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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:
Trustpilot

Are you happy for your response to be published?

Yes

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

Yes

Competition

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

Please respond here.:

More in-depth analysis of consumer (customer) sentiment and the level of trust in businesses.

For example, does survey data collected on consumer problems reflect a higher incidence of problems, or a greater propensity for dissatisfied consumers to take action? The 2020 State of UK Competition report says at 4.26 that: “[...] 12.9% of UK consumers experienced at least one problem worthy of complaint compared to the EU average of 8.5%.” Data limitations are acknowledged in the report, but we know from online reviews that issues can be complex, and can reflect mismatched expectations, misunderstandings, or misinformation. The distinction between problems and perceived problems may not always be accurately captured in data sets. Analysis of customer sentiment can give a more nuanced picture.

2 Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

No

Please expand on your answer here.:

This is likely to be disruptive or burdensome for businesses, especially if creating such documentation is a regular exercise. The CMA should commercially procure relevant data in return for fair compensation.

There are also free resources available, which are open to use by consumers, businesses and government, and can provide useful insight into the state of competition in the UK. For example, online review platforms such as Trustpilot can be used to gain both an overview across certain markets and their trends, as well as drilling down into more specific detail on what problem areas might need to be addressed.

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

No

Please expand on your answer here.:

While the CMA must remain transparent and accountable with its work, it should not be subject to more regular, and formalised, directional influence from the government. The traditional, high-level strategic steer issued once a Parliament should be sufficient, also to avoid shifting the goal posts in terms of priorities, decreasing business certainty, and further damaging consumer trust.

While steers are non-binding, more detailed priorities and expectations could mean the CMA is seen to be more politically influenced than it is politically independent, and this could damage the credibility of its work. As Lord Tyrie stated in his May 2019 speech: "...The task of rebuilding public trust and

confidence requires ... the CMA to be a more visible and vocal consumer champion, independent [...] of political pressures. ..."

CMA priorities should remain evidence-based, and grounded in the accumulated market knowledge it gains through carrying out its work. As reflected at 1.23, the CMA's report into the state of UK competition is built on academic research and "widely publicised concerns", so it is inevitable that the CMA will be influenced by real-time public and political discourse, and that this, along with accumulated expert knowledge will be implicitly factored into their prioritisation.

The points set out at 1.42 seem likely to impose an extra administrative burden on the CMA, which is not in line with the broader aim of increasing its efficiency and effectiveness. A requirement that the CMA provide explanations for why it has departed from any non-binding steers (at 1.44) can be viewed similarly.

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

No

Please expand on your answer here.:

While this would arguably provide the CMA with greater flexibility, and the proposal provides that the same legal standard as for a market investigation must be met, it is questionable whether the level of detail in the information and insight uncovered via a market study would be sufficient to allow the imposition of effective remedies. Given the potentially substantial effect of remedies on the concerned businesses, this approach seems short-sighted unless it can be balanced with robust safeguards.

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

No

Please expand on your answer here.:

While we agree that market studies and market investigations ('market inquiries') need to reach quick, efficient and proportionate conclusions, this needs to be carefully balanced with the fact that remedies necessarily require careful consideration before being imposed, or they risk being ineffective. Also, a two-stage process provides for a quicker conclusion in the case that a market study concludes that no further investigations (or remedies) are needed.

Reform of the overall process rather than streamlining it risks losing some of the benefits, such as the ability for the CMA to use market studies to gain a quick overview of a market (such as a digital market), then decide whether or not to proceed. Replacing the current system with a single-stage tool could also lead to more rapid and frequent intervention grounded in less thorough evidence - which potentially has substantial implications for any businesses affected.

A market investigation is usually preceded by a market study, where the end-to-end process can take over three years to complete, and the statutory deadlines are 12 months and 18-24 months, plus time for remedies. The proposed single-stage market inquiry tool would be two years by default, with options for extension. There may be some efficiencies gained in the single-stage option in terms of overlap or duplication, and potentially at least six months in time. However, two years is still a long time for businesses to handle the legal uncertainty of a market inquiry, especially if the outcome is that no further action is warranted. For such a business, a market study offers the benefit of lasting half of the time of a market inquiry. If efficiencies can also be found by adjusting the current dual system rather than wholly replacing it, there is potentially a smaller risk of negatively impacting the operations of legitimate businesses who are striving to comply with the law, and where the information uncovered via a market study subsequently suggests that they are doing so.

