Response to: **Department for Business, Energy & Industrial Strategy** *consultation on*

Reforming Competition and Consumer Policy

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Reforming Competition and Consumer Policy

CCP consultation response by Bruce Lyons and (for ch.2) Bob Sugden

The BEIS consultation on competition and consumer policy contains many excellent proposals ranging from details of the specifics of merger control to more direct enforcement of consumer law. It asks 75 detailed questions covering a wide range of proposed reforms to competition and consumer policy and their enforcement. Most of the questions address important issues, but BEIS also needs to step back and ask how the proposals would fit together (or not). While I strongly support the aims of restoring faith in markets and enhancing process speed and efficiency, my concern is that these may be undermined by failures in due process and anticipation of new harms, while possibly distorting business innovation. This response focusses on two such systemic issues:

- There is an underlying theme of extending the role of executive/administrative decision-making by the CMA, with a reduced role for independent panels and the courts, but there is insufficient consideration of the consequences for confirmation bias, business innovation or standards of review.
- Opportunities for post-Brexit substantive reform have been missed. In particular, proposals on consumer law focus on blacklisting specific unfair sales practices that have emerged over the last decade, rather than on clarifying the underlying principles of what makes them unfair sales practices. The latter would address unethical business behaviour more directly and facilitate rapid response to new practices as they emerge.

Beyond these broad themes, I also comment on some of the specific consultation questions.

Ch.1 Competition

Metrics and Steers

> **Q1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?**

The CMA's state of competition report makes a good start.[1] However, all the cautions about concentration and margin statistics, set out in the first report, must not be forgotten (e.g. aggregation, international trade, local markets, endogenous market structure, competition in improving quality through fixed cost investments including R&D). These reservations mean that aggregate statistics can be positively misleading and should not be used to 'hold the CMA to account' [#1.42].

In relation to the identification of problem markets, it would be more feasible to focus on sectors that are already candidates for a market study than it would be to expect a very broad search to unearth unexpected candidate markets.

> **Q2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?**

Only if used sparingly and if well targeted. Beware of requiring evidence from every firm in the economy (which may be an implication of a genuine 'state of competition in the UK' report) – this would be a non-negligible burden other than, say, as a quinquennial census.

[1] The summary review of the literature on 'increasing market power' in the consultation [#1.23-1.28] is less balanced.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

There seems to be an implicit suggestion that the government proposes to limit CMA independence and intervene more directly. To the extent that this is a correct interpretation, it would be a retrograde step that would undermine business certainty. A particularly negative side effect it that it would favour CEOs with lobbying skills over those with business and innovation skills.

A strategic steer should *not* be frequently revised [#1.42], or it would no longer be strategic. More frequent interventions inevitably become operational interventions, so independence is lost. A public political steer on general prioritisation principles *is* appropriate, as long as specific case selection remains with the CMA. A public steer is much more conducive to effective competition policy than would be secret steers.

It is not clear what regional issues the consultation has in mind when it says: "Government would also like to see the CMA consider whether these tools can be used more regularly to support regional development by addressing harms to competition and consumers that may be specific to particular regions of the UK." [#1.55]. The CMA has often addressed regional competition in the past (e.g., buses, groceries, private healthcare). In the absence of any examples, it is unclear what lies behind this statement.

Markets Regime

The consultation sets out two alternative proposals [#1.56]:

> "Proposal 1: Retaining market studies and market investigations, but enabling the CMA to impose certain remedies at the end of a market study.
> Proposal 2: Replacing the existing market study and market investigation system with a new single stage market inquiry tool."

Proposal 1 is damagingly flawed, but Proposal 2, if appropriately implemented, could be a fruitful way to rejuvenate the markets regime.

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

Proposal 1 would institutionalise confirmation bias: "Government's preferred approach would be for the CMA's board to act as the responsible decision maker when deciding whether to impose remedies at the end of a market study" [#1.61]. *This is a terrible idea!* The CMA Board would *not* (as claimed) "provide a fresh review or 'second pair of eyes' without the need for the appointment of a full independent panel such as that currently used for market investigations" [#1.61], because the CMA Board also decides which market studies to open. So, the CMA board would decide each of what to investigate, whether there is an adverse effect on competition and what remedies to impose. Additionally, the senior executives of the CMA sit on the Board, so they would be in direct line of management of the staff investigating the market (i.e., staff with career concerns who may be worried about displeasing line managers). Furthermore, it is highly questionable that Board members would have the time to read into the details of the evidence in specific cases, alongside their other numerous and complex wider commitments. There would be a complete lack of independence of decision-making.

