask consumers to write a review. So - how is an enforcer to know whether that is that person's genuine view or not? And how much time and effort is he to take to determine something subjective?

Even if a reviewer is asked to write a review with a particular slant does not mean the review is not the reviewers genuine opinion. It may not be – but proving it is not would be difficult.

In 2.35 the Paper points out the existing legal prohibitions which apparently have not been enforced given the number of alleged fake reviews.

In 2.30 the paper defines a fake review as one that does not reflect an actual consumer's genuine experience of a good or service. That can be challenged. A review can be provided by someone who has not purchased the good or service and who is therefore a consumer but who has tested it and provided comments on it.

Thus if payment does not make it fake; if an opinion that is out of kilter with other opinions does not make it fake; if a review that is commissioned to be positive or negative does not of itself make it fake we do not believe it is possible to know easily and objectively whether a review is fake or not – and this means enforcers would not have the time or resources to really check and platforms would equally find it difficult to judge.

The only way forward is to try to identify some objective criteria that are enforceable and which would enable a consumer to make their own judgement of the validity of a review, taking into account advertising is allowed to exaggerate because consumers expect it to do so. Should the same be applied to certain reviews?

To place a practice on the blacklist requires very clear definition of what is banned. It is even more important if it is to be subject to criminal prosecution. From the enforcer's perspective if there is any vagueness about what is banned the need to prove beyond reasonable doubt could be a bar to prosecution – and an incentive for a trader to simply get around the specificity of the ban.

It is clear that misleading claims about a product or a service are not legal. So if a review states that product x will do something it cannot do or a service provides y and it does not, then that is already not legal and misleading.

Providing a review that makes a false claim about the product or service is likewise misleading – though whether the publisher or the reviewer is guilty is a moot point – unless the publisher knows or ought to know it is false.

Selling reviews or reviewers could be so suspicious that it could be banned – though even then their reviews are not necessarily fake or misleading – only if they claim to be from a normal consumer transaction.

Also there are rogue businesses that post reviews of their own products on a website they own but which is not in their name in what seems to be an unbiased list of reviews. Strangely their products are always best in class compared with those of others. We would suggest that is misleading unless it is made clear the website and the review site are owned by the same trader.

Beyond that we find ourselves in some difficulty.

In our view the more informative route – and one that is more likely to be obvious and enforceable – is in this case an information requirement that clearly states the nature of the review i.e. – is it from a consumer who has bought the product to use for his own purposes; is it from a consumer who has bought the product in order to review it – or has been given the product for that purpose; has the reviewer been paid or received any advantage to write the review; has the reviewer been asked to write anything specific in the review such as whether the product is good or bad; is the review by an expert or professional reviewer. A requirement for every review to include one of those statements would enable a consumer to make up his mind about the likely veracity of the review – and if the statement is absent would enable a Platform or enforcer (if he has the resources and it is a priority) to pursue the matter.

The danger of the approaches suggested in the Paper in this and elsewhere is that without

enforcement the gap between those who always aim to be compliant and those who do not care will grow ever wider and in the end those who do not care will have even more advantages over the compliant.

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?

The BRC does not believe there is necessarily any benefit in adding to the list of banned practices when there is principled legislation that was closely argued over at the time – and when the BRE consultation is suggesting a move away from detailed regulation in favour of principled legislation.

While we accept it might be easier for enforcers if something is black and white, in this case we are not convinced that the black and white options actually deal with the issue – or indeed whether enforcers have the resources to trawl websites to look for compliance or indeed to follow up reports from consumers.

Option a would be detrimental to legitimate commissioning of reviews even perhaps where a business asks a genuine consumer who has used its services or products if they are prepared to write a review.

Adding Option b to the blacklist sounds nice but still raises the issue of what is really fake; how does someone defend themselves against an accusation as opposed to commissioning a review; and how can it be enforced.

Option c raises the same issues because what is fake has to be defined and enforceable.

As we have said we believe in this case an information requirement would be a better approach. In spite of our general view of information requirements and their value, in this case it would be a very simple addition to the review.

Apart from that we are of the view that in this case the context is even more important than in some others – and the question of whether the review would or might lead to the average consumer to take a transactional decision they would not otherwise have taken provides a better way of getting a reasonable assessment than an absolute ban that requires a workable definition of fake.

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?

Basically, depending on the definition of commissioning, a business would be prevented from asking someone to write a review about the products on its website or the service it has provided with or without a consideration for doing so. This is a common practice where a business asks a consumer to submit a review to Trustpilot, for example, which in turn provides

a useful service provided the business asks all consumers to do this and all reviews are published unless abusive etc. As the Paper states, new businesses would be unable to use this method to establish themselves and build up clients – with a possible effect on innovation and competition.

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?

Given enforcers have clearly found it impossible to deal with 'fake' reviews it seems a little bit much to pass the buck to others. It may be possible for large businesses to use AI to weed out reviews that always come from one reviewer or to weed out common language but this could be unfair and would be unlikely to be possible for smaller businesses. It would be much easier to weed out reviews that do not include the information requirement suggested – recognizing of course that in itself may not be genuine.

