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Submitted to Reforming Competition and Consumer Policy
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About you

What is your name?

Name:
[redacted] responding on behalf of a business client

What is your email address?

Email:
[redacted]@hilldickinson.com

What is your organisation?

Organisation:
Hill Dickinson LLP responding on behalf of one of our business clients

Are you happy for your response to be published?

Yes, but without identifying information

Would you like to be contacted when the consultation response is published?

Yes

Consumer Rights

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

Not Answered

Please expand on your answer here.:

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

Please respond here.:

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

Not Answered

Please expand on your answer here.:

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

Please respond here.:

34 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?

Not Answered

Please expand on your answer here.:

35 How would the reminder requirement impact traders?

Please respond here.:

36 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?

Not Answered

Please expand on your answer here.:

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

Please respond here.:

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

Please respond here.:

39 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)?

Not Answered

Please expand on your answer here.:

40 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?

Not Answered

Please expand on your answer here.:

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

Not Answered

Please expand on your answer here.:

42 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?

Not Answered

Please expand on your answer here.:

43 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?

Please respond here.:

44 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?

Please respond here.:

45 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?

Not Answered

Please expand on your answer here.:

46 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?

Not Answered

Please expand on your answer here.:

47 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?

Not Answered

Please expand on your answer here.:

48 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?

Yes

Please expand on your answer here.:

The current climate (COVID) has highlighted that businesses and consumers would benefit from there being greater clarity in relation to when a contract is frustrated in law, and the role the availability of relatively low cost insurance plays when considering if a Business' refund policy (refusal to refund) is unfair or not.

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

Not Answered

Please expand on your answer here.:

50 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?

Not Answered

Please expand on your answer here.:

51 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?

Not Answered

Please expand on your answer here.:

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

Please respond here.:

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

Please respond here.:

54 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?

Not Answered

Please expand on your answer here.:

Consumer Law Enforcement

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

No

Please expand on your answer here.:

At present, the approach taken by the courts in England and the CMA as regards certain aspects of consumer protection law are not matching up. One judge recently said that the court needed to give due consideration to the CMA's views (as raised by the Claimant) but that the CMA can't change the law in England and Wales, and the Court found for the Defendant. It is concerning that the CMA's views contradict, or go further than is legally correct in respect of, certain aspects of consumer protection laws in England. Due to this, the role of the courts in England and Wales is still a very important one to balance all the different important interests. One suggestion that may assist in this, is if the CMA seeks approval of its consumer protection laws guidance from a scrutiny or oversight panel that includes business representatives as well as consumer champions, before issuing that guidance. This would result in clarity for consumers and businesses and prevent cases going to court based on guidance that businesses do not always agree with (and which the courts have not always agreed with or wanted to enforce in all instances). There is a concern that the CMA isn't impartial like a Court, and is instead championing only the consumer rather than balancing the interests of consumers and businesses which is what consumer law often requires.

56 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?

Please respond here.:

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

Please respond here.:

If the CMA is going to take a proactive view to identifying breaches of consumer protection law, investigating them and giving a decision, it's important for the CMA to act even-handedly in relation to businesses within a sector in potential breach, and for the CMA to approach each case in a manner which is joined-up with the courts' view of whether there is a breach or not, otherwise businesses subject to review may doubt if the CMA is correct and matters will end up in the civil court system in any event. Perhaps the CMA could test its proposed decisions with a scrutiny or oversight panel which includes representatives of business before finally making those decisions. This would not preclude appeals, but it would certainly focus minds on the limited matters that any appeal may need to be on.

In terms of appeals, it would be fair for any decision of the CMA to remain confidential until any rights of appeal have been exhausted (as decisions can change on appeal, and significant harm may be caused to a business in the interim). The right of appeal should be open to business without unnecessary emphasis being placed on the downsides of ending up there (financial, reputational or otherwise).

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

Please respond here.:

59 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?

Yes

Please expand on your answer here.:

The key is that wherever the appeal is heard, the rights of consumers and businesses should be weighed against each other. To tip too far one way or another should not be the basis of consumer protection law. A specialist tribunal could allow specialised training in the competing interests. An understanding of the financial pressures in a business (cashflow drivers, borrowing facilities, etc.) should be as important an understanding harm, disappointment etc. to a consumer.

60 Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

Not Answered

Please expand on your answer here.:

61 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?

Maybe

Please expand on your answer here.:

Any fine should drive good behaviour, but any fine should not be so large so as to drive settlements and exert unnecessary pressure as opposed to the proper trying and appealing of a matter. Fines should be harm-related rather than simply turnover-related.

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

Please respond here.:

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

Not Answered

Please expand on your answer here.:

64 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?

Please respond here.:

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

Please respond here.:

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

Please respond here.:

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

Please respond here.:

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

Please respond here.:

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

Not Answered

Please expand on your answer here.:

70 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?

Please respond here.:

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

Please respond here.:

72 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?

Please respond here.:

73 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?

Please respond here.:

74 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?

Please respond here.:

75 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?

No

Please expand on your answer here.:

Guidance needs to be consistent with what the courts in England and Wales would find; business and consumer confidence would improve in such guidance if it approbation from an oversight committee in advance comprised of business representatives as well as consumer champions.