Reforming Competition and Consumer Policy

Response to Consultation Paper by Professor Christian Twigg-Flesner, University of Warwick [redacted]

1. I am responding to this consultation in a personal capacity and not on behalf of my University. I have considerable experience of domestic and European Union (EU) Consumer Law and law reform, both through my academic work and through various forms of involvement with UK consumer law reform, including assisting with the transposition of the Unfair Commercial Practices Directive (2005/29/EU) into UK Law,[1] and preparations for the Consumer Rights Act 2015,[2] as well as giving oral evidence to Parliamentary select committees. My response focuses on the proposals made in chapter 2 on "consumer rights".

Two preliminary observations

2. Before I turn to the specific proposals made in this chapter, and address some of the questions for consultation, there are two preliminary observations I would like to make.

3. My **first observation** concerns the lack of clarity in the Consultation Paper (CP) about the fact that UK consumer law is currently an amalgam of EU-derived provisions and domestic law. Although the UK has gained regulatory freedom with regard to consumer law and policy, this does not eradicate the legacy of EU-derived provisions and entire EU-derived measures, in domestic law. Some aspects are clearly identifiable as such (e.g., regulations on package travel, or the Consumer Contracts Regulations 2013), whereas others are more integrated with the surrounding domestic law (e.g., in the provision on goods contracts in the Consumer Rights Act 2015, particularly with regard to remedies). All of these provisions/measures are integral features of UK consumer law, and were, indeed, generally welcomed by UK governments on either side of the political spectrum at the time of their enactment. The "European route" was used effectively by successive government to deal with consumer law reform where doing so might otherwise have taken up a lot of Parliamentary time. The best example is the significant streamlining of domestic law through the implementation of the Consumer Protection from Unfair Trading Regulations 2008 (CPUTR), which enabled the repeal of several outdated Acts of Parliament (the Mock Auctions Act and the Fraudulent Mediums Act, for instance), and significantly simplified the regulatory landscape in the field of consumer law.

4. The reason I make this point is because this legacy has not disappeared. As the EU continues to develop its consumer law, both through reforms of existing measures and the

[1] Christian Twigg-Flesner, Geraint Howells, Annette Nordhausen and Deborah Parry, *An Analysis of the Application and Scope of the Unfair Commercial Practices Directive* – study prepared for the Department of Trade and Industry, (May 2005); also Robert Bradgate, Roger Brownsword and Christian Twigg-Flesner, *The Impact of Adopting a Duty to Trade Fairly* (July 2003).
[2] Geraint Howells and Christian Twigg-Flesner (eds.) *Consolidation and Simplification of UK Consumer Law*: lead a research team and edited final report (November 2010).

adoption of new measures, there remains potential for improving domestic consumer law without reinventing the wheel. This requires a clear and transparent decision as to (i) whether and (ii) how account could be taken of European developments. The UK has the freedom now not to follow EU developments, and can, of course, ignore them altogether. However, many consumer issues affect UK and EU consumers alike, and as the EU adjusts its consumer law, there would be no harm in the UK considering doing so, provided this is suitable for the needs to UK consumers.

5. As it turns out, several of the proposals made in this CP do reflect changes made to EU Law recently. Take the proposals made at paras. 2-38-2.40 to amend Schedule 1 to the CPUTR 2008 by adding a new prohibition of commissioned/incentivised reviews. This proposal closely resembles the change made to Annex I of the UCPD (on which the CPUTR are based), to which the recent Modernisation Directive (2019/2161/EU) added a provision as item 23c doing exactly that. The CP presents its proposal as arising from CMA research, but this is rather disingenuous. Of course, it is right that the CMA's work confirms that fake reviews are a problem for UK consumers and so action is merited. However, why was this not presented in terms of the EU having recently made these changes, and whilst the UK is no longer bound to follow these, the CMA's work shows that this change would be a useful one to follow nevertheless? The same point could be made about the overlap between the proposal at para 2.41 which corresponds to new point 23b in Annex I of the UCPD, or the proposal regarding paid-for search result in Q47(b) – overlapping with new point 11a in Annex I of the UCPD.