One apparent safeguard is proposed: "government believes it would be appropriate to reserve structural remedies, such as the sale of assets or ownership separation, for use in market investigations only" [#1.60]. For very good reasons, structural remedies (in particular, breaking up successful firms) are rarely imposed, so this proposal would effectively kill market investigations.

Since well before 2000, there have been only two break-ups imposed: the London and Scottish airport monopolies (created by a deeply flawed privatisation); and cement (which would have been appealed had a much larger merger proposal not come into play). Market studies and most remedies would consequently become a purely administrative, one-phase procedure (with all the risks discussed below).

The definition of a structural remedy is contestable (are limits on expansion in local groceries monopolies or price controls 'structural'?) and would become subject to extensive legal argument. Does a proposed remedy fall within the remit of 'non-structural' remedies? Furthermore, the temptation to avoid a full market investigation could bias the choice of the most appropriate remedies.

> **Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?**

Proposal 2, *if appropriately implemented*, could be an excellent way to rejuvenate the markets regime. However, for reasons detailed in my response to Q13 (and Q4), the first instance decisions in relation to adverse effects and remedies would have to be taken independently from the investigating team – in particular, by a group chosen from an independent panel and with genuine independence from the Board.

This should *not* be seen as the same as a current market investigation without a prior market study, because the role of the panel should be much less intrusive in the investigation stage. Instead, it should be brought in at the decision (and remedy) stage once the evidence has been gathered and analysed by the staff, and when they have proposed findings and associated remedy proposals. The panel (group) should then hold hearings with senior executives from the relevant parties, and should be able to request clarificatory evidence and/or analysis from them as well as from CMA staff. The group would then make a formal decision on adverse effects and remedies (which need not be the same as those proposed by the investigating staff).

Consistency and efficiency could further be enhanced by use of a common panel for all substantial competition decisions, including for markets, mergers and antitrust, and for concurrency decisions following inquiries by sector regulators. [See Q13 below.]

> **Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?**

"Government recognises that allowing the use of interim measures in a market investigation could risk prejudicing regulatory incentives and could lead to unintended market distortions. Government is therefore seeking views on whether, if the CMA is given these powers, their use should be subject to additional limitations or safeguards" [#1.61]. Safeguards are indeed necessary, not least because of Lord Tyrie's vision that the CMA could wield interim measures like a baseball bat, to impose restrictions without the necessity for an investigation or fear of the courts. He suggested that new powers to impose legally binding interim remedies during a phase 1 market study would:

> "enable the CMA more effectively to influence the conduct of those businesses whose practices raise concerns, *without the need for formal work* in the form of market studies or market investigations… Weighing on the minds of management in deciding whether to cooperate with the CMA would be the alternative: direct intervention, in the form of legally-binding requirements. … Many of these exchanges would occur in private. Early public communication of problems in markets, and sources of consumer detriment, could also

encourage improvements to behaviour. For instance, an announcement that the CMA was concerned about certain practices or markets, and minded to investigate, might in itself be sufficient to secure engagement with firms and improve standards…. Legal protections may also be required to ensure that the CMA is adequately protected from defamation liability…" [Tyrie letter, pp.17-18, emphasis added].

An appropriate safeguard would be that interim measures should be imposed only once a market inquiry is opened, time limited, and following a short review of the prima facie evidence by a sufficiently independent decision maker.

Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

It is in the nature of market inquiries (as opposed to, say, abuse of dominance) that a market with multiple firms is the subject of the inquiry, and there could be a serious problem in getting all firms independently to sign up to binding commitments. Furthermore, it could be highly anticompetitive if the CMA were to encourage firms to collude in devising collective restrictions on their behaviour.

Q8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

It is a good idea to give "the CMA a power that requires businesses to participate in implementation trials [that] would allow the CMA to test and trial how best to implement its remedies." [#1.81]

It is also a good idea that "safeguards would be needed to ensure that businesses could be confident that remedies would not become subject to perpetual review" [#1.87].