Where a more flexible market study - and its findings - precede an in-depth investigation, this provides a useful focal point and insight for businesses by highlighting potential problems and issues that may need to be addressed. By alleviating the two-stage system of a market study, it also lessens the opportunity for market players to be informed (directly or indirectly) by the market study and proactively make changes to tackle issues. Arguably, market players themselves should both be motivated to address problems in line with market study guidance or the information uncovered. Their knowledge of the market dynamics and their business means they should also be well-placed to identify and tailor changes in order to more precisely target problems without adversely affecting other aspects of the market.

We suggest that a distinction between two different levels of inquiry should be maintained and efficiencies should be optimised within this system.

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

No

Please expand on your answer here.:

Not from the beginning. At an early stage, there is unlikely to be enough evidence to support a proper understanding of the dynamics of the market, and especially how any intervention may impact it - even if this is intended to prevent potential harm while review is ongoing. It is arguably not a fair and proportionate approach to impose interim measures at such an early stage, given that they can have a profound commercial and reputational effect on the business concerned (and even if they are only temporary).

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

Maybe

Please expand on your answer here.:

This option could be beneficial for efficiency, and in terms of narrowing the scope of an investigation, but it needs stronger procedural safeguards than simply allowing commitments that have a high likelihood of remedying CMA concerns. Transparency regarding the CMA's processes and work must also be maintained to allow for accountability. Otherwise, the impending threat of a drawn-out market inquiry could be perceived by businesses, in practice, as an inducement to more quickly enter into commitments that might not prove as effective or well-considered as remedies imposed after a full inquiry.

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

No

Please expand on your answer here.:

The proposed powers for CMA-mandated testing of consumer-facing remedies (such as those outlined at 1.82) are potentially deeply problematic. Such testing involves a direct encroachment into the business's product and development processes, with potential impact extending to areas from branding to UX and even engineering/software development. It should be the remit of a business's internal legal advisers to work together with their technical and product teams to optimise aspects such as the communication of important messages to consumers.

As tech companies are aware, user behaviour is a complex area and language and communication solutions imposed from a legal perspective, without other considerations, can often fall short of the anticipated levels of effectiveness. Given the time and costs typically involved with designing, iterating and testing communications to consumers, it could become a drawn-out process if remedies are suggested by the CMA, without the in-depth and accumulated product and user-related knowledge held by the business. It should be up to the business affected to test relevant solutions and justify their choices on the basis of effectiveness.

It is a delicate balance to update the CMA's remedy design process to be more versatile and effective without significantly impacting transparency and business certainty. We suggest that the proposed reforms are currently too broad, and too blunt to achieve the necessary balance.

Expanded powers for the CMA to periodically review, and if necessary, vary, imposed remedies or accepted commitments should be limited to revoking remedies if they have become unnecessary. Legal uncertainty for businesses will be significant if the CMA is able to expand or supplement remedies perpetually, without a fixed trigger point such as market change.

If safeguards include a "mandatory cooling off period for several years", as proposed, then this, together with the "additional compulsory information gathering tools" mentioned at 1.88 suggest that the time and resources involved will not be insignificant. This raises the question as to why completing a new market investigation wouldn't be a better option - particularly since the latter would have the added advantage of delivering much-needed business certainty.

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

Please respond here.:

The far-reaching proposals put forward have the potential to increase the CMA's efficiency and flexibility, but unfortunately at the expense of proportionality, and business' rights of defence. Fine-tuning of the proposed reforms to redress this imbalance would be beneficial.

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

Not Answered

Please expand on your answer here.:

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

Not Answered

Please expand on your answer here.:

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

Please respond here.:

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

Maybe

Please expand on your answer here.:

While a smaller, more dedicated pool of Panel members for whom CMA work is their primary employment could enhance efficiency and provide the CMA with greater administrative flexibility during the course of the investigation, a narrower Panel role will inevitably result in increased involvement of CMA case teams in decision-making processes. The impact of this on the idea of "fresh eyes" as a check and balance need to be carefully considered.

