The National Consumer Federation

Response to the consultation questions

Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers

Presented to Parliament
by the Secretary of State for Business, Energy and Industrial Strategy
by Command of Her Majesty

July 2021

Key response topics

Metrics for market competitiveness and the effectiveness of competition in reducing consumer harm and detriment

Regulation that establishes principles and makes use of British Standards for assessing compliance as per National Quality Infrastructure practices

Addressing compliance with nuanced market surveillance and enforcement

September 2021

The National Consumer Federation

NCF response to the BEIS consultation

Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers July 2021

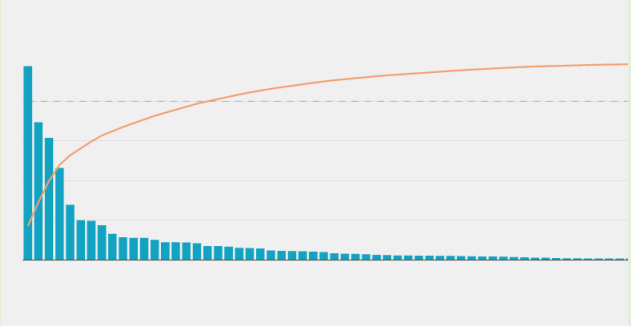
Consultation questions

Competition

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

   "Fair and open competition is the bedrock of the UK economy. The competitive process creates incentives for firms to deliver the deals on goods and services that consumers want and need and to innovate to create new goods and services to win market share from rivals."

A key question for consumers is whether a sector is dominated by a few huge providers who need investigating for uncompetitive practices. So a publicly available, transparent, pareto distribution of market shares of companies in each sector should be provided against which the public can understand any steps being taken to address fair competition and consumer protection. In addition, where needed, such a distribution should be taken down to product type too.



https://mode.com/blog/pareto-chart-101/

Proportionality

Since the larger the business the greater the number of individuals affected by any unfair or harmful behaviour by that business, competition and all other regulation should be shaped so that greater market share brings with it the need to meet greater regulatory compliance. Through such a mechanism the entrance and initial growth for innovative companies would be favoured.

However innovative companies should be required to use good innovation practices that demonstrate a duty of care in dealing with consumers and practices that are not fundamentally exploitative of consumer biases or vulnerabilities.

Measurements should be in place to demonstrate the proportional application of regulatory requirements by market shares.

Other measures of whether markets are working to the benefit of consumers

UK consumer access to fundamental goods and services

Within the UK competition does not necessarily guarantee access for all consumers to basic goods and services when the economics are unfavourable. It is essential that the CMA should include the profiling of market sectors for consumer impacts that are due to inadequate or no access to food, fuel, energy, water, health services, transport, basic financial services like banking and insurance, and digital communications access.

In the 2020's these are such basic consumer needs that the CMA must ensure that unfettered market behaviour does not leave consumers short and suffering due to inadequate availability by location or circumstances.

Competition to reduce carbon and other waste that impacts the environment.

Given the huge challenge facing the UK and the world the CMA should have measurement and a competitive framework that encourages sustainable product design and business operations.

Markets with high consumer detriment

It is essential that regulatory action through enforcement is taken where market competition is not preventing high levels of consumer detriment. The CMA should ensure it has in place and maintains measures for consumer detriment by sector, and even products where needed. More NCF consultation feedback on this aspect of competition is provided in the enforcement section questions

Global competitiveness

Inefficient markets affect UK productivity and the impact of bad actors who cause consumer detriment result in corrective 'put it right' action and / or lost expenditure both of which in turn dilute productivity. This means addressing consumer detriment and its impacts are directly helpful in reducing wasteful activity, improving effective productivity and our competitiveness as a nation. A 'lean' economy approach.

Though not strictly a consumer issue, the NCF would like to see more British globally successful companies. We appreciate that to compete and grow internationally a company needs the ability to make substantial investments, whether in take overs or innovative R&D. We would agree that this factor be allowed for with British owned companies when their UK market competitiveness is considered.