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?

Again that is emotionally positive and if linked to businesses whose sole purpose is to do that could reduce the opportunity for people to write reviews about products or services they have not used if effectively enforced among all the offers on the internet from UK and elsewhere – but it only works fairly if there is an understanding of what is fake – and if enforced proactively or on the basis of consumer complaints.

Use of Behavioural techniques

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?

It is unlikely that most consumers would be aware of the use of the techniques outlined – indeed that is the whole raison d'etre of nudge techniques which we know the Government also uses in its communications.

The question is not whether they are aware but whether the techniques are a problem. The paper stresses that not much is known about this in terms of its prevalence or any harm. We cannot object to more research which sets such practices in a wider context but we note that once again the influence of major players and commerce platforms seems to be the target even before the research is carried out. Unbiased research should start without presuppositions of that nature. In any case it seems somewhat odd for a Command Paper to suggest a topic for thorough research into anything – which seems to suggest minds may already be made up on this matter.

We also note the suggestion that this could lead to further additions to the list of banned practices in Schedule 1. That list has been carefully crafted to be precise and limited and subject to criminal law for the most part with other unfair and misleading practices left to the general

prohibition to be proven on a case-by-case basis. A knee jerk reaction of placing practices on the list because it is convenient is totally undesirable. In any event we do not believe the list should be amended without proper Parliamentary scrutiny. Guidance should be the way forward in general.

If there is a desire to move to more prescriptive legislation, that is a decision that should be taken in principle after debate – noting it goes against the whole thrust of the Better Regulation consultation currently in play. We accept there are arguments for such an approach and would be happy to engage in a debate based on experience to date and actual evidence of the advantages and disadvantages. However any such move would undermine the opportunity for innovation and competition in how individual businesses meet the outcomes desired for any given policy objective and to some extent the Primary Authority approach.

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?

We note the statement that the Government is considering strengthening he law so that it is easier for enforcement agencies such as the CMA to take action against particular exploitative designs that feature on some websites and will champion 'fairness by design' principles. The next paragraph then goes on to reference drip pricing which suggests the Government believes this falls into that category.

This raises specific and generic issues.

The generic issues relate to whether or not principled regulation is preferable to prescriptive – and even if the latter is preferred how should the specific be changed to prevent knee-jerk reactions to political issues as they arise.

The second question is whether these practices require priority enforcement.

The third question is the extent to which the government should seek to control the market and in how much detail – and whether it should seek more control simply because the market is online. For example, a retailer can place goods wherever it wishes in a store. It can be paid to place some more prominently and in better positions than others as part of a promotion. It is not required to state how it chooses or whether it has been paid. In the omnichannel world there needs to be some equivalence between face to face and online retailing rather than a suspicion of online selling in general now it is so well established.

The third question is what the Government has in mind with the vague statement that the Government is considering strengthening the law to make it easier for enforcement agencies to take action. This has no further explanation but if it means enforcers could simply add practices to the blacklist we would have some reservations – and would expect some further debate as to the overall desirability of adding specific prohibitions; whether the approach would be consistent with the better regulation approach discussed elsewhere in BEIS; and if it is a better approach, should a regulator be able to add to the list at any time or for that matter should it be possible by SI – or should it only occur in the context of the primary legislation (though in this case the Primary legislation was required to simply enact the EU Directive).

Our recollection is that the OFT/CMA undertook research into drip pricing and it was not found to be detrimental. However the concept of 'drip pricing' (a rather undefined concept all round) in that case seemed to be different – it referred to a practice of changing the price once a consumer returned to look at a product again or to the practice of changing the price in relation to demand and supply as in the airline or hotel industry. In this document it is apparently meant to mean purely the failure to include all charges upfront or if that is not possible an indication of how those charges will be calculated so there is a drip effect of additional charges. As the paper makes clear, this is already against the law so it is a matter of enforcement rather than research into some mysterious behavioural technique.

We have indicated elsewhere that one of the key failures is lack of enforcement in general. Whether or not this particular issue should be a priority is a difficult judgement. Sometimes it is simply not possible for a consumer to be presented with all the charges because it may depend on their final selection and any discount for multiple purchases; an indication of where they live; and whether they wish to click and collect for free, have a fast delivery, or have a standard delivery.

The most important point here is that a consumer knows before making their final decision what the total cost will be. We accept that it is inconvenient for a consumer to reach the end of the process only to find that the price is more than expected – but evidence from baskets abandoned before payment suggests that a business that engages in unnecessary failure to provide the price upfront is already at a competitive disadvantage and the consumer may never return. Thus we have no objection to more effective enforcement but given the question in this case is specific to a particular practice which in itself leads to competitive disadvantage, we wonder whether other practices deserve priority if a choice has to be made.