6. In my view, this CP should have included a preliminary discussion about how the UK will, in future, take note of EU developments. Regulatory freedom in Consumer Law does not have to mean ignoring EU developments (and, as noted above, it seems the CP isn't actually ignoring them – just disguising them). I actually see some merit in being able to "cherry pick" now: some EU reforms are perfectly sensible and useful, although there might be some which are less helpful and in respect of which the UK should use its regulatory freedom to develop alternatives which work better for the UK, and which might also tackle the specific issue better than EU law is able to do. But I think it makes no sense to pretend that there is no connection between UK and EU consumer law, nor that EU developments could be a helpful pointer for improving UK consumer law at times.

7. I therefore strongly urge BEIS to develop, and consult on, a "tracking process", whereby reforms made to EU measures which were previously implemented in the UK and are part of UK Law, can be considered to determine: (i) whether there are steps taken in EU consumer law in respect of issues which are also of concern to UK consumers; (ii) whether the solutions adopted by the EU are suitable for tackling these concerns adequately; (iii) whether the UK could modify or enhance the EU's solutions in some way; and (iv) whether to make corresponding changes to domestic law.

8. This would not in any way tie the UK to following the EU at all. But if the EU is doing the leg-work in developing ways of tackling identified consumer concerns, and if the solutions developed by the EU would fit into existing UK Consumer Law because of the historic

interaction between EU-derived and domestic rules, then keeping track of EU developments overtly seems advisable.

9. My **second observation** is another EU-related point, but this time in respect of the Trade and Cooperation Agreement (TCA) between the UK and the EU. The CP also does not mention this at all in the context of consumer law, but there does seem to be a need to consider how the TCA relates to the future development of UK consumer policy and law. For instance, points 7 and 12 of the Preamble to the TCA stress the joint commitment to a "high level of consumer protection" and refers to *improving* "their respective high levels of protection". There is a lot of interpretative room but the TCA does express a commitment by the UK and the EU not to lower levels of consumer protection, but to "improve" them. "Improving" protection can mean a number of things: it could refer to making existing levels of protection work better, balancing an intended adjustment in one area with an enhancement in another area, and further raising levels of consumer protection. So there really needs to be a debate in the UK as to how it might seek to reflect the commitments made in the TCA in developing its future consumer policy.

10. Furthermore, Art.208 TCA contains clear commitments in respect of consumer protection in the specific context of electronic commerce transactions. Some of these are already met by existing legislation, but not all, and further steps might be necessary to ensure the specific commitments are all met. Not doing so would mean relying on the "deemed modification" approach in s.29 of the European Union (Future Relationship) Act 2020 which, whilst achieving technical compliance, does not help to improve transparency and clarify for consumers and businesses. Indeed, the question of whether domestic law suffices to implement Art.438 TCA has already been the subject of consideration by the Court of Appeal,[3] concluding that at the present time, this is the case – but there are various things that could happen which might change this.

11. The UK therefore needs a clear position on how the commitments made in the TCA will shape the future development of domestic consumer law and policy.

12. I make these points because they are fundamental to any future development of domestic consumer policy and law in light of the much greater regulatory freedom available to the UK post-Brexit. Withdrawal from the EU and any binding obligations under EU Law should not, however, mean pretending that EU consumer law neither exists nor has significance for domestic consumer law. And the consumer protection commitments made as part of the TCA need to be properly implemented, both with regard to the specific matters in e.g., Art.208 and 438, as well as the wider commitments made in the TCA.

Specific observations

13. Para 2.5: the UK has a real opportunity to improve the position of "vulnerable" consumers. It needs to develop a clearer understanding of what makes consumers vulnerable and how

[3] *Lipton v BA City Flyer* [2021] EWCA Civ 454

this can appropriately be reflected in legislation. For instance, the CPUTR 2008 currently rely on the "characteristic"-based approach of vulnerability based on the UCPD (which refers to age, mental or physical infirmity, or credulity). This does not allow for vulnerability arising from other systemic factors, such as educational background, ethnic origin, economic circumstances, nor from situational factors (e.g., recently bereaved, recently unemployed etc). The EU has been slow to tackle its conception of vulnerability and to reflect this in legislation, but the UK could now go further and adopt a more comprehensive notion of vulnerability in consumer law.

