

Response to BEIS consultation REFORMING COMPETITION AND CONSUMER POLICY 2021

Response by Prof. Christine Riefa, University of Reading

Consumer Protection (including rights when buying online, privacy and data protection) is essential to maintain trust in consumer markets. To retain and develop a world-class system of protection, the UK will need to ensure it leads in regulating a digital and brick-and-mortar marketplaces that are ‘fair by design’ for consumers to use. This cannot be delivered by regulating competition alone. Reforms in consumer law, that prioritise an economic approach to protection and robust public enforcement will be best placed to deliver fairness in digital and brick and mortar consumer markets.

Consumer law and competition law are thus in need of some changes. I welcome the initiative to consult on a reform of the rules, especially in light of BREXIT and the departure that will inevitably occur from EU rules in those fields. The strengthening of powers of the CMA is particularly important.

In this response I wish to briefly comment on two elements of the consultation:

- Updating consumer rights to keep pace with markets (Chapter 2)
- Strengthening the enforcement of consumer law by individuals and regulators (Chapter 3).

I do not propose to offer systematic and direct answers to the consultation questions, but instead wish to address more general, yet essential points to develop a system of consumer protection that can be truly effective.

Chapter 2 – Consumer Rights

The overall remit of the changes discussed in the consultation is fairly limited. It focusses on fixing a few known areas where problems have developed (subscription traps, fake reviews, non-compliance on refunds, pre-payment protections) rather than looking at a more sustainable and effective overhaul of the legislation. This is regrettable.

Consumer law lacks not only a clear policy direction and programme (and has done so for many years), but also a clear theoretical underpinning able to guide intervention in the digital age. Consumer law has also suffered from an imbalanced relationship with competition law where the latter is regarded as a superior vehicle to achieve consumer protection in the UK.¹ It is reassuring to read in the consultation document that ‘consumer protection legislation plays a crucial role in ensuring that competition and markets work for everyone’.² It is my view that consumer law can be a ‘trust maker’ in consumer markets and that it has a much more important role to play alongside competition that it has been able to play in the past.³ The granting of ‘administrative’ powers to the CMA in line with those it already holds in the competition sphere will go a long way to enabling a levelling up of consumer and competition law.

¹ Siciliani P., Riefa C., Gamper H., *Consumer Theories of Harm: an economic approach to consumer enforcement and policy making* (Hart 2019) 7.

² Reforming Competition and Consumer Policy: driving growth and delivering competitive markets that work for consumers (July 2021) CP488, Executive summary, para 0.22, p. 16.

³ For more on this, see Siciliani P., Riefa C., Gamper H., *Consumer Theories of Harm: an economic approach to consumer enforcement and policy making* (Hart 2019), Chapters 1 & 2.

It is therefore regrettable that the consultation having acknowledged the crucial role consumer law plays, only limits itself to identifying two main developments where there is an opportunity to update consumer rights (namely challenges linked to online shopping and the use of big data as well as fake reviews, and subscription traps). The CMA will, despite new powers, not be able to do much if it does not have a strong legal basis to combat new unfair practices that may develop in future years. Indeed, unfairness is all around consumers and punctual intervention will not (at least not for long) protect consumers from unfair commercial practices. New ones will take their place.

As a result, I regret that the consultation does not seek to go beyond ‘tinkering around the edges’ as far as consumer rights are concerned (I shall return to enforcement later on). While I cannot but welcome further actions to protect consumers against subscription traps or the other under-hand tactics explored in the consultation, in my view, it would have been more effective to reflect on how to change the way in which expectations are placed on businesses and look at a different way to define consumer rights and justify intervention in markets.

For example, in the USA, Prof. Willis called for a performance-based approach that would encompass a comprehension performance standard and a suitability standard⁴ motivated by the fact that rules on disclosures and product design, which focus on the actions of firms (rather than the effect those have on consumers) have failed. Firms have framed disclosures or reformulated products to evade product design rules and the regulation of transaction terms.⁵ Willis explains that ‘Performance-based consumer law together with ongoing field-testing has the potential to incentivize firms to educate rather than obfuscate, to develop simple and intuitive product designs that align with, rather than defy, consumer expectations, and to channel consumers toward products that are suitable for consumers’ circumstances’.⁶