The paper also mentions the practice of payment for ranking goods, services or digital content more prominently on a website and failure to make this transparent. The paper suggests this is already likely to be a breach under the CPRs presumably on the basis it could mislead. It then asks if government or regulators should do more to address this. The question in itself suggests a take it or leave it approach to enforcement which is a debatable approach. As indicated elsewhere if the suggestion is that this be placed on the blacklist, there is an overall question of approach to be settled first and then a question as to whether this is really such a problem that it needs to be on the blacklist of the most egregious practices. Clearly whatever system is used for listing, there needs to be a system of some sort and perhaps the more relevant question is whether all searches should indicate what that system is. Also if it is the case that a consumer is more likely to opt for the first thing they see, what is the effect of an actual advertisement at the head of the list?

Simplification and burdensome requirements

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?

Unfair contract terms are complicated and the requirements to place something to later be relied on not totally easy to interpret. We would suggest that clarification/simplification could take the form of a clearer requirement as to the key issues to be placed upfront – and that

these be as few as possible, simple, clear and concise to aid consumer understanding. In a shop there are implied terms – should this be extended to online sales?

We have also elsewhere mentioned the excess of information requirements that consumers ignore anyway and which require constant update in terms of product information and cannot be shown on a mobile in any sensible form.

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

The perverse incentives and unintended consequences derive in large part from having a raft of requirements including information requirements with which reputable businesses try to comply but in the absence of enforcement either by proactive action of enforcers or by acting on consumer complaints and obtaining redress then the advantage lies with the non-compliant - and those based overseas who may not be apparent as they are allowed to have co.uk websites which lead consumers into a false sense of security - who can build ever wider gaps with the compliant and make the playing field even more unbalanced in terms of costs, offers and business terms and conditions.

While this reflects on resources for enforcers – and just consider the number of EU websweeps that found non compliance year after year but it just was allowed to continue – it also reflects on the law itself. The more complicated it is and the more detailed it is in terms of all the information requirements, required assessments of principled regulation the easier it is for the non compliant to escape while the compliant spend time and resources seeking to comply.

Yet at the end of the day, it is often the reputable who are trying to comply that are singled out as an example – perhaps because it is easier to know where to find them to serve papers. Consideration needs to be given to an extension of the Primary Authority concept to actual regulation within the overall legislation so that those that can be trusted have greater flexibility to deliver compliance in ways appropriate to their business model, leaving enforcers more space to deal with those outwith that system.

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?

The obvious area is information requirements which can be excessive when the consumer protection plus the individual product requirements are added up – food, energy etc. being obvious examples – plus the key terms and conditions. Even more requirements are proposed in the paper. This is particularly burdensome when trying to display on a mobile where most online transactions now take place and will become even more so with voice purchases without the involvement of an agent.

More emphasis needs to be placed on the key requirements with some more advice on what regulators regard as the key requirements. It may well be better to list 4 or 5 key requirements to be placed prominently on a site from which orders can be placed. In that way consumers could be made more aware of these expectations and be suspicious of sites that do not have them – and enforcers could better identify the non compliant. It would help to level the playing field between the compliant and non compliant.

There is ample evidence that consumers do not read the detail of information provided – that is why they ignore recall notices in shop windows. By reducing the requirements to the basics they might be more willing to check. Those who have special needs such as nutrition advice could be directed to a larger website.

Given the fundamental changes to retailing, it is time for an assessment of the divergence between face to face requirements and online requirements, many of which were introduced to provide reassurance to consumers making an online purchase. Some years ago a DTI review even proposed the end of withdrawal rights online on the basis they were redundant and that they could always be offered as a commercial proposition as they are in some face to face stores. The BRC does not have a policy on that but we do believe that with so many businesses operating an omnichannel model there should also be an assessment of whether and where the divergence remains appropriate and where or whether it creates too many difficulties for consumers and businesses in an omnichannel world where one consumer standing in line with a return within 14 days can get a refund while the one next to them with the same product bought at the same time face to face cannot – and where one consumer is treated to pages of information about the product and the other simply picks it up and buys it.

These would be radical ideas and the BRC might well decide change is not to be supported – but it is such radical assessments for comment that we find lacking in this paper.

Overall, we would like to see a thorough assessment of current EU derived law with suggestions from the Government of the implications of keeping or removing any obligations.

Within this consideration there should be a proper assessment of the value and effectiveness of principled legislation as against detailed prescriptive legislation. When the UCPD was transposed into UK law it was a novel approach for the UK where hitherto traders and consumers had greater precision in what was and what was not allowed. There was quite some debate over whether this would be desirable or not, whether enforcement was realistic and whether there should be a blacklist of banned practices or not thereby mixing and matching to some extent. The average consumer concept and the transactional decision test to be applied in some circumstances were novel concepts.

One example that created much debate was the demise of the Prices Code that set out clearly the claims that could be made in offering a promotion and the like.

At the EU level, retailers across Europe successfully fought off too many additions to the blacklist on the basis that even these needed some interpretation and contextualisation if they were to be fair.

In the UK smaller retailers – and some large – kept pushing for the Code to be as prescriptive as EU law would permit.

In time retailers came to understand the requirements of this and other more principled outcomes-based legislation and the Primary Authority system created one way of filling in some of the blanks of some of it and applying them to make them relevant to the processes of individual retailers.