14. Q.30: the proposed definition seems incomplete, and not clearly worded. Allow me to suggest the following: "A 'subscription contract' is a contract between a trade and a consumer for the supply of goods, digital content, or a service, or a combination thereof, over a fixed or indefinite period of time, in return for regular payments at particular points throughout the lifetime of the contract". It seems important to capture the payment commitment of the consumer in the definition.

15. Q.31/32: This proposal would simply set out a specific application of a general information requirement already found in UK law (both under the Consumer Contracts Regulations 2013, and under the CPUTR 2008), and so should not have a significant effect on traders already complying fully with their obligations regarding pre-contractual information.

16. Q.33: Traders will be better placed to answer this question, of course. However, I would imagine that honest traders who are genuine in wishing to look after their customers would not be concerned about this.

17. Q.34/35: From a consumer protection perspective, a reminder that an auto-renewal point is approaching and that the consumer has a limited opportunity to exercise the right to cancel the contract at this point should be given in respect of all subscription contracts, irrespective of what the right to cancel would be after the auto-renewal point. Anything less would seem insufficient to address the policy concern identified in the CP.

18. Q.36: It would probably be helpful to consider the behavioural economics dimension of this point, and I would hope that colleagues with relevant expertise will have responded to you separately about this. Option (i) would allow for the continuation of the contract and thereby utilise (exploit?) consumer lethargy in acting to stop the continuation. Consumers might miss the reminder, or might not appreciate the urgency of acting, so there is a risk of inadvertently sliding into the continuation period. Option (ii) would require an active step and would protect consumers who would otherwise not act but subsequently face the negative effects of the full price. Again, I would expect honest and reputable traders to have an approach consistent with Option (ii) already. In any case, from a consumer perspective, option (ii) might be preferable.

19. Q37/38: I have no particular views on this, other than to endorse the general proposal that automatic suspension after long inactivity would seem appropriate.

20. Q39/40: I agree with this proposal. Most consumers will have experiences where finding information about how to cancel a subscription contract is difficult, and the process itself often puts several hurdles in the consumer's way (eg. Having to speak to someone on the telephone, who will then do their best to deter the consumer from cancelling). Although businesses will, understandably, wish to preserve subscriptions, this should not mean that consumers should face a process which makes cancelling more difficult than signing up.

21. Q41: I agree that certain contracts might need to be considered for exemption from some of the proposals, particularly those where stopping supply would adversely affect a consumer's health or legal obligations.

22. Q42: Option (b) or (c) are more appropriate than option (a). In principle, there is no objection to having instances of "commissioned" reviews because reviews can have an important informative role for consumers. But the parameters of commissioning are important. In particular, the extent to which a trader might seek to exercise editorial control over a review might need to be addressed to ensure that reviews remain reasonably balanced. Reviews also need to be published clearly as "commissioned" reviews, and the conditions of commission the particular review should be made available to any reader of the review. There might even be scope to encourage the establishment of some sort of industry scheme, or at least a code of practice, on commissioned reviews.

23. However, fake consumer reviews are a different issue, and prohibitions of such reviews such be as broad as possible because of the very serious detriment these can cause to both businesses and consumers alike. Option (c) would be the strongest one, and I would support this.

24. Q43: this is something business representatives are better placed to comment on.

25. Q44: This is probably better answered by someone aware of the practical possibilities offered by review systems. I would imagine that a trader who invites customers to review products on its website can easily verify whether the customer has actually purchased the product (although less so whether that customer has then also used the product). Third party review sites will face greater difficulties in proving this but there might be technical means which allow for some verification that a review is genuine (for instance providing a copy of a serial number, where available).

