

# **BEIS Consultation: *Reforming Competition and Consumer Policy***

## **Response from The Digital Regulation Project Yale Tobin Center for Economic Policy**

**1 October 2021**

*The Digital Regulation Project is a collaborative effort of experts in economics and regulation in the United States, the UK, and the European Union, who have studied, and are committed to the improvement of, competition in digital markets.*

*This response has been prepared by Amelia Fletcher (University of East Anglia), Greg Crawford (University of Zurich), Jacques Crémer (Toulouse School of Economics), David Dinielli (Yale University), Paul Heidhues (DICE, Heinrich-Heine University Düsseldorf), Fiona Scott Morton (Yale University), Monika Schnitzer (Ludwig-Maximilians-University Munich), Katja Seim (Yale University).<sup>1</sup>*

---

### **Introduction**

We very much welcome the BEIS consultation on *Reforming Competition and Consumer Policy*. Our response focuses on the substantive consumer protection aspects of the consultation in Chapter 2. In doing so, we draw heavily on our policy paper *Consumer Protection for Online Markets and Large Digital Platforms*, published earlier this year.

In our paper, we emphasise the need to update consumer protection law for online markets. In doing so, we distinguish between rules that are needed for all online firms, and those that are suitable only for the largest digital platforms.

In the UK context, we recognise that the latter would likely be addressed under the ‘trust and transparency’ element of the proposed digital platform regulation, as elements of a code of conduct to be imposed by the Digital Markets Unit. As such, our response here only covers those policy proposals in the paper which we consider suitable for all online traders.

We also note that the proposals in our paper are not jurisdiction-specific, and many are already embedded within UK law. As such, our response here also only covers those policy proposals in the paper which we do not consider to be effectively addressed in the UK currently.

---

<sup>1</sup> The Tobin Center hosts the papers of the Digital Regulation Project as a way for some of the world's leading economists and regulatory experts to present policy recommendations based on their relevant research and expertise. The Tobin Center does not take policy positions and therefore the content does not represent the positions of the Tobin Center or Yale University.

We first discuss three key areas that are already included in the reform proposals. We then highlight a couple of key issues which the reforms have not addressed, and where we feel strongly that reform is needed.

## Online subscriptions

In our paper, we address the issue of online subscriptions. In this regard, we make a number of recommendations:

1. *For any sale of subscription-based or auto-renewing service, the price and any minimum contract period or minimum purchase obligation should be set out clearly and prominently upfront.* Where a service is sold on the basis of an initial free period, the price to be paid after this period should be set out clearly and prominently upfront. These terms should also be notified to consumers through a sign-up email.
2. *Advance notice should be made of any change in terms.* This should be sent via email and the change in terms should be clear and prominent and flagged within the subject header of the email. When terms change, consumers must be given the chance to cancel and at the same time to continue using the service for a reasonable amount of time while looking for a new supplier. Free trials should not be converted into paid services without specific notice being given, allowing time to cancel.
3. *Consumers should be notified of their total ongoing charges from that trader at an appropriate frequency.* Consumers can sometimes stack up a variety of subscriptions, sometimes even duplicative ones, so requiring the trader to notify total charges would help to identify this issue. Guidance would be needed as to what an “appropriate frequency” might be, but it should be infrequent enough to engage the attention of consumers but frequent enough to allow for timely decision-making.
4. *There should be a prohibition on the opt-out selling of automatic renewals,* whereby a consumer is defaulted into an auto-renewing contract unless they take a specific action not to allow auto-renewal. Signing up for automatic renewals should require active consent by consumers, not be the result of default bias.
5. *It should be possible to cancel a contract via the same medium as it is entered.* That is, there should be no need to phone or write an email or letter to cancel a contract entered online. This obligation could potentially be generalized into a principle-based rule that that it be as easy to cancel a contract online as it is to enter it.
6. *There should be no exit fees (i) after any initial minimum contract period or minimum purchase obligation, or (ii) for any contract that has auto-renewed, or (iii) for any contract offered on the basis of a free initial period.* The notice period for any cancellation should not be any longer than 28 days, and thereafter sellers must reimburse *pro rata* any fees paid in advance for any unused service.
7. *There should be an easy and efficient mechanism to cancel the service.* This should involve consumers making no more than three clicks. A simple link should be included within the initial sign-up email, and all email notifications thereafter. It may be useful to provide further guidance on what a simple cancellation mechanism might comprise. For example, a template “cancellation button” (standardized with respect to

color, placement, font, and the like) could usefully be provided; use of this would then act as a safe harbor against liability. Immediate email confirmation of cancellation with date from which on contract is cancelled should also be required.