In the UK, Siciliani, Riefa and Gamper⁷ recommend the adoption of a general duty to trade fairly in consumer markets. This duty rests on reversing the current dominant expectation that it is for the consumer to beware, and instead expect businesses to behave. Its adoption in policy making and consumer enforcement would prepare the ground for markets where fairness is included by design, and not as a form of redress, very much in the same way a positive duty to place only safe products on the market did to improve the safety of consumers in the EU and UK.⁸ Over time, it would push for a ‘fairness-by-design’ approach⁹ that will emerge as the only acceptable way to compete. This would also benefit the businesses that strive to compete fairly because the adoption of a more economic approach to consumer law enforcement can empower

⁴ Lauren E Willis, ‘Performance-Based Consumer Law’ (2015) 82 U. Chicago L. Rev. 1309, 1311 <<http://www.ssrn.com/abstract=2485667>>.

⁵ *ibid.*

⁶ *ibid* 1315.

⁷ Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019).

⁸ *Ibid* 209.

⁹ Note that the consultation itself does make a reference to ‘fairness-by-design’ principles regarding preventing online exploitation of consumers, but this reference is limited to the way information is presented and the architecture of transactions. What *Consumer Theories of Harm* cover is different. It is more akin to safety obligations where the business is asked not to put to market or sell to a particular consumer a product if it is not fair to do so.

enforcers to act in areas where detriment for consumers derives from a lack of professional diligence.¹⁰

Siciliani, Riefa and Gamper developed a number of economic models based on the mainstream economic theory of ‘bounded rationality’ (coined *Consumer Theories of Harm*) that can help enforcers move beyond the erroneous yet dominant belief that armed with information consumers will be able to actively police markets and vote with their feet. The *Consumer Theories of Harm* can be used to identify detriment¹¹ and ensure that enforcement resources are ‘best allocated to the enforcement authority most able to protect consumers and repair the harm caused (which can be an entity located abroad). This is especially important in those cases where prompt intervention under consumer law can prevent the issue from deteriorating to the point where not even competition enforcement would suffice to restore a fair market outcome (as is the case in digital markets). In turn, more reliable consumer enforcement ought to help develop a general duty to trade fairly, shaping markets for the future and lessening the need for competition enforcement, that is, thanks to the fact that the presence of more confident and assertive consumers empowers competition on the merits.’¹²

Instead of a change in gear, some of the reforms consulted on under this chapter, simply seek to continue with the already established and debunked ‘information paradigm’.¹³ The solutions proposed in the consultation focus on information tools for consumers. This is thus an issue as more information or choice on auto-renewal for example is unlikely to drastically change businesses’ behaviours. What is more likely to happen is businesses becoming creative in the way the information is disclosed in order to avoid detection by consumers. Obfuscation will be incentivised and consumers will continue to suffer harm as a result.

The consultation also relies heavily on nudges and behavioural economics as a means to improve consumers’ plights. This is welcome on the one hand, as behavioural economics and nudges can have some positive effects, but it also runs the risk of stigmatising consumers who in spite of the nudge are unable to avoid the trap.¹⁴ I therefore urge caution in the roll out of those tools but would welcome even only marginal gains. However, I would here again encourage looking at solutions that can stand the test of time rather than solutions that would quickly become obsolete as traders find new ways to circumvent the rules deployed. This is why I have strongly made the case (with my co-authors) that a positive duty to trade fairly may be more helpful.¹⁵ For example, it could be deemed unfair to make leaving a subscription harder than entering the contract.

¹⁰ Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019) 209.

¹¹ Ibid 109-136.

¹² Ibid 9.

¹³ Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019) 18.

¹⁴ C. Riefa, H. Gamper, Economic theory and consumer vulnerability, exploring an uneasy relationship, in C. Riefa, S. Saintier (eds.), *Vulnerable Consumers and the Law, Consumer Protection and Access to Justice* (Routledge 2021) 21.

¹⁵ Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019) chapter 7.

With regards to fake reviews, I strongly favour banning them altogether, notwithstanding that enforcement will remain a challenge. Using the CPRs to do so appears a good approach. However, some action is also recommended on influencer marketing.¹⁶

I welcome the discussions on the prevention of online exploitation of consumer behaviour but would again warn against too heavy a reliance on behavioural economics in the protection of consumers, an issue that my co-authors and I have written at length in *Consumer Theories of Harm*.¹⁷ I much prefer a focus not on reducing the impact of harmful practices (p. 94) but on finding ways to avoid them altogether and removing the incentives for businesses to utilise underhand tactics. In any event, I am overall in favour of the initiatives discussed and would favour the use of the CPRs to tighten the expectations placed on businesses. On these matters, see for example, C Riefa, Consumer law enforcement as a tool to bolster competition in digital markets: a case study on personalised pricing, in UNCTAD, *Competition and Consumer Protection Policies, For inclusive development in the digital era* (2021) UNCTAD/DITC/CPLP/2021/2, 15-29.¹⁸

