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Submitted to Reforming Competition and Consumer Policy
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About you

What is your name?

Name:
[redacted]

What is your email address?

Email:
[redacted]

What is your organisation?

Organisation:
Institute of Consumer Affairs

Are you happy for your response to be published?

Yes

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?

Maybe

Please expand on your answer here.:

The definition should make clear that mixed contracts - goods & services, or goods and digital content for example, are also within the definition

The definition should also make clear subscription contracts require some form of renewal - whether automatic or with the express agreement of the consumer

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

Please respond here.:

These proposals will have an impact on traders but, we believe, that any cost is worthwhile to ensure that consumers have clear information about what they are entering into, how the contract can, or will, be renewed and how they can bring the contract to an end.

Good businesses will be aware that consumers generally do not read terms and conditions, as reported in the Green Paper. Therefore, there is real risk to the reputation of the business, and a greater potential to generate complaints (which are a cost to the business), if they hide behind copious terms and conditions.

We agree that the key information should be bought to the attention of the consumer, it should not be hidden or interspersed within a more general marketing communication. We also propose that information about subscription costs, renewal periods and methods to renew (or not) should be presented in prominent “Key Facts” boxes.

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

No

Please expand on your answer here.:

Businesses are already used to providing pre-contract information to consumers, so should be capable of doing this

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?

Yes

Please expand on your answer here.:

The reminder requirement should apply in both circumstances

35 How would the reminder requirement impact traders?

Please respond here.:

Businesses selling products that consumers value and enjoy, should have nothing to fear from giving consumers a clear opportunity to renew, or from giving them clear information about when auto-renewal will take place.

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?

Yes

Please expand on your answer here.:

We believe that both options should require information to be provided. Explicit consent should be given at any point where the trial/low-cost period ends or a contract auto renews. This should be consent and not just a reminder.

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

Please respond here.:

Although there is considerable logic in this proposal, it will be important to ensure that consumers are not disadvantaged if their contract is to be bought to an end. A recent example of this has been the closing of accounts by the Dartford River Crossing through lack of use (primarily due to Covid travel restrictions) which left consumers liable to a penalty charge for non-payment, because they assumed that they were still covered by their account. It would also appear that Highways England, potentially, benefitted financially by retaining funds from 'closed' accounts.

The notice provisions proposed above should also help reduce this risk. It will be important that any final notice to end a subscription is very clear about what is proposed, and the consequences, and makes proper provision for the return of funds that are due to the consumer.

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

Please respond here.:

The time period might depend upon the type of contract and the likelihood of, relatively, long periods of inactivity

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)?

Yes

Please expand on your answer here.:

Absolutely, entry into a subscription contract is easy (possibly too easy at times) enabling a consumer to fall into contract through being made more aware of the benefits, rather than the commitments.

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?

Yes

Please expand on your answer here.:

It is the experience of our members, that finding a way to cancel the contract can be exceedingly difficult, with the skills of a cyber detective needed to find the right page, and the patience of a saint to deal with the questions and checks that are put in front of you before, your legal right to cancel, is accepted.

It should also not be assumed that all consumers have internet access, therefore alternative means of cancellation should be provided, with no cost to the consumer.

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

No

Please expand on your answer here.:

We cannot understand why any exemptions should apply to consumer contracts that include the right to end, or not renew, them. The rules you propose require clear information to be given to enable consumers to make informed choices, why should any contract provider be exempted from such a requirement?

We are sure that you are aware that there any many problems with 'subscription traps' in the complementary health care sector. If there is to be an exemption for medicines, such an exemption must be very tightly and carefully worded.

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?

Yes

Please expand on your answer here.:

(c) would be our preferred option

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.:

Generating positive, and genuine, reviews are important to SME's and to consumers so should not be prevented

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.:

We do believe that sites that host reviews should take all reasonable and proportionate steps to identify fake reviews. Typically, these review sites are hosted by large online businesses who have the technology to identify fake reviews, particularly when questionable reviews have come from the same source in the past. These sites should have accessible mechanisms for fake reviews to be identified and reported (by consumers and traders) and then have the tools, through digital and human interaction, to proactively remove fake reviews and take action to block the sources of these reviews.