We are pleased to see that the BEIS reform proposals essentially address 1, 4 and 7. We strongly support these proposals.

We also note that the reform proposals include a requirement that traders remind consumers in good time before an auto-renewal takes place. We also strongly support this proposal and indeed will incorporate it in our own paper when it is revised. Relating to **Question 34**, we believe the reminder should apply in both of the stated circumstances.

In relation to initial free trials and introductory offers (**Question 36**), we consider it sufficient that a reminder be provided that a “full or higher price” contract is about to begin. Requiring active consent at this stage could have a number of detrimental effects. However, we strongly recommend that there should not be any exit fees for consumers who choose to exit such contracts, either before or after the ending of the initial period (see point 6 above).

In relation to long-term inactive subscriptions, our paper recommended that the largest platforms should be required to contact any subscriber that have not used the service for a year. In retrospect, we consider that this requirement would be reasonable to apply more widely, and thus support this BEIS reform proposal. We think one year would be a suitable time frame (**Question 38**).

In terms of exiting a contract, we support the proposals but would like to propose additionally that (i) consumers should be able to cancel any subscription via the same medium it was entered into (see point 5 above) and (ii) further thought should be given to the circumstances in which exit fees can be levied (see point 6 above).

Finally, we note that the current reform proposals do not address points 2 and 3 in the above list, which relate to the information provided to consumers during an ongoing subscription. This may be because it is considered these elements are already covered under existing consumer law. If so, it would be worth making this clear.

## **Fake reviews**

In our paper, we address the issue of fake reviews. In this regard, we make a number of recommendations:

1. *Conditional incentivization of ratings/reviews should also be prohibited.* Given the importance of ratings/reviews, many traders incentivize consumers to write them through special offers of one sort or another. There may be merit in this, so long as consumers are not inhibited from expressing their true view. However, some sellers make such incentives conditional on the consumer writing a 5-star review (or equivalent). This practice is clearly intended to falsely inflate ratings and should be prohibited.
2. *Fake reviews and ratings should be illegal, as should the service of selling fake reviews and ratings, and as should the hosting of advertising for such services.* The importance of reviews and ratings has led to some sellers seeking to post fake reviews

and ratings, or even to purchase such fake reviews/ratings from third parties. Until recently, services offering fake reviews/ratings were even hosted on eBay, Facebook and Instagram. Such activity undermines the usefulness and credibility of reviews and ratings. Regulators should be empowered to determine whether a review is fake, publicize what factors contribute to a finding that a review is a fake, and prohibit such fake reviews.

3. *Social media ‘influencers’ should be transparent about relevant sponsorship or payments when endorsing a product; such hidden advertising should be illegal and social media platforms should have a legal responsibility to prevent it.* Social media influencers are sometimes paid to endorse products, while posing as enthusiasts with no financial interest. Such influencers include bloggers, vloggers, celebrities and social media personalities. Paid-for or sponsored endorsement is effectively advertising and should be labelled as such (see above). This labelling should be sufficiently clear and prominent that consumers are readily able identify the paid ads. Hidden advertising should be illegal and social media platforms should have a legal responsibility to prevent it. This is partly because platforms should not be in a position to profit from illegal hidden advertising, but also because they are in the best position to design processes to prevent it.

We are pleased to see the BEIS reform proposals address each of these issues (albeit it appears to consider that the third is already sufficiently clear in existing consumer law).

In relation to **Question 42**, we consider it would be excessive and potentially detrimental to ban the commissioning or incentivising of consumer review in all circumstances, and therefore would not support Option 1. We would, however, support a ban both on commissioning and on incentivising fake reviews, as proposed in Option 3. We support the proposal that reviews should not be viewed as fake if they reflect genuine experience and impartial opinion (although we note that the proposals use an ‘or’, where we would propose the use of an ‘and’). We agree that any payment or incentive which is conditional on a certain type of review should be considered fake.

For the avoidance of doubt, we support the proposal in **Question 45**.