Subject to these points, and if the issues raised in my answers to Q4-Q7 are properly addressed, then the answer to Q8 should be in the affirmative.

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

The government requires the CMA to achieve a benefit to taxpayer-cost ratio of at least £10 for each £1 of taxpayer-cost (i.e. budget). In order to tie tangible benefits to tangible case work, 'benefit' is essentially measured by *expected direct price savings from the remedies on actual cases completed* (averaged over three years). This hugely underestimates the real benefits because it ignores deterrence. (Think how dangerous it would be if military leaders had to justify their budget by measuring the value of wars fought, ignoring wars deterred.) The 10:1 target has only narrowly been met despite the 3-year average including a series of very large market investigations – markets work has accounted for three-quarters of the tangible benefits of the CMA's work in recent years. It is a matter of concern that the target creates insidious distortions, including in the choice and execution of markets cases.[2] The Treasury target should be suspended pending appropriate measurement of the value of deterrence.

Merger Control

Q10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

[2] See the 2016 blog by Bruce Lyons: The dangerously distorted incentives created by the CMA's performance target | Competition Policy blog (wordpress.com).

It is helpful to distinguish: a) removal of potential competition from a market (in particular, the acquisition of an innovative firm with currently low sales); and b) 'leveraging of market power across different products or services'.

With respect to a), young, R&D intensive firms can take a long time before reaching market to earn high revenues, and digital firms often build a large client base without charging, before monetising later. BEIS is currently conducting a separate consultation on a proposed transaction value threshold of £100m-£200m for digital firms with Strategic Market Status, and a higher threshold for non-SMS firms (whether digital or not) would be appropriate.[3] A (share) price to sales (revenue) ratio greater than around five is associated more widely with innovative industries (including non-digital).[4] This suggests an acquisition value threshold of £350m-£500m might be an appropriate counterpart to the current and proposed turnover thresholds (£70m and £100m) to capture the future prospects of innovative (non-SMS) firms. This could be applicable to all mergers in updating the current test [#1.98].

With respect to b), the consultation considers "empowering the CMA to review a merger if any business which is a merging enterprise to the merger has both: a) a share of supply of at least 25% of a particular category of goods or services supplied or acquired in the UK or a substantial part of the UK; and b) a UK turnover of more than £100 million." [#1.105]. It is important to remember the increased resources burden of post-Brexit merger control, so beware of diluting the CMA budget. More substantively, beware of a sharp switch to consider vertical or diversifying mergers which do not have market power/competition concerns.

The consultation expresses a concern about the flexibility of the current share of supply test [#1.108-109]. I note that the recently revised CMA merger guidelines have greatly enhanced that flexibility/unpredictability. I expressed a concern about this in my response to the CMA's consultation on the revisions.

> **Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?**

> **Q12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?**

One proposal is to restrict the CMA to refer only the issues that are identified at Phase 1 [#1.118]. This would *not* be productive as the temptation would be for the kitchen sink of possible effects to be listed at the end of Phase 1; and what happens if a serious unanticipated problem is found during phase 2 investigation? Furthermore, there could be legal wrangles over whether the exact phase 2 finding matches the wording of the specified phase 1 potential harm.

It would be beneficial to allow parties to request automatic reference to Phase 2, particularly if some extra time is added to compensate for loss of analysis in phase 1 [#1.123].

CMA Panel Decision Making

> **Q13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?** [5]

[3] See A new pro-competition regime for digital markets, #181

[4] See, for example, Aswath Damodaran's financial database at NYU: Useful Data Sets (nyu.edu) under 'multiples'.

[5] See Lyons (2021) for a deeper analysis and the historical context. A relevant extract is attached as Annex 1.

The consultation rightly says that: "Independent Panel members are intended to act as an independent 'fresh pair of eyes'. They also provide the CMA with important outside perspectives and experience to assist with the CMA's decision making, including business acumen." [#1.130] These are crucial attributes for both efficiency in decision-making and due process. The CMA Panel should be retained.[6] However, *reform of the panel system is long overdue*.

Two changes are suggested in the consultation [#1.131].