14 Should the jurisdictional requirements of the Chapter I and Chapter IIprohibitions 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?

Not Answered

Please expand on your answer here.:

15 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?

Not Answered

Please expand on your answer here.:

16 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?

Not Answered

Please expand on your answer here.:

17 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?

Not Answered

Please expand on your answer here.:

18 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?

Not Answered

Please expand on your answer here.:

19 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?

Not Answered

Please expand on your answer here.:

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

Not Answered

Please expand on your answer here.:

21 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?

Not Answered

Please expand on your answer here.:

22 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?

Not Answered

Please expand on your answer here.:

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

Not Answered

Please expand on your answer here.:

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

Please respond here.:

25 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?

Please respond here.:

26 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?

Not Answered

Please expand on your answer here.:

27 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?

No

Please expand on your answer here.:

Extending the prohibition against (and penalties for) the provision of false or misleading information to cover responses to voluntary requests for information could act as a deterrent for businesses.

28 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?

Not Answered

Please expand on your answer here.:

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

Please respond here.:

With a globalised economy, company activities increasingly affect consumers across multiple geographies and inevitably include an international dimension. We agree that differing policies and outcomes can create uncertainty for businesses, and over- or under-enforcement of competition law is likely to impact the competitive process. It is also the case that multiple overlapping investigations by different authorities can be damaging to competitiveness.

However, significant safeguards will be required for information sharing to increase, including if new investigative assistance powers allow the UK's competition authorities to gather information on behalf of overseas authorities. Even small divergences in policy and law will necessarily impact the types of evidence relevant to each individual investigation, and - from the business's perspective - how information should be presented to optimally address the issues at question.

Without stringent conditions being introduced, information sharing risks failing to adequately preserve business's rights of defence. For example, investigative assistance powers would need to be subject to tighter conditions than those outlined at 1.245. It should not be sufficient that "the conduct about which information is requested" is "similar to conduct which could be investigated under the law of the country receiving the request." In order to maintain relevance, it must be identical or so close to identical that practically, it is the same. This may become increasingly difficult following the UK leaving the EU, and if there is divergence in policy approaches. In any event, information sharing practices should be subject to careful scrutiny and a meticulous balancing of the different interests involved to avoid prejudicing businesses' rights of defence.

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?

No

Please expand on your answer here.:

The subscription models discussed above Figure 8 focus on paid subscriptions. While "free trials" and "non-financial detriment" are mentioned, paid subscriptions (which can include a free trial period), rather than free subscriptions, are the focus. The definition should more clearly reflect that.

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

Please respond here.:

Pre-contract information requirements will only be effective in empowering consumers to protect themselves if they read and understand the information provided to them. However, clarity, better education and knowledge don't always follow from the provision of more information.

The discussion regarding subscription contracts also highlights the importance and value of facilitating open consumer feedback in the form of online consumer reviews. This is especially so given the increase in online shopping during the pandemic, and the popularity of subscription contacts with B2C traders. While online reviews are not perfect, and platforms must guard against fake reviews (see also our responses to Q42 and Q43), they offer consumers a valuable resource to check the opinions of others before buying. In our experience, where a trader hasn't emphasised information about subscription contracts clearly enough, the online reviews left by consumers on Trustpilot about that trader often tend to clearly highlight this point in an attempt to alert others. Because reviews can be arranged and presented in an easily digestible and readable way (which tends to be more engaging than terms and conditions), online review platforms represent a valuable complementary path to increasing awareness of potential issues with consumers.

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?

Yes

Please expand on your answer here.:

Services that are free to consumers (not just including a free trial) should be explicitly exempted, for the avoidance of doubt.

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?

No

Please expand on your answer here.:

Only option (b) should be added to the list.