### **Preventing online exploitation of consumer behaviour**

We are pleased to see the BEIS team recognising that consumer behaviour can be inappropriately exploited by unscrupulous traders. We agree that further empirical work in this area would be hugely valuable. In our paper, we make the following proposals:

1. *All advertising and marketing should be clearly and prominently labelled as such.* This labelling should enable consumers readily to identify paid ads/marketing. Advertising and marketing should also be sufficiently well demarcated from organic content that consumers are readily able to identify which is which. Standards should be developed to specify what demarcation is lawful in a variety of settings.
2. *Criteria for rankings and inclusion in “best buy” boxes should be stated clearly and prominently; where traders have paid for higher rankings or better positioning, this constitutes advertising and should be clearly labelled as such.* Given the huge range of products and services available online, consumers can gain great benefit from

ranking services and “best buy” boxes which help them to make choices. However, these consumer benefits can be limited if the criteria used to rank products or include them in a “best buy” box are not well aligned with the interests of the consumer. Given the importance of these choice tools, we consider that there should be a general requirement that criteria for ranking/inclusion are stated clearly and prominently. Critically, where traders have paid for ranking/inclusion, this again effectively constitutes advertising and should be labelled as such. Again, this labelling should be sufficiently clear and prominent that consumers are readily able identify the paid ads.

3. *Consumer ratings and reviews should be presented fairly and non-selectively.* If consumers are led to believe that they are getting the full picture, then this should be the case—all (genuine and legal) reviews should be shown. If a firm has a policy of removing reviews, it should state clearly and prominently that this is the case, and what the goal is. Any removals should be proportionate to that goal. Where “average” ratings are shown, there should be clarity on the approach being used to construct the averages. Where simple averages are not used, the firm should explain the goal behind the weightings used, and these should be proportionate to that goal.
4. *Ban the use of defaults that require a consumer to “opt-out” in order to avoid a financial commitment.* This is sometimes known as inertia selling. These often take the form of pre-ticked boxes to enrol, subscribe, or purchase the most expensive option but would include any situation in which inactivity on the part of a consumer leads to a purchasing “choice.”
5. *Ban the use of messages that create a false sense of urgency or scarcity, which in turn lead consumers to make rushed and pressurized decisions.* It should be noted that even information that is factually true can potentially be misused to create a misleading illusion of urgency or scarcity.
6. *Require that prices be displayed prominently upfront and include all unavoidable fees and charges.* Where unavoidable fees and charges can only be calculated at a later stage, they should be included as soon as they are calculable. Any fees and charges that have not been provided before the “checkout” stage of the purchasing process should be cost-reflective.
7. *More generally, prohibit interface design which acts to misdirect consumers.* This prohibition would address aspects such as misdirection through brightly coloured buttons, pale wording, or other aspect of interface design.

We are pleased to see the BEIS proposals addressing points 2 and 6. We are strongly supportive of reforms in this area.

We also note that UK law may also already address some of the other points made above and note that there has been useful action brought on some of these issues by the Advertising Standards Authority and Competition and Markets Authority. Nonetheless, we consider that further clarification about the legal position on these points would be valuable, and in particular points 3, 4 and 5.

## **Additional issues**

We would like to alert BEIS to four other issues that are not addressed in the reform proposals, but which we cover in our paper and consider important.

### ***‘Free’ products and services***

The first relates to the applicability of consumer law to services that have been provided to consumers for free. Consider for example a social network such as Facebook. We are concerned that such a firm could make promises to its consumers that form the apparent basis of a standard consumer arrangement, but the veracity of which might not be protected by consumer law, due to the fact that consumers pay make no pecuniary payment (albeit they arguably pay via their attention and their data – both of which are monetized by the social network).

In our paper, we therefore recommend:

- *all relevant consumer protection legislation should explicitly apply to digital content and digital services that are provided free of charge but in exchange for personal data, except where such personal data is only used to supply the digital content or service, or to comply with the law.*

In retrospect, we might add alter this to ‘attention or personal data’. In either case, we strongly recommend that BEIS consider this possible reform. We note that the EU is currently in the process of implemented a similar reform through the EU Consumer Modernization Directive.