26. Q45: In short, yes.

27. Q46: The problems of "dark patterns" and "sludges" have reached a general audience, although there is as yet limited awareness of this, it seems. More research is needed, both with regard to consumer awareness and consumer concerns, but also of reviews of specific websites for evidence of dark patterns. It is possible to deploy the CPUTR to combat dark patterns where these meet either one of the specific prohibitions of misleading actions/omissions or aggressive conduct, or the general prohibition of unfair commercial practices, but guidance by the CMA on this issue might be welcomed by both businesses and those advising consumers/tasked with consumer law enforcement.

28. Q47: “Drip-pricing” is already covered in law but requires both greater awareness and greater enforcement. “Paid for” search results can be misleading because they might be presented even though the result does not actually relate sufficiently to the consumer’s query. Indeed, this is an issue already added to Annex I of the UCPD by the recent Modernisation Directive and is therefore another example of a proposal closely related to a recent EU reform step. Introducing this particular prohibition into UK Law would be a useful step.

29. Q48: Although significant work has been done in simplifying Consumer Law already (the Consumer Rights Act 2015 was an important step in that direction), there is scope for doing more. The quality of legislative drafting, particularly of the 2015 Act, has met with critical comment and there is scope for improving legislative drafting generally.

30. Some updating might be useful: for instance, the indicative criteria for the satisfactory quality test in the Consumer Rights Act (see s.9(3) for goods, and s.34(3) for digital content) reflect the approach taken in 1994 when updating the Sale of Goods Act 1979 which, at that time, applied to both commercial and consumer sales transactions. Things have moved on since 1994, particularly the growth of the digital economy and the spread of smart devices. So there might be scope for adding additional relevant factors (e.g., on interoperability, compatibility etc) to reflect modern-day issues.

31. There is also potential for further consolidation and alignment of UK consumer law, particularly now that there is greater freedom to legislate after withdrawal from the EU and the removal of previous concerns about being able to demonstrate compliance with implementation obligations of EU Directives in this area. For instance, the Consumer Rights Act 2015, despite its name, does not implement the Consumer Rights Directive, even though early discussions about the Act were triggered by the EU’s initial proposal for the Consumer Rights Directive (I was involved in discussions with members of the team then active in BEIS’s precursor departments). Consideration should be given now to incorporating the Consumer Contracts Regulations and the CPUTR into the Consumer Rights Act, for instance.

32. There is also now the opportunity to be more ambitious and to write a large Consumer Act, comparable to a “Consumer Code” found in other jurisdictions. Such a new Consumer Act would bring together all the different pieces of consumer law in one single act and would thereby facilitate consistency in terminology and definitions, as well as better alignment of the various elements of consumer law.

33. If such a step seems too far-reaching, the government might wish to consider whether Consumer Law would benefit from the drafting of a “Restatement of Consumer Law”. Restatements have been a popular development in the United States, where the American Law Institute has been very active in drafting restatements of many areas of the law. I

have argued in my academic work that there would be some merit in a restatement.[4] This, too, could help in providing greater clarity, particularly because the text of the rules restated would be accompanied by explanations and examples (if the methodology of the ALI restatements were mirrored).

34. Q49: The consultation paper actually mentions one particular unintended consequence/perverse incentive of existing consumer law in the rise of practices delaying the formation of a contract (paras 2.57-2.60). This is in part caused by the triggering of certain consumer rights/trader obligations at the point of contract formation. As a result, traders have found a way of delaying this triggering point in a way not intended. It would seem sensible to review such instances and consider adjusting the law (in the context of pre-payments, where the Law Commission identified this problem, a solution might be to let certain rights/obligations be triggered by the taking of payment by the trader, irrespective of the point of formal contract formation).

35. Q50: Businesses can provide fuller responses to this question. However, it is well-known that the existing information duties and disclosure obligations do not always perform their intended objectives because they do not align with the information-seeking behaviour of most consumers. The UK has an opportunity to draw on relevant research in this area to consider how to revise the existing pattern of information duties in order to better reflect the way consumers behave, and the point at which the information in question would be needed by, or useful to, consumers.