The BRE consultation is suggesting that there should be more principled legislation with the detail either filled in by the courts (we do not support that suggestion because it would create total uncertainty) or by Regulators (again this raises many question marks) or perhaps by businesses themselves via Codes (we also have many reservations about that). However, in the context of this Command Paper the point is there could be principled legislation filled in by

businesses with PA type advice or by an element of prescriptive regulation in certain areas.

We note that enforcers have not found it easy or worthwhile to take businesses to court for breaches of the general principle – but neither have they taken many to court for breaches of the banned practices.

The BRC does not at this stage take a view on this issue – but we do believe it deserves a full debate in the context of consumer and competition law where different stakeholders, enforcers and regulators can argue their case and the outcome can be incorporated in future changes.

Refunds etc

The BRC is totally supportive of consumers receiving refunds to which they are entitled in a timely way. It should not be necessary to have to constantly chase traders for them and traders should react speedily to requests for legitimate refunds.

While some large and reputable businesses found difficulty in the pandemic, the CMA was able to deal with them and eventually secure a resolution. The real problem is all those lesser cases where individual consumers are denied their rights by unscrupulous traders who just ignore their requests. A quick look through Trustpilot reviews shows who they are. As we have emphasized elsewhere, the lack of enforcement and the ability to enforce even when consumers make complaints to Trading Standards and the lack of a body to which consumers can go not just for advice on how to do it themselves (arguably a very middle class concept) regardless of whether they have the time or resource to do so but to get someone to take up the case is a big gap in making consumer rights really relevant. ADR can help – but not if a trader will not even acknowledge the consumer's complaint.

Section 75 rights are, of course available – but the banks should not necessarily be left to pick up the pieces of disreputable traders unless they have not been diligent in withdrawing credit card facilities from those businesses that regularly feature in s75 claims. That would be a far more effective enforcement tool.

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?

We believe that those using savings clubs and the like need to be protected through the use of insurance or trust accounts. However, we do not believe there have been any cases in the last few years and wonder to what extent this remains a real detriment.

Where we depart company is the confusion with advance payments for ordering online. Savings clubs provide a financial service and should be treated in an appropriate discrete manner.

Q52. What other sectors might new powers regarding prepayment protections be usefully applied to?

Prepayment protections of the sort outlined above should be restricted to sectors offering a

type of financial service.

It is inappropriate to move from this to assuming that the same issues arise for other types of prepayments – not least when there have been no reports of such problems arising from recent bankruptcies. The answer to that issue is to change the order of creditors in a bankruptcy so HMRC is lower than consumers and business suppliers.

We regret the confusion that the Paper is causing by referring to savings clubs and the powers to deal with those and then also referencing the growth in online sales and prepayments and the need to deal with them in the same breath. – with the implication, real or otherwise, that this should be achieved through changes to contract formation and transfer of ownership.

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

We are not aware of how often retailers use terms and conditions to form the contract at any specific stage other than on payment or dispatch.

Q54. Does the practice of using terms and conditions to delay the formation of a sales contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?

We believe it is significant that the Law Commission stumbled across the practice in the course of its work on another issue and jumped to the conclusion that this must be detrimental to consumers and be a problem. Had it been a real problem it would have hit the Law Commission and others in the face instead of them just stumbling across it.

Were there a real issue the answer would be to change the order of creditors in the event of a bankruptcy to place consumers and suppliers ahead of HMRC.

We believe there has been a fundamental misunderstanding of what happens in practice and why it can be of benefit to consumers even in a bankruptcy.

Contract law requires 3 things for a contract to come into force:

- Offer to buy (from consumer)
- Acceptance of the offer (by retailer)
- Consideration (payment or the intention to pay by consumer)

In Scotland, consideration is not needed but we can ignore that.

Accordingly, a contract is formed when all 3 elements are in place. The Sale of Goods Act states that a contract is formed when the contract states it is formed.

In practice, the customer places an offer (to buy goods) and either pays or offers to pay and then the retailer decides in their Ts & Cs when they will accept the offer. For example, a major online retailer states that they will accept an order, and a contract will be formed, at the point they dispatch the goods to the customer. They also state that title (ownership of the goods)

passes to the customer on delivery.

Rather than the T and C determining when the contract is formed, the Law Commission proposal would, if payment has already been taken, determine the point at which the contract is formed (the contract has to be formed for goods title to pass from retailer to consumer) and at which title to the goods passes to the consumer. This point is essentially the earliest point at which the goods are allocated to a particular customer i.e. packaged and labelled for a specific customer.

As we pointed out, with supermarket deliveries and age restricted sales deliveries the contract is not usually formed until the point of delivery at the earliest (after any product substitutions or age verification checks have been completed) and may even be when the courier returns to the depot and uploads the final order details so these approaches will conflict with the new proposed law so these types of transactions would need to be exempted.

The Law Commission proposal is predicated on the basis that currently, if the retailer goes bust, some customers may not have a valid legal claim (under section 75 of the Consumer Credit Act) for a refund against the credit provider because no contract for the goods has actually been formed (as most online retailers form a contract at the point of dispatch). Similarly, with debit card transactions, the Law commission is concerned that consumers currently rely on the voluntary "chargeback" scheme but, as the scheme is voluntary, the debit card issuers could decline to refund. We have no experience of lenders refusing s75 CCA claims or of debit card issuers refusing chargeback refunds but the Law Commission and BEIS consider these significant risks.