2. 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?

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

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

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

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

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

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

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

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

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

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

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

14. Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

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

16. Q16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

17. Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement

process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

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

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

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

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

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

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

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

25. 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?

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

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

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

Compliance effectiveness is also very much governed by how good the market surveillance is. If bad actors think they can get away with things,

compliance is low to non-existent. Strong and effective market surveillance is required.

Enforcement also faces the challenge of bad actors, who think they are going to get caught, folding their businesses and starting up a new business to continue under a different name. The CMA should strengthen the ability to track and enforce with respect to the individuals responsible rather than the organisation when it has folded.

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

Consumer Rights

30. 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?

This consultation tries to address detailed good practices where it should be establishing principles. Then the CMA should use detailed good practice British Standards for assessment purposes.

Principles for the CMA to consider include
- Clear, accessible and accurate consumer information
- Clear, accessible and easy to use subscription control for consumers
- Employment of a duty of care in applying subscriptions including product end of life and consumer end of use

The NCF propose that the CMA commission from BSI a rapid Publicly Available Specification for a consumer protection PAS for the creation and handling of recurring subscriptions.

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

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

33. 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?

34. 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

35. Q35. How would the reminder requirement impact traders?

36. 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?

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

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

39. 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)?

40. 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?

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

42. 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?

43. 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?

44. 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?

This is a clear case for making use of an existing standard for assessment of review sites. Available from BSI the standard is ISO 20488:2018 Online consumer reviews — Principles and requirements for their collection, moderation and publication.

Further any reasonable and proportional steps need to make use of the overarching principles that :-
- consumer review services themselves are subject to an assessment and compliance regime
- review services do not mislead consumers in review treatment or any associated promotional material.

The NCF particularly supports the use of this standard as it stems from NCF work in 2013 (ref https://thencf.org.uk/wp-content/uploads/2021/04/Trust-Schemes-for-Consumers.pdf)

As to business costs: There are independent businesses providing good practice review handling for organisations at low cost. (ref as an example https://www.referenceline.com). The NCF believes that reasonable costs and quality for such services are achievable and that the CMA should contact a range of these independent review organisations to confirm that view.

45. 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?

46. 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?

A factor of considerable concern in consumer choice techniques is that of personalised pricing which can be used to generate greater profits with adverse 'nudges'. Further it weakens the strength of consumer choice with no two offers the same between consumers for easy comparison.

The NCF recommends the application of the "Supermarket Shelf" principle whereby the same price is offered to any consumer in that particular sales environment at that time.

The supermarket shelf principle does not preclude the pricing practices of time based prices nor real or virtual location based pricing for individual sales environments. However time based pricing should be shaped by regulation to keep price changes over time at a human pace of change, for example no faster than every few hours and not every few milliseconds.

47. 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?

48. 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?

If simplification is under consideration then across all sectors and irrespective of who is responsible for regulation in a sector, clear and consistent requirements have to be maintained that products (goods and services and combinations of those) are fit for purpose in protecting consumers when being used in a reasonably foreseeable manner. That protection needs to be from reasonably expected levels of risk and harm.

Further it is vital that suppliers exercise a duty of care for their products in their development and delivery, and that such protection is maintained throughout their lifecycles.

There are particular challenges for products that include digital functionality which can be, and often is, changed a number of times during the lifecycle when consumers have acquired the product and it is in use by them. Within the National Quality Infrastructure, the repetition of independent acceptance tests for product fitness for purpose for every digital fix or design upgrade over the lifecycle would bring with it significant testing costs and hence burdens that could be significantly reduced with strong lifecycle duty of care regulation and standards.

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

50. 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?

51. 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?

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

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

There are International Standards being developed in ISO for fair terms and conditions.

In terms of an overall approach to address terms and conditions that cause detriment, much work needs to be done on understanding consumer reasonable expectations that should be fairly addressed in standardised T's and C's. That then enables the simplification that only exceptions to those expectations need to be highlighted to consumers.