36. Q51/52: I welcome the government's commitment to implementing the Law Commission's proposals regarding changes to the law in respect of prepayments. I have some reservations about the detail of the Law Commission's final proposals with regard to how the changes would be given legal effect in the proposed amendments to the Consumer Rights Act 2015, but I agree with the substance of these proposals. However, as these proposals will not succeed in tackling all of the consumer problems which prompted the initial report by the Law Commission, it seems right that attention is given to areas where consumer detriment has been identified and where this would hit consumers who are economically vulnerable.

37. Q53/54: this practice seems quite widespread these days, and can be observed by anyone who has ordered goods online. Often, the confirmation email sent by the trader will contain a statement that the email does not constitute an acceptance and that a contract is only formed once the trader has despatched the goods which have been ordered. As a result, certain consumer rights and obligations on a trader, which were probably intended to be triggered once the consumer has placed an order, can be deferred at the trader's will.

38. For instance, s.28 of the Consumer Rights Act 2015 on "delivery", sub-section (3), gives effect to certain rules as to the time of delivery as being terms treated as included in the

[4] See Christian Twigg-Flesner, "Some thoughts on Consumer Law Reform – Consolidation, Codification, or a Restatement?' in L Gullifer and S Vogenauer (eds.), *English and European Perspectives on Contract and Commercial Law – Essays in Honour of Hugh Beale* (Oxford: Hart, 2014).

contract, with time running "after the day on which the contract is entered into". Yet, by deferring this obligation indefinitely through deferring the formation of the contract, a trader can control when time starts to run. In this way, the section is neutered in its practical effect and consumers may still face endless waits before the goods they have ordered are delivered – contrary to the objective pursued by s.28.

39. There is no reason why this consequence needs to happen, and adjustments to the wording of s.28 could easily override a trader's ability to defer the point at which time starts to run: first, there is no reason why the obligation as to the time of delivery has to be part of the contract at all – this could simply be expressed as a statutory obligation. Secondly, the relevant moment at which time starts to run could be the moment *at which the order has been confirmed*. If traders are concerned about receiving more orders than they can fulfil, then there is the practical answer of ensuring that their websites reflect their stock levels and orders cannot be placed one stock has been exhausted; furthermore, if the trader states at the outset that stock is limited and that delivery within the required time will not be possible, the trader can notify the consumer of this either before the order is placed, or by declining to accept the order as part of the order confirmation. There are probably better solutions, but my point is that much of the practical problems caused by delaying the formation of a contract could be solved by drafting changes to the legislation.

40. As for the specific difficulty raised by the Law Commission on this: traders sometimes take payment for the goods at the time of ordering and not at the time when they "accept" the consumer's order. One would probably need a somewhat convoluted argument to determine a legal basis for the trader taking payment at this point (it cannot be as part of the performance of the contract, because the trader has deliberately chosen to defer the coming into existence of the contract), but that might not actually be necessary. Rather, provisions aimed at protecting consumers who have prepaid for goods could be triggered *as soon as payment has been taken*, irrespective of whether the contract has been formed yet or not. Where this involves the transfer of ownership (property), this would be a conditional transfer and if the contract is never formed, the return of the prepayment could trigger revesting of property in the trader (but no sooner). Similarly, the delivery obligations in s.28 of the Consumer Rights Act 2015 could be triggered by the taking of payment. One might even go further and consider whether the trader will be treated as having accepted the consumer's offer (i.e., the order) by taking payment.

Conclusion

41. My comments are intended to be constructive and helpful in developing a forward-looking consumer policy, and I support the substantive proposals made here. But I think that BEIS could be more ambitious. The digital economy poses many additional challenges for consumer protection. The EU has made further legislative progress, and there would be some sense in considering whether further improvements could be made to domestic consumer law, e.g., by updating the Consumer Rights Act provisions on digital content in light of the aspects addressed in the Directive on Digital Content and Digital Services not already reflected in the Consumer Rights Act provisions.

Professor Christian Twigg-Flesner (1 October 2021)