The Law Commission proposals will mean that if a retailer goes bust and some consumers' orders are still in the retailer's possession (and have been labelled with the customer's details) then the consumer will be the legal owner of the goods. Accordingly, these consumers will in theory have the following remedies available to them:

- If they paid by credit card, they can sue the credit card company (subject to the value of the transaction being at least £100) because a contract is in place
- They can request the administrator of the retail company insolvency to provide the goods

However, from a practical viewpoint only a limited number of customers will benefit from these options because:

- When a retailer is under administration/in liquidation all normal processes are usually stopped so contact centre and delivery services are unlikely to be active. This means even if goods have been allocated to a specific customer, that customer is unlikely to know such and will therefore be unaware if a contract has been formed or not. How does the customer get any information about their specific order if the retailer's contact centre is shut, its warehouse has only skeleton staff and the administrator will not deal with individual consumers?
- Even if a customer is aware of allocated goods being held at the retailer's, or their courier's, warehouse the likelihood of the customer being able to take physical possession of those goods is remote – in all likelihood they would not be able to gain

access to the site or even if they did be able to transport the goods home from a distance away.

- The time from online retailers receiving an order to dispatching it is constantly getting shorter and shorter (some are working on a 20 minute target) so, in any event, if a business does go bust, there are not likely to be many allocated products still in the pipeline.

In summary, the outcomes provided by the credit and debit card companies on a "goodwill" basis have proven to be exceptionally beneficial for consumers meaning there have been no reported cases of mass consumer detriment during the last 18 months when lots of businesses have gone bust.

We therefore believe this is a solution in search of a problem – and a solution that is more likely to in practice be detrimental to consumers than of assistance.

Consumer Law Enforcement

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

The BRC retains the same in principle reservations about this proposal as it did when it was suggested in 2014. The fact that the CMA uses this model for competition matters where the parties will have ample preparation and advance notice is not in itself – though the paper constantly references this - a valid reason for introducing them to consumer protection issues that are very different in nature.

Having said that, the BRC notes that the key task of dealing with consumer detriment seems to fall on Trading Standards at various levels based on the savings for consumers achieved. The CMA has an important role at the national level dealing with market wide problems taking action to gain compliance in 16 sectors over 6 years, obtaining 131 undertakings, and concluding 17 consumer protection cases in that time frame with a direct saving to consumers of £387 million plus £200 million during the pandemic on cancellations.

We also note that the CMA and others face significant delays in enforcing consumer protection legislation because it may need to go to court at all stages of an investigation – while requesting information; taking action when undertakings have been breached; seeking a court order to end infringements; enforcing an order granted by the court. Moreover, the paper states that civil cases are lengthy, costly, complex and there are no financial penalties for breaches of consumer protection law and few civil sanctions for frustrating the enforcement process.

It is important to recognise that justice needs to be fair not just efficient – albeit that too is desirable. What we find missing in the Paper is any reasoning as to why these specific problems faced by the CMA cannot be addressed within the current system rather than a wholesale change to the system being necessary. Why not address the lack of financial penalties and sanctions for frustrating the enforcement process – providing that can be proven. Why not examine options for dealing better with breaches of undertakings where these are proven? While much of this must be frustrating for an enforcer, our system of justice works on the basis of an enforcer – including the police – having to go to court and prove a case rather than the

enforcer itself acting as prosecutor, jury and judge.

The request here is for the CMA to have more powers than the police or indeed an ordinary consumer trying to get justice by having to enforce their rights themselves.

On the one hand there is a requirement for efficiency and a capacity to deal with poor practices or market wide problems and on the other a requirement for due process.

Noting that the CMA has largely used undertakings to secure compliance this process would not necessarily by a move to an administrative system unless it is thought such a system would bring greater pressure to bear to agree an undertaking rather than run the risk of an administrative penalty. In any event there are some objections to a system of secret undertakings whose terms are unknown to competitors and which therefore fail to clarify the law or the CMA view of the law for everyone. However, it should not be impossible to reach a point where breaches of undertakings can be dealt with more swiftly as is proposed elsewhere in the Paper.

This leaves us with the 16 sectoral actions and the 17 actual cases over the last 6 years. In the case of sectoral action, clearly this requires considerable investigation regardless of the system. We note that having determined there is a market wide problem and the remedy, individual businesses can play the system and delay corrective action. We believe that it should be possible to legislate to prevent or reduce this without necessarily moving to a total administrative approach. Interim measures, for example, could be required pending appeal.

We then come to the 17 actual cases in 6 years. There is no indication in the paper whether there is an intention to increase the number substantially if there is a move to an administrative system or if the basic approach is to remain much the same with possibly a few additional cases given the claimed time saving benefit.

As we have stated the BRC has some in principle reservations about the introduction of an administrative system. Regardless of the number of cases it would require a range of safeguards. There are questions over how far it might spread within the overall system. And there are questions about using the system against one trader as an example to the rest when that trader has not had its day in court.