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?

Yes

Please expand on your answer here.:

Absolutely yes, many consumers use reviews as a part of their buying decision, it is essential that they have reliable information available to them.

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?

No

Please expand on your answer here.:

Many of us are not aware that these techniques are used, and this does cause us concern. These techniques may present even greater risks to vulnerable consumers who could be more adversely affected by these practices.

This would appear to be an area where more research is needed, perhaps the Behavioural Insights Team could investigate the negative use of 'nudge' techniques in marketing and their potential impact.

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?

Yes

Please expand on your answer here.:

Yes, we believe that both activities could constitute misleading omissions under the CPR's

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?

Not Answered

Please expand on your answer here.:

We believe that the Consumer Contracts (Cancellation, Information and Additional Charges) Regulations 2013 present a challenge to businesses, particularly those entering into off-premises contracts. We believe there are high levels of non-compliance particularly in the home improvements sector. This can leave hard-working and legitimate SME's vulnerable, due to their failure to give cancellation rights when required.

Your own Five-Year Review identified many challenges, but changes could not be made whilst the UK remained part of the EU. There is now an opportunity to undertake a complete review of these Regulations to identify simpler ways of ensuring that consumers are given clear information and, where appropriate, a right to cancel whilst enabling businesses to comply.

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

Yes

Please expand on your answer here.:

The Consumer Contracts (Cancellation, Information and Additional Charges) Regulations 2013 set a cancellation period, for sales contracts, that starts when the contract is agreed and ends 14 days after the goods come into the possession of the consumer. This means, for many home-improvement contracts, that consumers may have a very long period to cancel, the last 14 days of which are totally impractical to use because they will be after the goods have been installed. We wonder whether it might be more appropriate to place contracts involving both goods and services under the definition of a 'service', rather than a 'sales contract' providing a straight 14-days, from date of the contract, cooling-off period? This may also enable the removal of goods made to a consumer's specification from the exemption to provide a right to cancel - sadly some of the sectors that benefit from this exemption have a poor track record of pressure-selling.

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?

Yes

Please expand on your answer here.:

We do agree that this financial protection is needed and is, in our opinion, long overdue.

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

Please respond here.:

We already have a requirement for payment protection in the package holiday sector and it is our opinion that this protection should be widened to other pre-payments. We don't believe that this should relate to all prepayments, but it should apply where there are 100% upfront payments and/or where part-payments are made a long time in advance, such as theatre tickets. We feel that further investigation is required into the main areas of consumer detriment where payments are lost due to insolvency.

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

Please respond here.:

We do believe that these terms and conditions are in use online and are used by some major online retailers.

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?

Yes

Please expand on your answer here.:

We believe that now this risk has been identified it must be dealt with. The Law Commission has identified that these terms could deprive consumers of protection under section 28 CRA 2015, or section 75 of the Consumer Credit Act 1974, these loopholes must now be blocked.

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?

Yes

Please expand on your answer here.:

The CMA has now become a major enforcer of consumer law, which has been evidenced through their actions during the Covid pandemic. Powers of direct enforcement would enable them to deal with major consumer problems swiftly and effectively

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.:

It would make sense for the CMA to work under Part 8 of the EA 02. This would ensure clarity and consistency for regulators, consumers and businesses regarding the applicable law.

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

Please respond here.:

As under EA 02, we would expect the CMA to consult and to seek undertakings before taking formal enforcement action, unless there is an urgent risk due to the scale of consumer detriment.

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.:

Clearly there should be some form of appeals process available to those who are the subject of CMA enforcement action

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.:

We believe that whatever forum that is used should provide for swift recourse to appeal, ensuring that a business cannot continue to engage in an unfair practice for an unacceptably long time whilst waiting for their appeal to be heard.

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?

Yes

Please expand on your answer here.:

There is certainly an argument that other sectoral regulators should have these powers.