The issues reflected in (a) regarding commissioning reviews are more complex than can be addressed by a blunt ban in all circumstances, and will be difficult to enforce (also for platforms). The definition of "commission" is set out at 2.39 to mean: "the commercial practice of making a request (which need not be in any particular form, nor in writing) in exchange for a payment (monetary or non-monetary) or reward". Arguably, "reward" could be read broadly so as to potentially catch any improvement in status or public recognition, while "making a request" could in theory extend to invitations to write reviews. Therefore, the wording needs to be refined to exclude the practice of inviting people to leave reviews, whereafter such reviews can be posted on platforms and rewarded with "likes" or otherwise acknowledged. This is surely not the intended scope of such a provision, since review invitations can be a valuable way to increase the ease with which consumers can leave genuine feedback in the form of reviews. Invitations can also be fundamentally important to activating review feedback for businesses in all markets, and particularly so for smaller businesses, who likely do not have large advertising budgets to promote their business and therefore benefit in particular from consumer reviews.

At Trustpilot, fake reviews are always prohibited on our platform. In 2020, we made a decision to no longer allow review incentives, even for genuine reviews left in response to a neutral request for feedback. This was taken amid growing concern that incentives could sway sentiment in a more positive direction. However, it is possible to envisage circumstances in which commissioned reviews (as in option (a)) can be beneficial to consumers. It is therefore unnecessary to designate them as automatically unfair in all cases, and it should be up to businesses and review platforms to decide whether safeguards can be adequately used to ensure the legitimacy of information, for the protection of consumers.

A fake review is defined at 2.30 as "one that does not reflect an actual consumer's genuine experience of a good or service." A broad definition of "incentivise" is explained at 2.40 as: "...an offer of payment, reward or any other form of incentive or inducement...". The latter term is ill-defined in the sense that it is so broad it could, in theory, inadvertently catch an invitation to leave a review. Such a broad definition, taken together with the broad definition of "fake review", risks having a punitive impact on legitimate businesses who are aiming to build their reputation. For example, it could catch invited reviews where the reviewer is unable to show their status as a consumer, or may have even left their review of a fledgling business from a B2B perspective. While the idea behind the prohibition is logical and we are supportive of it, its scope is too broad. The wording needs to be refined before option (c) is workable in practice.

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.:

Option (b)'s clear ban on commissioning fake reviews (above) is unlikely to be detrimental to either businesses who use reviews legitimately, or to consumers. Most review platforms, including Trustpilot, have a zero-tolerance policy for fake reviews and have mechanisms in place to detect and weed them out.

However, as stated above in our response to Q42, options (a) and (c) could result in punitive damage to businesses. It is possible to envisage circumstances in which commissioned reviews can be beneficial to small or micro businesses in particular, as well as to consumers.

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 agree that steps should be taken to ensure consumer reviews hosted online are genuine. These steps should include a combination of automated systems to detect fake and misleading reviews, human review and oversight of automated technology, investigation into reports from users of the platform, and the adoption of existing and emerging technologies to verify consumer identity (to ensure reviewers are real consumers) and to verify consumer experiences (to ensure that the consumer had an experience of a product or service provided by a business).

At 2.41 it is proposed to add to the CPRs Schedule 1 that it will be automatically unfair to "host[ing] consumer reviews of a good or service without taking reasonable and proportionate steps to ensure that they originate from consumers who have actually used or purchased that good or service." While this provision applies to "businesses", reviews that retailers place on their websites can be sourced from online review platforms (such as, for example, Trustpilot).

Therefore, any requirements in this regard should take into account how platforms work. It should not inadvertently have the result of pushing the collection of reviews towards exclusively "closed" platform models, since this would lead to the loss of different and diverse consumer voices and potentially result in more control (with a risk of bias) by businesses - which would ultimately be to the detriment of consumers.

"Reasonable and proportionate steps" should preserve the ability for both open and closed review collection models to operate.

For example, at Trustpilot, we consider our platform "open" in the sense that everyone with a genuine experience can have their say, and have their voice

heard on our platform without interference from businesses. In contrast to our model, other “closed”, pay-to-access review platforms do exist where companies collect reviews solely through invites, and can ‘unpublish’ those reviews they don’t like, either after the fact or by pre-screening. While a model that only collects reviews where they’re triggered by a direct purchase means that there will usually be a transactional paper trail showing that a consumer has made a purchase, by its very nature, this approach excludes experiences that do not necessarily result in a purchase. For example, the prospective consumer that did not make a purchase, or felt that they did not receive adequate service - meaning they did not conclude a transaction - should be equally as entitled to submit a review about their experience as a consumer that was successful in completing a transaction. Being “open” in this way is vital to build a platform and community where consumers can really trust in the content, and this is critical feedback for businesses. In our view, closed platforms don’t give consumers the full picture or businesses the full insights they need to improve.