54. 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?

Consumer Law Enforcement

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

A CMA power should be reserved for those occasions when existing market operation, law / regulation and surveillance / enforcement by any sector responsible regulators is proving inadequate in protecting consumers.

The issue of CMA empowerment is much more nuanced than the question implies. The CMA should assure itself and the public that all consumer sectors have effective market surveillance and enforcement in place as outlined below.

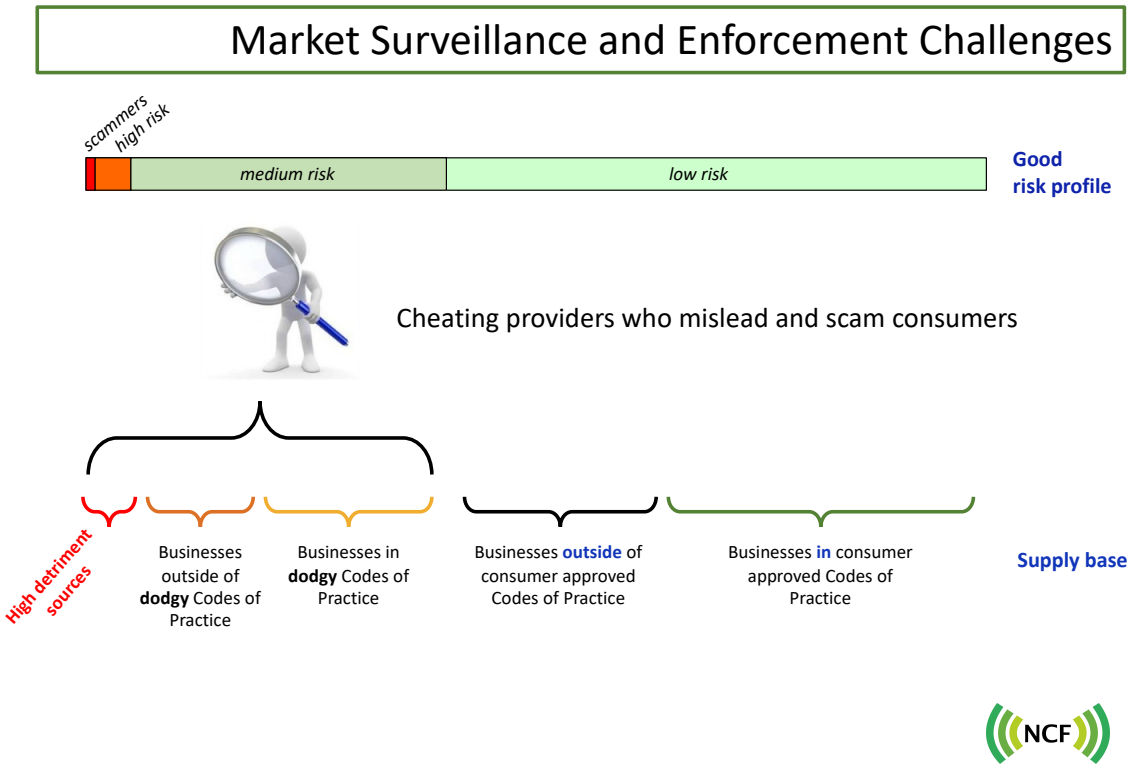
Market monitoring and enforcement to bring down consumer detriment needs to be considered against a risk profile of the supply side of the consumer market to identify where uncompetitive, unfair and misleading trading practices are occurring.

Risky suppliers of goods and services do not comply with regulations nor take due care when dealing with consumers and in so doing they rob 'the good guys' of market share and profits as well as creating much consumer detriment.

The CMA should ensure that each consumer sector has the supply side market consumer risk and detriment data to focus appropriate surveillance and enforcement action. In 2021 this is supply side risk analysis and action is particularly applicable to the growth in consumers' online digital world.