We also have concerns with the statement in the paper at 3.14 – 'Without stronger powers, including fines for frustrating enforcement procedures or breaking the law which can be deployed without a series of lengthy court actions, the CMA could shorten enforcement by many months or years, stopping harm to consumers far sooner'.

The way to address this problem could just as well be the proposals elsewhere in the Paper with fines for proven frustration of enforcement procedures; fines for breaking the law; and added to that changes to the court processes to speed them up.

Clearly any enforcer could shorten the process if it could itself decide the law had been broken and then fine the culprit – and cut some of the current corners to do so. The question is whether the corners, however inconvenient, are there for a purpose and would in fact to be fair need to be introduced into an administrative system.

The system proposed is set out at 3.17 as CMA having powers to decide whether a business is, has or is likely to infringe certain consumer laws; if so decide on a direction to stop and provide compensation for victims; and also whether to pay a fine.

In practice, this would seem to have very different implications from competition cases, not least in view of the type of businesses that may often be involved.

It would seem quite a draconian change in principle if it is to be applied to just 17 cases over 6 years – though presumably it also applies to the sector wide issues where a business does not comply with the remedy.

In conclusion on the overall matter of moving to an administrative system, we believe the introduction of administrative penalties could be counter-productive to a co-operative approach to enforcement if that enforcement culture of consultation and education first is not already in place prior to their introduction. Businesses must not be dissuaded from seeking advice and guidance through fear of the regulator and the regulator must not seize the approach as a means of avoiding a risk based targeted approach.

Indeed, we believe that it is essential in such a system where a regulator has administrative powers that the regulator is willing to provide guidance on its understanding of the law as it applies to any business situation and that a business can rely on advice it has been given by any enforcer. As such we believe the CMA should be required to follow and accept Primary Authority assured advice and become a fully fledged supporting regulator. It should also be required to develop its own system of providing assured advice on which a business can rely.

We understand the reasons and have faith in the CMA to act reasonably and fairly but nevertheless as a matter of basic principle we retain reservations about a system where a powerful regulator however well intentioned is prosecutor, judge and jury. The road to hell is paved with many good intentions.

Before setting off on that path we believe the government should explain the drawbacks to dealing with the identified specific blockages and drawbacks within the existing system instead and consider whether there are better ways of dealing with those cases where a business is not implementing market wide changes that are proposed for all businesses.

If the government does decide to proceed we believe the statement in 3.23 about basic protections must be implemented in full.

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?

We support the CMA retaining the same enforcement scope as now where it shares the same system with other regulators. Where another regulator does not have administrative powers, it could cause unfairness and confusion if the CMA is acting on an administrative basis and others on 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?

It is not entirely clear whether the administrative powers are an optional addition for the CMA or their only route to enforcement. This should be clear. If the regulator has an option, so too should the defending business.

The problem with an administrative system is that once the regulator has decided for itself that there has been a breach, that same regulator is the recipient of representations. Those representations are not clearly on the basis of the victim being regarded as innocent until proven guilty – the victim is virtually having to prove his innocence. No appeals process can properly overcome this because an appeal even on merits requires the accused to prove he is not in fact guilty rather than the enforcer having to prove he is. This is a reversal of the burden of proof – and in the case of the CMA a reversal for the most serious cases.

The processes and procedures must do all they can to overcome this and be set down in legislation. They should not be determined by the Regulator. They should include:

- The same level of proof should be required as would have been necessary in court.
- There should be no criminal record on the basis of a finding in an administrative case.
- The processes should at all times be based on a presumption of innocence until proven guilty.
- The business should be entitled to legal representation with procedures in place for cross questioning as in a court.
- The business should not be required to make representations prior to appearance before the judging team that may undermine its case.
- The business should be given sufficient time to provide any requested information and the request should be precise.
- The business and its legal team should be supplied with all the evidence against it together with a statement of the alleged breach, the law on which the allegation is made and the reasons why the CMA believes the alleged action by the business falls within the scope and its interpretation of the law
- Within the regulator there should be Chinese walls between the investigating team and the judging team – and the investigating team should be required to prove their case to the judging team.
- The judging team should determine whether the investigating team has correctly interpreted and applied the law and followed due process
- The judging team should decide the consequences of a finding against the business on the basis of representations both by the business and the investigating team
- The judgement should be in writing, with reasons provided and the basis for any penalty
- Payment of a penalty should be suspended pending appeal

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?

We agree with the government that the appeals body should have the full range of powers and scope.

Given the nature of an administrative system where the same regulator is prosecutor, judge and jury and the nature of any appeal system is that the business is probably having to appeal

against conviction and thus a finding of guilt – though ideally the appeal could proceed in these circumstances on the basis of the regulator having to prove its case rather than the business having to prove its innocence, the appeals process needs to go way beyond judicial review of process and include issues of interpretation and application of the law; issues of fact; admission of any fresh evidence; and the ability to dismiss the case or revise the penalty.

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?

While there is some attraction in a specialized body dealing with very technical issues, on balance we are inclined to the view that appeals should be to the High Court for consistency with decisions made on cases brought by other enforcers and because the issues in consumer protection cases, unlike competition cases for example, would benefit from a degree of broader understanding of their context.