First: "*Size and composition:* Government proposes a smaller pool of dedicated Panel members for whom work on the CMA's Panel is their primary employment." This is broadly sensible for the reasons given. However, it would *not*, as suggested, "allow the CMA to attract a more diverse talent pool" unless a range of time commitments (between, say, 3 and 5 days per week) is permitted. This would facilitate mid-career talent to become members without entirely abandoning their current careers.

A related concern is that there would be a loss of independence if panel membership was to become part of a career at the CMA or similar regulators. It is important to retain fixed, non-renewable terms (with a proportion of the panel changing, say, every 2 years) so members are not tempted to decide cases with an eye on their own contract renewal (which may conflict with the merits of the case). Panels should, of course, operate according to a collective set of aims, principles and approaches to enforcement and remedies, guided by legislation and general CMA guidance documents, so there is coherence and consistency in decision making.

The second suggested change is: "*Role: To reflect the smaller number of Panel members, government is considering revising the role of the Panel members to making final decisions on theories of harm and remedies*." Panel members are currently too closely involved in the investigation, so this is broadly a good idea. However, there are (at least) two variants of the proposed role. Option 1 would be for the inquiry group of panel members to review the evidence only as presented to them by CMA staff. Option 2 would: a) require the inquiry group to attend hearings with the main parties so they could hear and interrogate their evidence first-hand; and b) prior to making their decisions, permit the inquiry group to request further (feasible and reasonably available) evidence and/or analysis from CMA staff where this was felt to be inadequate or lacking. The latter option 2 is much more preferable as it provides: the group with a better feel for the issues; the firms with greater satisfaction in due process; and it avoids stumbling over gaps in the evidence and/or a lengthy remittal process which could be required after the first instance decision.

Two other reforms (second part of Q13) are necessary to complement the above:

First, *Panel members and the Panel Chair should be fully independent of the CMA's executive committees*, including the Executive Committee (XCo), Pipeline Steering Group (PSG) and Case and Policy Committee (CPC).[7] These executive committees are highly influential in the initiation and investigation of individual cases, with membership in direct line of inquiry staff and staff decision makers, who may have career concerns. A fully independent panel system would eliminate these sources of *confirmation bias* and the perception of such bias.

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[6] See The role of the CMA panel in decision making: Merger enforcement and reform - GOV.UK (www.gov.uk) for some insight from a current CMA panel member.

[7] See Lyons (2021) 'Unfinished Reform of the Institutions Enforcing UK Competition Law'. Chapter 8 in: Angus MacCulloch, Barry Rodger and Peter Whelan (Eds) *The UK Competition Regime: A Twenty-Year Retrospective* Oxford University Press. Section 6.3 of the chapter develops detail of the reforms required, and is reproduced as Annex 1 below.

Second, efficiency, balance and consistency would be promoted by *aligning the markets, mergers and antitrust regimes with the same decision-making process*. *Antitrust concurrency decisions* would similarly benefit by using the same panel and procedure following investigation by the sector regulators.[8] There would be room for some sector specialists on the panel,[9] to sit alongside general panellists to form a decision group in cases brought by a sector regulator. In fact, the role of panel members in concurrency decisions by the sector regulators is very similar to the role I suggest above. See Annex 2 for a summary of the current decision-making processes in antitrust concurrency cases at Ofgem and the FCA.

Antitrust Enforcement

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions 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?

Q15. 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?

Q16. 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?

Q17. 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?

Q18. 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?

Q19. 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?

Q20. 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?

Q21. 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?

[8] It is not clear if the consultation intends the following applies to panels: "Unless the context indicates otherwise the proposed reforms to the CMA's competition law enforcement powers or procedures set out in this consultation would also apply to the concurrent regulators' competition law enforcement powers or procedures." [#1.14 fn18]

[9] Specialist panel membership has a long history.

Q22. 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?

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

The answer is a most definite no. On the contrary, and for the same reasons as given in my answer to Q13, the independence of decision making in Competition Act investigations should be enhanced (along the lines suggested in my answer to Q13).