For an open platform, “reasonable and proportionate steps” should not exceed applying a robust system to detect and remove reviews that are deemed fraudulent based on a range of data points, and making sure that a notice-and-action mechanism is in place for consumers or other interested parties to flag reviews that they believe do not originate from reviewers who have used or purchased the good or service. With appropriate safeguards in place, such as strategic human oversight, such systems preserve the balance between helping consumers to voice genuine feedback by leaving reviews, and taking swift action to remove fakes.

The steps described above involve significant costs which are borne by platforms such as ours. To the extent that businesses subscribe to our paid review collection services, some of these costs are effectively shared. However, this also doesn’t take into account the R&D investment into ongoing improvements to our systems, and development of new methods to further verify the legitimacy of reviews and to innovate further in fraud detection and prevention.

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.:

We agree in principle with this proposal but suggest that the proposed wording needs revising. The practice should only be added if the definitions are carefully fine-tuned.

While it may be helpful to clearly set out that soliciting fake reviews will not be tolerated, as we stated above in our answers to Q42 and Q43, the definitions of “fake reviews” and “commission” need to be refined. They need to more specifically target the prohibited conduct and not cast such a wide net as to potentially catch legitimate reviews (such as B2B reviews) and invited reviews.

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?

Maybe

Please expand on your answer here.:

As stated at 2.44, “[i]n many cases, firms may design their systems in ways which benefit consumers’ interests.” Here, consumers may not be aware of techniques that guide them through complicated flows with a view to helping them achieve their purchasing goals. It is also unlikely that consumers would have concerns about helpful nudging. Any attempt to address “sludge” (negative nudges) must ensure that the very important practice of positive nudging to help consumers and facilitate their use of services isn’t detrimentally impacted.

Most consumers are at least somewhat able to detect and identify unwanted manipulation. However, manipulation (such as “dark patterns”) must be distinguished from poor design and/or communication, or a lack of clarity in any legitimate attempt to convey messaging or meet complex regulatory requirements. For example, platform iterations to find the best way of conveying complex information should be clearly distinguished from deliberate manipulation through “dark patterns”. Platforms who have unintentionally created a confusing user journey should not be inadvertently caught by any regulatory attempts to address the deliberate and much more sinister practice of devising “dark patterns”.

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?

Maybe

Please expand on your answer here.:

Consumers tend to be selective and reward businesses that are transparent about pricing with their trust, while avoiding purchases (or repeat purchases) with those who do not. Techniques such as drip pricing, where consumers face additional fees and charges are, on balance, likely to act as a deterrent for consumers and in some cases will result in non-completion of a transaction.

This, in turn, highlights the importance of *open* review platforms - where reviews criticising such practices or warning other consumers about businesses using drip pricing can be left organically. In contrast, where reviews are triggered by or can only be left specifically in response to a purchase (such as with closed review platforms, or where specific documentation in the form of a purchase receipt is required in order to document a review), consumers will be less able to provide important feedback to the business, or inform others about their dissatisfying experience. While regulation is one part of the solution, allowing reviewers to transparently share information about their genuine experiences is also critical to empower consumers to be more informed in their decision-making and to ensure that businesses feel the negative impact of their opaque practices.

Transparency about paid-for rankings is also desirable, but clarity is needed to refine exactly how and when this should apply. Specifically, the scope should be narrowed to address the problem of search results *directly* influenced by payment, where payments are made for that purpose.

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.:

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.:

The proposal seeks to significantly strengthen the CMA’s powers, enabling direct CMA intervention and increasing consumer law enforcement. This is expected to result in a greater number of consumer law cases (handled more quickly), and a corresponding increase in the deterrent effect for businesses engaging in illegal conduct.