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?

It is important that businesses comply with requests for information properly made. However, there is a quid pro quo. The regulator needs to make the information that is requested totally clear along with the reasons the request is being made including whether the business is under investigation or not. A business that is under investigation should not be required to provide information that could undermine its defence without the option of legal representation. Where the request is vague it cannot easily be met.

While we accept the power to impose a fine for failure to comply the timescale must be reasonable and a reasoned request for an extension must be considered on its merits.

We do not accept that the regulator should itself determine that a request has not been diligently met or that it could have been met within the timescale provided. A business should be able to appeal to the usual body determined for appeals in administrative cases on the basis the request was improperly made, was not clear or was not possible within the timescale.

The level of penalties would seem to potentially be 100% of turnover after 20 days which combined with the 1% of annual turnover could in some cases where a business relies on immediate turnover takings (and this is turnover not profit) to pay staff and suppliers lead to bankruptcy. There would have to be a very serious reason for the request to lead to such a situation and perhaps should require formal enforcement action against the business to have begun for the highest penalty.

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?

Undertakings should be a serious commitment made by a business to agree to do something. They should be public so that competitors are aware of what has been agreed. This in itself

would act as an incentive to abide by them.

We would be reluctant to agree to fines for breaches where the reason for the breach is that the business no longer believes it was in breach of the law in the first place or that competitors are not being brought into line for similar action. An undertaking should not be requested unless the regulator has some evidence the business is breaching the law.

It is also the case that unless there is an admission of guilt neither the enforcer nor the business are likely to have assessed the evidence as thoroughly as might be required for the regulator to take an actual case. A business may in due course come to believe the undertaking was given unnecessarily to a regulator that had access to administrative determinations and fines.

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

Undertakings without an admission of guilt are a useful procedure to ensure compliance and may more readily be given if the business can be sure that the undertaking carries no such reputational risk and cannot be used in a case of collective redress, for example, that may be pursued against it.

The process for agreeing an undertaking with an admission of guilt and with a penalty attached would need to be akin to the process for a formal enforcement procedure where a business could plead guilty without having to provide any undertaking. The penalty reduction would therefore need to be relatively substantial to make this attractive. An admission of guilt provided under such an arrangement would not be suitable a basis for other businesses to understand their legal obligations in the manner proposed because it would purely be the view of the business concerned that it was in breach, the circumstances of the breach of the law may not be clear and in any case the business may have admitted the breach simply to move on.

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?

The enforcement powers should be that the admission is taken into account in any subsequent enforcement action and if the body with the authority to adjudicate on the breach agrees that the grounds on which the undertaking was provided was in fact a breach of consumer law, then the failure to abide by the undertaking should be an aggravating factor.

Supporting consumers enforcing their rights independently

The key issue here is in the title which reflects the whole thrust of the Paper – consumers are expected to enforce their rights independently. As the Paper states, most complaints are individual in nature and consumers need knowledge and support to pursue them for themselves and may be less capable of expressing themselves even in an ADR process.

This is an ex cathedra statement without any room for debate as to whether consumers enforcing their rights independently creates a level playing field for businesses or whether this independent enforcement delivers for consumers.

Most consumers do not have the time to pursue claims especially when the business itself is not willing to engage and is not responsive – and the fact is that the problem claims are often against a business that is unresponsive even to the request to address the issue. Such businesses will not even acknowledge the request to go to ADR.

The new approach to ADR for all types of disputes and the call for evidence from the MoJ for thoughts on out of court dispute resolution to become part of the overall legal system could solve some problems but is a long way off and will not solve the most intractable.

For them consumers need someone official to actively pursue the issue on their behalf – with conditions such as the consumer had tried to contact the company and received no response or a total rebuff – and that was why we supported the concept of a Consumer Advocate long since dropped by the Government.

It is also a reason to support online services such as Resolver which assist in a very direct way. Dispute resolution does not necessarily have to be through a formal ADR approach but can be through one which enables the complaint to be brought before a business in a better way. It can also gather real evidence of businesses that fail to co-operate with consumers which enforcers should use to follow up with those businesses where there is evidence of widespread failure.

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

While there is a formal, albeit wide, definition of vulnerability we believe that it is better understood in relation to specific activities rather than in relation to age or education or economic circumstance – important though those may be. For example, nearly everyone is vulnerable when negotiating a financial service beyond something basic; or setting up a pension; or when getting a car serviced or a home improvement.

If we take this wider definition, it can be seen that what is needed is not a service for certain sections of the community – but for everyone when faced by something they find complicated or do not understand and need active assistance to resolve a complaint they believe they have.

They need to be able to go to someone; present their complaint and get advice on whether it is legitimate; have someone put it to the business; and only then if the business fails to engage or gives an unsatisfactory answer should adr or any other legal avenue proceed.

Better enforcement across the board against below par traders will also help establish greater confidence that the trader with whom they are dealing is providing legitimate advice on their rights.

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?