We also like to see consideration of lower-level fixed penalties for trading standards to deal with local detriment. As an example, a business that is continuing to charge for credit card payments can only be sanctioned through (costly) EA 02 action, whereas a fixed penalty could bring about compliance and reduce consumer detriment. This approach has, in our opinion, worked well for enforcement of the letting agents fees provisions of CRA 2015, and could be extended to the EA 02 for use by local Trading Standards Services.

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?

Not Answered

Please expand on your answer here.:

Most consumer protection legislation imposes a lesser penalty for a business that fails to provide information when requested to so, under an enforcer's powers. This provides an incentive for a business to fail to provide information with the sanctions being less than the principal offences that they may be committing. This is a perverse situation.

Legitimate businesses should have nothing to fear from this sanction which is, in our opinion, beneficial to consumer protection.

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.:

As we have already indicated, we believe that enforcement powers should include consultation and the use of undertakings prior to any administrative fines being raised, unless the situation is an urgent one with, potentially, high levels of consumer detriment.

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.:

We believe that the current availability of multiple ADR providers, particularly in the home improvements and motor trade sectors is confusing for consumers and, probably, more so for vulnerable consumers. This over complicates ADR, meaning consumers may not be aware of its availability and how they can access it.

The use of online technology has the potential to improve access to ADR, for consumers and businesses alike, but there is a trade-off between this and ensuring proper access for those who cannot work online at all or without appropriate assistance.

We are aware that the Citizens Advice Consumer Service does promote ADR, when dealing with consumer enquiries but vulnerable consumers may need more support to access the ADR Service. There is, therefore, a clear responsibility for all accredited ADR providers to ensure equal access for all consumers to their services.

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.:

There is a balance to be struck to ensure a proper opportunity to investigate and resolve a complaint whilst ensuring a swift path to ADR and resolution. Therefore, timescales may need to be sector specific, and allow for situations where a longer period may be more appropriate. As an example, in the current climate, delays in getting parts or getting actual goods delivered is a reality, due to Covid, EU Exit and other factors. Consumers do also need to understand the real-world situations that might lead to delays that might, otherwise, be unacceptable.

On the positive side, we are aware that many good businesses will resolve complaints, or refer a case to ADR, in much shorter timescales - the good traders do not sit waiting for the time limit to expire, they want these maters resolved as much as the consumer does.

Overall, we do not see a 'one size fits all' solution, this must be sector specific.

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.:

We believe that regulatory changes are needed to ensure that the Competent Authority carries out a robust oversight of accredited ADR bodies. In particular, the assessment should include the fitness, as well as the competence, of those running the body and their ADR Officials.

The Competent Authority should also ensure that accredited ADR providers have sufficient mechanisms in place to support the needs of vulnerable consumers.

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

Please respond here.:

We are concerned with the proposal that all ADR providers, including informal ADR bodies should be subject to accreditation. Many local authority trading standards services will offer informal services when dealing with disputes between local traders and consumers (particularly if they have an approved trader scheme), and many trade association will endeavour to resolve disputes between consumers and their members. These schemes, in the main recognise, that they are not the formal ADR process that consumers can still engage with if their dispute cannot be resolved, but they do resolve many complaints quickly without recourse to formal ADR. Extending accreditation to these organisations may have the effect of them moving away from

helping consumers, because they will not have the resources or systems in place to go through the formal accreditation process, thereby generating more disputes that need to be taken to an accredited ADR Scheme and disadvantaging consumers.

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?

Maybe

Please expand on your answer here.:

Although we see a real benefit to consumers in having single sector ADR providers, we are concerned how the mandatory nature of the scheme will be established and enforced. There is no doubt that schemes such as FOS benefit from the fact that part of the authorisation of the business requires participation and respect for FOS decisions. Failure to do this could result in the removal of an authorisation.

The volume of businesses, in the home improvements sector in particular, is vast and we doubt that the Government is proposing to set up a system of authorisations. Therefore, we are interested to understand what sanctions will be put in place to ensure that all businesses sign up for their sectoral ADR provider. We know, and will comment on this later, that local authority trading standards services do not have the resources to enforce compliance. We need more information before we would be able to support mandatory ADR, there is little point in putting mandatory requirements in place if there is an ineffective system of sanctions.