The obvious advantage is that strengthened enforcement can avoid the significant cost and time-commitment required for court cases, and allows the CMA to act more quickly to put a stop to “rip-offs” and end harm to consumers. However, the proposal also gives the CMA the power to impose fines for breaches of consumer law of up to 10% of a non-compliant company’s global turnover, and impose fines for non-compliance in line with those proposed with regard to competition law. These are potentially very large penalties. Such fundamental changes must be balanced against the inevitable increase in administrative burden on businesses arising from more frequent cases, as well as preserving each business’s right to fair notice, procedural fairness, and its rights of defence.

There is no doubt that better enforcement against businesses who are intentionally breaking the law is likely to benefit consumers. But there will inevitably be spillover effects that impact businesses who are found *not* to be engaging in such conduct, or who are asked to provide data evidence. Where cases involve digital technology and new forms of potential consumer detriment, as foreshadowed by Lord Tyrie in his 2019 letter, such cases are likely to be complex, requiring significant resources from the businesses affected. With such considerable fines at stake, appropriate built-in safeguards are critical to ensure fair, proportionate and consistent outcomes for everyone. The current proposal does not set out such safeguards.

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.:

See answer to Q55, above. There need to be appropriate checks, balances and safeguards to ensure procedural fairness and that business's rights of defence are not impaired.

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

Please respond here.:

The CMA should be sure to engage with businesses informally at an early stage before resorting to formal, punitive action. It should only open investigation cases where its suspicion that "an infringement of consumer protection law has occurred or is likely to occur" meets a sufficient and reasonable threshold test. The business affected should be given enough time to understand the information held against it (i.e. information that purports to show a potential infringement) and ample time to carefully and substantially respond to the case. Safeguards should be put in place to ensure that such processes allocate enough time and are sufficient for businesses, and to ensure that there is flexibility for the CMA to extend the period in which a business can provide a response, if necessary. This is especially so in cases where the facts may be complex, such as - for example - in digital cases.

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.:

It may be appropriate for an appeal body to have the ability to:
- review issues of law relevant to the appeal before it,
- review issues of fact relevant to the appeal before it,
- admit fresh evidence (not before the CMA) on appeal, and
- quash decisions of the CMA on legal and factual issues relevant to the appeal before it.

All of these options potentially provide necessary checks and balances on the proposed expanded powers of the CMA. Reviews on issues of law, with the ability to admit fresh evidence, should help ensure quality assurance of the CMA's interpretation of consumer protection law, while reviews on issues of fact should provide important oversight and strengthen business confidence that their actions will be assessed fairly. There also needs to be an ability to quash decisions if judicial scrutiny is to have credibility with both consumers and businesses. However, it could weaken legal certainty if an appeal body has the power to substitute its own decision or take any other step that the CMA could have taken. In our view, this last proposal is too broad.

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?

Maybe

Please expand on your answer here.:

Given that the cases that the CMA will be handling are "likely to be more complex than many of the investigations previously undertaken by the CMA" (as stated at 1.4), a specialised tribunal with the necessary expertise to efficiently master the issues at hand may be better suited than a generalist court. This is particularly so for cases involving a digital element, where cross-disciplinary expertise is likely to be relevant.

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?

Maybe

Please expand on your answer here.:

As stated at 3.34, broadening of these enforcement powers will necessitate "appropriate safeguards including a robust appeals process as well as close consideration to determine which regulator is best placed to take action, to avoid duplication of proceedings from different regulators." Further detail on how this might function in practice is needed to assess the extent to which it is likely to be adequate.

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.:

Sanctions should be applied sparingly. Where they are imposed for non-compliance with information-gathering powers, sanctions should be limited to deliberate attempts to circumvent the process, or clearly unreasonable delays. False or misleading information should be penalised where it is provided intentionally, or perhaps recklessly. However, there must be some accommodation for accidental errors. It is understandable that businesses gathering wide-ranging datasets and information across multiple internal departments can make mistakes, despite their best efforts. They should be given the

opportunity to correct these without penalty where unintentional.

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.:

Undertakings should be enforceable in their own right.

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

No

Please expand on your answer here.:

While in some cases such a process may provide an incentive for businesses to settle, it could also have a deterrent effect if businesses have inadvertently breached their legal obligations.