The figure below provided in this section shows what a good supply side market should look like when surveillance and enforcement are effective. The risk profile is based on early 2000's Trading Standards data.

Figure for Q55 – NCF supply side market risk framework



The different supply side risk segments in any sector of the economy require different approaches to surveillance and enforcement.

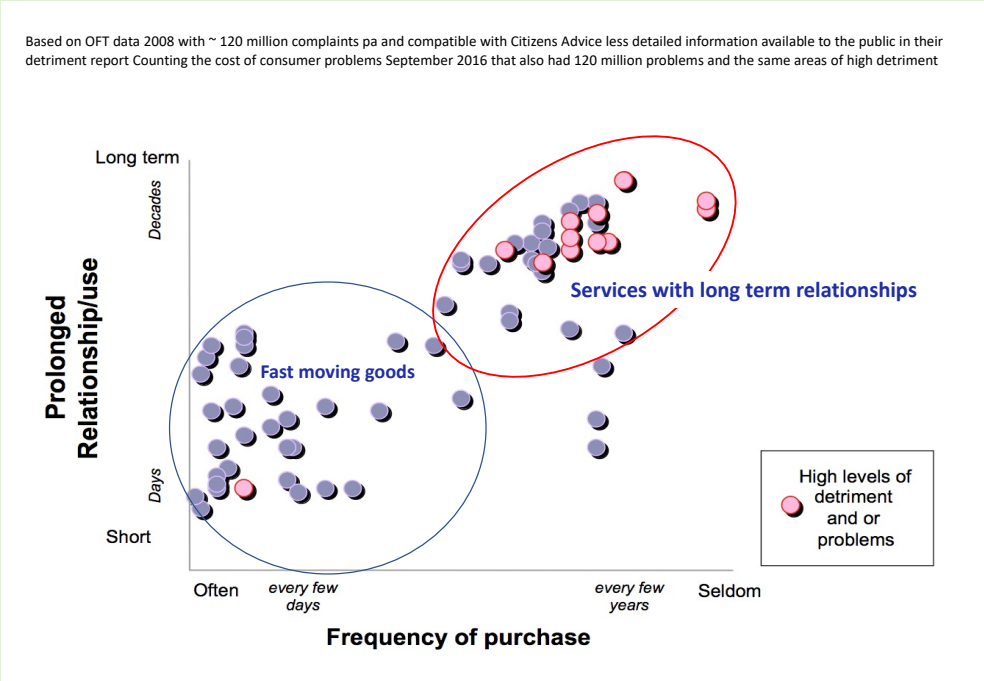
Businesses and organisations that are members of approved Codes of Practices, like those operating under the TrustMark banner, will be self-regulating with a high degree of effectiveness and so require the lightest of touches other than checks by UKAS on scheme operations and regulatory data collection from the schemes re complaints and risks.

Businesses and organisations that are not members of approved Codes of Practices but none the less are good companies who compete fairly and deal with customers well need a light touch from the CMA or other regulators or surveillance / enforcers. That light touch may well be visits spaced as long as once every 10 years to ensure that the businesses have not slipped back or, more likely, check whether they are up to date with the latest regulatory changes applicable to their business.

Medium risk businesses should be more closely monitored and efforts made to bring them up to standard with enforcement held in reserve as an 'encouragement'.

High risk businesses need intensive monitoring beyond waiting for consumer complaints to arise with enforcement applied straight away.

As we have previously submitted to consultations the priority markets for surveillance and enforcement are those where long term consumer relationships are involved and consumer detriment is high. See figure below



56. 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?

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

58. 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?

59. 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?

60. Q60. 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?

61. 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?

62. 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?

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

64. 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?

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

66. 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?

67. 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?

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

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

70. 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?

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

72. 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?

73. 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?

74. 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?

75. 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?

[redacted]

30th September 2021

[redacted]

Reviewed and approved by the **NCF** Board

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