As an example, and very pertinent to the home improvements sector, we believe that levels of compliance with the Consumer Contracts Regulations is poor - but these are primarily hard-working and honest SME's who are unaware of the law, not just the rogue traders. Therefore, there will be a need to reach many businesses who would need to be aware of an ADR requirement, otherwise any change in the law would be ineffective and would not help consumers.

We would also be interested to know more about how the mandatory nature of ADR would be balanced with a consumer's or trader's right to launch legal action with regard to their dispute.

With regard to payment for ADR, we believe that is a financial decision for a business based upon the options available. An SME with the ability to resolve any complaints that they receive does not need to pay for a scheme that they are unlikely to use, this would appear like an additional 'tax' on their business.

If single, sectoral, schemes are to be adopted, we believe that these should all be Ombudsman Schemes and meet the standards of the Ombudsman Association.

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.:

Although there is an argument that a nominal fee would deter vexatious consumers, it is our members' experience that these consumers would not be deterred by a nominal fee and would continue with their dispute. A fee of any kind could deter consumers, particularly those on lower incomes, from taking their case to ADR. We see the proposal of a nominal fee as a potential disincentive for consumers to use an ADR Scheme.

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

Please respond here.:

Typically, Ombudsman ADR schemes also provide ongoing training, advice and sectoral insights which assist businesses in understanding their obligations and how best to meet them.

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.:

Although there are clear benefits for collective consumer redress schemes, we are worried about the costs of these action. We doubt that many local enforcers would have the resources to bring collective redress cases.

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.:

Although, we appreciate that local government funding is not within the remit of BEIS, it is a fact that local authority TSS are poorly resourced and have suffered massive financial cuts over recent years. The “Penrose Report” identified the enforcement gap, “The problem is LATS teams have been hollowed out in some - but by no means all - parts of the country by Councils facing budget pressures.” Mr. Penrose proposed that, “We should create a new statutory duty for minimum standards in LATS teams, including powers to mount antitrust and consumer investigations, and provide ring-fenced resources so they can deliver them well.”

In answering this question, we believe that the inadequacy of TSS resources is relevant to many aspects of this Command Paper. Dealing directly with this question, it should not just ask whether large national cases can be investigated effectively, it is should also ask about the ability of local TSS to deal with the smaller local cases which may, collectively, cause greater detriment than that solved by national investigations.

Overall, we believe that the relationship between NTS and TSS does work, although there will always be ways of improving these relationships. However we cannot ignore the fundamental issue is the lack of sufficient resources for TSS at a local level.

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?

Maybe

Please expand on your answer here.:

We believe that effective business education can improve compliance in many areas and show businesses the value of resolving consumer disputes. We believe that the Business Companion website is an excellent resource, but information is not enough on its own. Many of our members are frustrated by business support and regeneration organisations that focus on the economic aspects of a business without posing the important questions, “Is what I am about to do legal?”

There so many missed opportunities for public business support schemes, Chambers of Commerce etc and the banks to ensure the businesses that they work with are complying with all consumer protection legislation. Consideration should be given to how a duty could be placed upon all organisations working with businesses to ensure that there is adequate information about, and support to ensure that a business complies with, consumer protection legislation.

ADR Schemes should be required to adopt the Ombudsman approach to looking for lessons that can be learnt from a dispute which can be fed back to Scheme members. We believe that Ombudsman-type feedback loops should be mandatory for all accredited ADR Schemes.

We are also concerned about the quality of some online consumer protection resources for businesses, provided by well-meaning but uninformed sources. Adding to our comments above, we believe that signposting by business organisations etc should only be to recognised sources, such as Government websites, Business Companion etc.

Finally, we would also like highlight the lack of consumer education in the UK. Although many websites, Citizens Advice and Which? for example, provide excellent information, this is not consumer education. Resources are no longer available, at a local level, to work with schools and community groups to improve consumer knowledge. Informed consumers are key to what you are proposing.