The potential impact of reputational damage to businesses through publication of cases is also a deterrent.

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.:

In our experience, the body of online reviews we collect can reveal both legitimate causes for complaint by consumers, and also misunderstandings. There are obvious advantages to increasing access to ADR (including for vulnerable consumers), such as it being less confrontational, the lower cost to traders (compared with court cases that proceed) and the absence of costs for consumers. But these benefits must be carefully balanced against the risk of businesses increasingly being exposed to malicious, frivolous or unfair complaints, or complaints based on a misunderstanding or misplaced consumer expectations.

ADR should indeed be low cost to consumers (including vulnerable consumers) to be accessible, but it is questionable as to whether it should in all cases be completely free (or almost free) to consumers. This is especially so if their case is later found to be malicious or baseless. For businesses, there is a risk of facing significantly increased costs due to the inevitable increase in cases that would result from ease of consumer redress.

It is also relevant that consumers may have the ability to freely voice their views on social media (at no cost), and increasingly do so. They can also share genuine experiences via other channels such as online review platforms. The potential reputational impact of this on businesses further underscores why “most businesses try hard to resolve consumer complaints” (as stated at 3.72). Where resolutions are not reached, complaints may have - but do not always have - legitimate cause justifying further redress.

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.:

Businesses should be allowed exceptions in complex cases so that they can take the time to properly investigate and resolve them. However, even if an upper limit of four weeks is established for businesses to resolve complaints before consumers are entitled to take a dispute to ADR, this may not necessarily mean that consumers will not abandon complaints. In the age of social media, a consumer might expect a business to respond to a Tweet within an hour or two. Therefore, four weeks is likely to seem unacceptable for consumers. If they are not made aware of the overall process, and the business’s right to take days, if not weeks to thoroughly investigate, then this will seem disproportionate and could be inflammatory. From the business’s perspective, four weeks is likely to provide a reasonable timeframe to investigate.

We suggest that any reduction in the time allowed for businesses to resolve complaints, combined with ADR redress, necessarily must be accompanied by clear explanations to consumers regarding the process. Consumers who feel they have grounds for a complaint will need to be reminded why it is important, and also in their interests, that an appropriate time period is provided to business to conduct thorough investigations.

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.:

ADR cannot win the trust of businesses and consumers without adequate quality standards and oversight, including requirements for providers to be accredited and supervised. Providers must also have relevant expertise.

As a *minimum*, the Competent Authority should oversee a mandatory approval system, and have the ability to monitor and hold providers

accountable. Further checks and balances may be warranted.

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

Please respond here.:

Consumers will need to be adequately informed about the process to set their expectations.

Businesses are likely to view ADR as an extra cost, since it is proposed they must pay for it. As stated above, if malicious or frivolous claims are brought by consumers, businesses should not have to bear the burden of the entire cost of ADR, plus their time and expenses incurred in addressing the complaint.

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.:

It is necessary to introduce a nominal fee to consumers in order to deter malicious or frivolous claims. However, in most cases £10-20 is unlikely to be enough and the amount should be set higher. If consumers are confident in the merits of their complaint, then a higher amount (which is proposed to be reimbursed in the event of success) should not be a deterrent.

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

Please respond here.:

See our answer to Q70. Businesses are unlikely to see the benefits in the changes unless they are adequately protected from frivolous claims.

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.:

Given the breadth and depth of the changes proposed (as discussed above), and the potential for those changes to significantly impact businesses, it is unnecessary to also broaden routes to collective consumer redress. For smaller businesses in particular, the cost (including time cost) of understanding and complying with multiple different redress routes will be considerable.

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.:

Businesses would likely raise concerns about whether private organisations in particular have the ability to exercise the same level of diligence as public enforcers. There would also have to be adequate safeguards against frivolous or unfounded claims.

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.:

NTS and TSS should be given enforcement power to tackle national cases. LATSS conducting cases with a connection to their area are unlikely to be able to achieve the same overview, expertise and consistency in handling such cases.

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.:

The support provided by LATSS can be extremely helpful, but there can also be gaps in expertise. Businesses would likely benefit indirectly from more efficient knowledge and resource sharing between and within LATSS so that duplication of information can be avoided.