### ***C2C Platforms***

Consumer protection law typically only protects consumers when acting on the demand-side of any trade. Moreover, it only protects consumers against poor treatment by business sellers, and it is not always obvious to consumers whether they are dealing with a business or a consumer seller.

The success of the main C2C platforms partly reflects the investment they have made in finding alternative routes for protection of their customers, on both sides of the platform, which has earned many of them a substantial degree of trust. However, this form of “self-regulation” has been imperfect and customers often complain that they find out too late that they were purchasing from an individual, not a business, and thus have no recourse under consumer protection law.

There is thus a need to complement the valuable consumer protection measures introduced by C2C platforms themselves, if consumer trust is to be enhanced and justified. In our paper, we therefore make the following proposals:

- C2C platforms should require sellers to state whether they are a business or an individual.
- C2C platforms are themselves sellers of services to their trader customers. Where these are individuals, standard consumer protection law should apply to the

intermediation service sold by the platform to the trader, even though the traders are formally a seller rather than a consumer. Effectively, such individuals should be viewed as consumers of the platform's intermediation service.

Again, we note that the first of these is currently being introduced in the EU as Consumer Modernization Directive. We strongly recommend that BEIS consider both proposals.

### ***Membership based platforms***

Many digital platforms tend to exhibit network effects, in that the value of the platform to any user will increase with the total number of platform users. This means that platforms—especially when starting out—have strong incentives to increase their user base through illicit means.

Dating sites provide a good example. In recent years, a firm with several dating sites was found to have cross-registered members across their different sites without the members' knowledge, to have falsified its member numbers, and to have made it hard for people to take down their profiles when they cancelled their subscription.<sup>2</sup> Another dating site was found to have falsified profiles to gain new members.<sup>3</sup> By using such deceptive tactics to suggest a larger number of potentially available dates or partners, dating platforms can keep users engaged and benefit from their willingness to pay for continuing to use the service.

While we recognise that action has already been taken against such practices under existing consumer law, we nonetheless think that further clarification would be valuable. In our paper, we make the following proposal, and we strongly urge BEIS to consider adopting this.

- *Membership platforms should be barred from cross-registering members across their services without their active consent, and from creating fake profiles. When people cancel their membership, their profile should be automatically removed unless they explicitly consent otherwise.*

### ***Individualised targeting***

Finally, we note that the BEIS consultation paper makes no reference to individualised targeting of pricing or sales practices. In our paper, we note that such individualised targeting can often be positive, and thus it would be detrimental to ban it generally. However, the paper proposes that:

- *Traders should be required to inform consumers when a price is personalized on the basis of automated decision-making. They should also set out the criteria on which the personalization is based. This would help to provide a reputational check against forms of price personalization that are considered socially egregious. As an example, Uber has been accused of charging higher prices to users whose cell phone batteries were low and the consumers were thus less likely to take the time to search for a*

---

<sup>2</sup> Competition & Markets Authority, *Online Dating Giant Vows Clearer Path to Love*, GOV.UK (June 13, 2018), <https://www.gov.uk/government/news/online-dating-giant-vows-clearer-path-to-love>.

<sup>3</sup> Federal Trade Commission, *FTC Sues Owner of Online Dating Service Match.com for Using Fake Love Interest Ads to Trick Consumers into Paying for a Match.com Subscription* (Sep. 25, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-sues-owner-online-dating-service-matchcom-using-fake-love>.

lower price. Uber has denied this practice but has accepted that this would be technologically feasible. We presume that its main reason for not engaging in such a pricing strategy is reputational.

- *Platforms should not be permitted (through algorithms or direct targeting) to discriminate against consumers based on their membership in any protected class (race, religion, gender, etc.) or any group identified by a specific sector regulator to be vulnerable to particular sales practices or services.*
- *Clarify the law in order to explicitly permit reverse engineering for research or policy purposes.* Currently, algorithmic discrimination is most often proven through reverse engineering algorithms and reviewing their outcomes. However, such activity is potentially in breach of the law relating to data scraping, and academics working in this area, typically in the public interest, are fearful of prosecution. Clarification that the law allows this use would help to support such socially useful research. While web scraping can potentially impose costs on host sites, they can easily avoid this by providing APIs which allow data to be downloaded directly.

We would particularly urge BEIS to consider the first of these policy proposals which has a strong analogue in changes being introduced by the EU in the Consumer Modernization Directive.