The experience of the regulated sectors may not be comparable. Such sectors tend to have fewer businesses and a large volume of complaints so they can employ experienced complaint

handlers who can deal with matters quickly based on experience and familiarity with rights and common issues.

Smaller businesses and indeed businesses that have only a few higher value products that might warrant an ADR intervention on the other hand may hopefully have far fewer and irregular complaints which have to be dealt with by someone who has other responsibilities and may be unfamiliar with the requirements. For them a longer period may be necessary particularly where the complaint is very individualized such as a home improvement. Even if the period is reduced there should be scope for the actual taking up of the complaint by the ADR body with the agreement of that body to be extended pending further investigation.

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?

One reason for failure to go to ADR has been that businesses do not have confidence in the impartiality of the ADR provider or that it has been properly vetted for knowledge of a consumer's real rights, which should form the basis of its adjudication, Improvements to that process – and regular checks along the lines of the CQC elsewhere - could lead to more confidence in the system.

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?

We would think it unlikely that a very low fee for consumers would have any sort of deterrent effect on frivolous claims, given that the reason for nominating the sectors is the high value of claims.

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

Better enforcement and take up where a business refuses to engage – possibly with a default to accepting the consumer's case in such circumstances.

Other enforcement issues

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?

Collective redress can be useful provided the usual requirements are met – loser pays; opt in; ex post proof of a breach. We do not see any need for opening up further routes without more evidence of need and without a much more fundamental discussion of the advantages and disadvantages than is presented here.

If an administrative system is applied using collective actions to prove a breach could complicate the process with both the courts and the regulator involved in determining the breach. Business needs a degree of certainty that such an approach could undermine.

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?

In any extension of this nature the basic rules would need to apply – loser pays and opt in. The organisation bringing the case would need to establish upfront that it can pay both its own costs and the reasonable costs of the defendant(s). Our preferred option is for public enforcers alone to bring cases – after a breach is proven.

The danger is that organisations would pursue political campaigns rather than undertake serious cases on behalf of consumers that have no publicity value.

Further consideration of the implications for a collective action would be needed where the breach was proven by an administrative route or where an action was pursued on the basis of an undertaking where liability was admitted.

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?

As we have indicated elsewhere, we regret that the paper has failed to address in any substantial way the key requirement before any changes to consumer protection law are considered – namely whether the current enforcement landscape is working and whether or not changes need to be made.

We have said in a wide range of places that enforcement at a level below that of the CMA is broken – but is vital for a level playing field for businesses and for consumer confidence in markets especially those online. The clear evidence of that failure (and perhaps of excessive regulation) is provided by the EU websweeps which consistently came out with breaches that were repeated year on year because nobody did anything about them.

We do not believe that individual Trading Standards Departments at a local level are best placed to deal with online scams, consumer complaints about unfair trading and with monitoring the online market for compliance which is not only national but international in its scope. Without that all the changes to consumer protection in the world cannot succeed properly. The CMA can take a few major cases with national significance a year at most. Something more and better is needed below that. It is in the interests of both businesses and consumers.

For this reason, we would support a fully and directly resourced National Body to undertake this activity – to monitor and police the market and take forward consumer complaints.

With regard to local services, the options are either that the Government ring fences funding for Trading Standards instead of leaving it to local authorities or that it starts to consider the case for a national service delivered locally. In the latter case, the overall body could take on the online role above, thereby integrating the overall operation.

We acknowledge this may not be a popular change in every locality and all parts of the service – but we believe without such changes Trading Standards services will go into further decline as funds are restricted and local authorities downgrade their importance compared with other

services that are more apparent to local people.

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?

The real success story is Primary Authority and its provision of assured advice to businesses. The scope should be extended and it should be made easier to add new – and existing – regulation to the remit.

In the case of consumer legislation, the CMA should be required to accept assured advice – which it does not currently do. It should become a Supporting Regulator in the fullest sense, willing to review advice when asked by a Primary Authority. And as we have said elsewhere, one of the conditions for it being given administrative fines powers should be that it itself becomes a sort of national PA required to provide assured advice either directly or vis a local authority thereby providing a degree of certainty to businesses.

The advice provided by CTSI could be improved – but this could be a more limited improvement than suggested below if the PA system were expanded in this way. When the business advice service was transferred to CTSI there were fears that it would not carry the same weight as when the Government itself prepared the advice and placed it on the Government website. Additionally, we do not believe that CTSI has the resources to develop advice in consultation with stakeholders and to take any risk that it might be relied upon but turn out not to be accurate. This was the case with the replacement for the Prices Code where it agonized over just how far it could go with would and should and the like.

It is important that all enforcers accept the advice as valid and that it be authoritative. Many businesses may not realise the role of CTSI in providing guidance and tend to look elsewhere.

We also regret the separation of business and consumer advice. It is important that consumers and enforcers and businesses are all working from the same hymn sheet if disputes are to be resolved and if there is to be a common understanding of rights and duties of all parties. While the advice may be interpreted differently for different audiences, the basis advice should be one and the same.

The BRC would welcome the reintegration of the role of provision of advice and its allocation to a Government controlled body, potentially the CMA which has both a consumer and business facing role.