I am also in favour of tackling the excesses of the COVID 19 pandemic and notably the non-compliance on refunds. On this see, C. Riefa, Coronavirus as a catalyst to transform consumer policy and enforcement, *Journal of Consumer Policy*, 43, 451–461 (2020).¹⁹

Chapter 3 – Enforcement of consumer law

Many unfair practices are causing harm to consumers. For example, with regards to connected devices (Internet of Things), evidence points to grave consumer concerns around price, privacy, interoperability and security acting as barriers to choosing such products. 63% of people described their connected devices as ‘creepy’ in the way they collect data about people and their behaviours.²⁰ Tech companies are also using dark patterns where consumers are nudged into providing information with no ability to move to an alternate provider.²¹ Consumer face similar issues when dealing with the platform economy where reliance on digital influencers²² or fake reviews are increasing (this last point is clearly targeted by the consultation). In addition, consumers also need to contend with large amounts of products bought on online platforms failing safety tests with potentially dangerous consequences (such as electric shock, fire, or suffocation).²³

¹⁶ See <https://committees.parliament.uk/writtenevidence/35423/html/> and Riefa, C., & Clausen, L. (2019). Towards Fairness in Digital Influencers' Marketing Practices. *Journal of European Consumer and Market Law*, 8(2), 64-74.

¹⁷ Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019). Instead we see a way through better protection by applying the economic models we developed to help enforcers justify and prioritise intervention. Our economic outlook is anchored on Herbert Simon.

¹⁸ Available online: https://unctad.org/system/files/official-document/ditceplp2021d2_en_0.pdf

¹⁹ Available online: <https://link.springer.com/article/10.1007/s10603-020-09462-0>

²⁰ Consumers International and the Internet Society, *The Trust Opportunity: Exploring Consumers Attitudes to the Internet of Things* (2019) 12.

²¹ See for eg. Mathur et al, ‘Dark Patterns at Scale: Findings from a Crawl of 11k Shopping Website (2019) <<https://arxiv.org/pdf/1907.07032.pdf>>; Forbrukerradet, *Deceived by Design, How Tech Companies use Dark Patterns to Discourage us from Exercising our Rights to Privacy* (2018) < <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>>.

²² See fn 16.

²³ <https://www.beuc.eu/publications/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups/html>

Without adequate legal responses, there is an acute risk that traders will use underhand tactics to sell products. Consumers are often unable to stop unfair commercial practices such as covert data collection, security hacks, sale of fake or dangerous products, amongst many others. This is because, on the one hand, their access to court or ADR is very much limited²⁴, and on the other, any isolated action will not be able to change the way the market operates and/or force the adoption of better practices, let alone provide relief for the detriment suffered. At worst, the cross-border nature of many transactions will act as an additional obstacle to consumer redress.

To reinforce consumer protection in a digital economy (and in brick and mortar markets), strong public enforcement is necessary to serve consumers.²⁵ It needs to become central to any policy. Public enforcers are also best placed to help devise global enforcement solutions, that are crucial when most leading retail platforms are established outside the UK (eg. Amazon in Luxembourg, Google and Facebook in Dublin).

I therefore welcome the proposed changes to the powers granted to enforcers, CMA in the first instance. Andrew Tyrie had made clear the need to enable the CMA to ‘intervene earlier and more robustly to tackle consumer detriment, and to penalise and deter wrongdoing when it occurs’.²⁶ Tyrie made a number of proposals to bring consumer law tools in line with competition law enforcement, with notably more administrative powers being granted.²⁷ It is reassuring to see that the CMA would be allowed to decide for itself where a breach of consumer law has occurred rather than continue to rely on courts to enable the CMA to take real action. The other proposed changes (fines up to 10% and sanctions for traders who ‘drag their feet’) are welcome as they ought to signal a change in gear with regards to expectations placed on businesses that flout consumer law.

I have however strong reservations with pushing towards consumers and traders resolving disputes more independently, although tailored supports to litigants seems a useful step forward. However, I wish to warn against pushing towards arbitration as a method in consumer disputes as well believing that signposting will and can herald a new dawn for consumers to take matters in their own hands. I here regret also that the consultation does not reflect more broadly on vulnerable consumers and their needs in access to justice with only one question addressing their needs directly (Q65). On these matters, I invite you to read: Riefa C., Saintier S. (eds.), *Vulnerable Consumers and the Law, Consumer Protection and Access to Justice* (Routledge 2021) and notably the concluding chapter 15, C. Riefa, S. Saintier, the way forward, for an ‘inclusive’ access to justice to protect vulnerable consumers’, pp. 244-259. The book recommends 3 main areas of action that go beyond the use of ADR and include notably acknowledging lack of access to justice as a systemic failure, supporting effective and fair dispute avoidance through improving dispute resolution in regulation and public enforcement and improving dispute resolution and access to justice by looking at one-stop-shops to close the access to justice gap, harnessing digital justice where appropriate, and above all making the required political commitment and financial investment in a sector that has been stripped bare. ADR cannot be the only way forward. Small claims courts also need to play an important role.

²⁴ For more on the state of access to Justice for consumers in the UK (and further afield), see C. Riefa S. Saintier (eds.), *Vulnerable Consumers and the Law, consumer protection and access to justice* (Routledge 2021).

²⁵ This is the conclusion reached by Paolo Siciliani, Christine Riefa, Harriet Gamper, *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019).

²⁶ Andrew Tyrie, ‘Letter from Andrew Tyrie to the Secretary of State BEIS’ (21 February 2019) 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf>.

²⁷ Ibid.

In any event, fixing the current deficient ADR system is also an important step and, in this light, I support the proposed changes for oversight of ADR bodies as well as quality.

With Regards to consumers ‘banding together’ to seek redress I wish to push for better tools for collective actions in the UK (answering Q72). There are 2 main ways for consumers to act together in seeking redress (Group litigation orders and stand-alone or follow-on actions in front of the CAT). Both types have strong limitations. In front of the CAT come cases where the harm to consumers come from an anti-competitive practice. GLO require passing a threshold that is often too high for consumers’ actions to be considered together. There are also many sectors where actions are not possible (eg: housing) whereas it is quasi-automatic in another (eg: rail). The UK is lagging behind in this respect and the departure from the EU will bar UK consumers from the benefits of the proposed EU Collective action²⁸ which will have a broad remit as it covers any sectors with provisions that protect consumers. Thus, it will enable collective actions for harmful practices in a large number of sectors, including tourism, food, financial services, and can also stretch to data protection, etc. I strongly urge government to consider changes in this area in order to strengthen private enforcement and to enable consumers to have the ability to change the behaviour of economic operators. I also would suggest that opening up existing avenues (other than CAT) to consumers associations and representative bodies to broaden the base of collective actions and bring the overall regime in line with the competition regime at the CAT. This would help in bolstering consumer protection. It could also help in speeding up the process of certification of class representative. Because acting as class representative requires expertise and funding that most individuals may not be able to put together, I also would encourage investigating ways to fund class representatives (especially since all legal aid has been removed for individual actions).

About the author:

Prof Christine Riefa specialises in consumer and e-commerce/new-tech law. She is widely published on these topics with work cited in official documents from international institutions (incl. The World Economic Forum, UNCTAD, the OECD) and academic scholarship. Her books include *Consumer Theories of Harm, an economic approach to consumer law enforcement and policy making* (Hart 2019); *Vulnerable Consumers and the Law* (Routledge 2021); *Consumer Protection and Online Auction Platforms* (Routledge 2016). She currently serves on the United Nations Working Group on Consumer Protection in E-Commerce (sub-groups on unfair commercial practices and sub-group on cross-border enforcement) as part of UNCTAD Inter-Governmental Group of Experts. She is a member of the Consultative Group of Experts of the Committee for the development of an International Code for the Protection of Tourists at the World Tourism Organisation (A specialised agency of the United Nations). She is the expert to the Rapporteur at the European Economic and Social Committee on the reform of the General Product Safety Directive. She is serving as a member of the consultative group for proposed class representative Liz Coll in *Elizabeth Helen Coll v Alphabet Inc. and Others* (CAT1408/7/7/21). She is a Board Member of the International Association of Consumer Law and a founding editor of the *Journal of European Consumer and Market Law* (EuCML, published by Beck and available on Kluwer).

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²⁸ Proposal for an EU Collective Redress Directive COM (2018) 184 final.