I note in passing and in anticipation of Q24, that *neither the CMA nor the CAT may reach this view*, but for very different reasons. The institutional interest of the CMA is in expediting executive decisions with minimal challenge, and the CAT in conducting in-depth reviews. This sets up a sharp difference of opinion between the CMA and the CAT with respect to the appropriate level of judicial scrutiny. It is also the source of the CMA's complaint that the CAT is willing to hear new evidence. The result is the lengthy process that may lead to the even lengthier process of remittal. This inefficiency would be substantially finessed by having *fully* independent case decision groups at the CMA, in which case due process could be preserved (and efficiency enhanced by earlier challenge) by lighter touch judicial review.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

This should remain as appeal on the merit unless and until CMA antitrust decisions are made by fully independent case decision groups. [See above answers to Q13 and Q23.] The consultation sets out the original reasons for merits review (quasi-criminality and significant financial penalties) [#1.201]. More generally,[10] the level of review/appeal is a matter of common law, the Human Rights Act 1998, and legislation (CA 1998 requires merits review for the prohibitions). In practice, there are two sets of factors to be balanced, as set out by the England and Wales Court of Appeal.[11] First, the seriousness of the consequences of the first instance decision. This includes fines, invasive remedies and reputational damage associated with quasi-criminality. Secondly, the expertise, processes, and independence of decision-making behind the first instance determination, especially relative to that of the appeals body. This is why the independence of decision-making within the CMA is crucial to determining the appropriate level of judicial scrutiny. This opinion aligns with that of the Furman review.[12] *Fully independent panels would balance fairness and efficiency in process and so permit a reduced level of judicial review*.

Q25. 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?

[10] This paragraph is taken from Lyons, 2021, ch. 8.2.3.

[11] A review on merits 'will accord appropriate respect to the decision of the lower court. ***Appropriate respect will be tempered by the nature of the lower court and its decision-making process***. There will also be a spectrum of appropriate respect depending on the ***nature of the decision of the lower court*** which is challenged'. Dupont de Nemours v Dupont (2003) EWCA Civ 1368, para 94. [emphasis added]

[12] "As a counterpart to this change, the CMA's structures for antitrust cases ***should enhance the role of the independent members of its decision-making panels***, to safeguard decisions against the potential for executive overreach." [Furman, p.14, emphasis added] This part of the Furman Review recommendation is unfortunately omitted from #1.203 of this consultation.

Q26. 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?

Investigative and Enforcement Powers

Q27. 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?

On the difference between mandated and voluntary provision of information: it is right to hold voluntary requests to account with respect to any information that a firm chooses to provide. However, what if there is only partial information provision, with some less favourable evidence kept back? Such selective information provision could be punishable in the context of a mandatory request as part of a case investigation, but similar punishment would have a negative effect for voluntary requests if it incentivises firms to hold back from cooperation.

Q28. 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?

Q29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

The Minister should authorise international agreements. Thereafter, the Minister should stand back from decisions relating to individual cases, so as to maintain CMA independence.

Ch.2 Consumer Rights[13]

We fully agree with the fundamental importance of the consumer protection regime and its need to be able to evolve flexibly because markets are "continually changing and adapting to new opportunities" [#2.3]. A strong regime is also necessary to restore consumer faith in markets. ***Our concern is that the consultation looks over its shoulder at specific issues that have emerged over the last decade, and it does not look forward to new issues that may emerge in the future*** (possibly even in response to the current proposals). The focus of the consultation is on three specific issues (subscription contracts, fake reviews, "exploitation of behavioural biases") [#2.6].

We suggest that it would be better to establish more fundamental principles that can be used to address such specific issues. For example, action is proposed in three areas in relation to subscription contracts: "(i) At the pre-contract stage, where important information about the subscription contract should be clear and prominent; (ii) contracts which continue and contain autorenewal features, should not auto-renew or rollover without the consumer's specific agreement and (iii) the process of exiting a contract should be clear and easy for consumers." [#2.13]. These are each examples of what Lyons and Sugden (2021) call '*transactional fairness'*, which requires *'no deception'* in entering a contract and *'no hindrance'* in exiting one.[14] We define deception and

[13] Response to C.2 co-authored by Bruce Lyons and Bob Sugden

[14] "Transactional fairness requires that a firm acts in such a way that consumers with normal expectations about pricing practices in the relevant market are able to understand the consequences of transacting with that firm (*No Deception*) and are not hindered from terminating a relationship with the firm or from

hindrance to embrace both active (e.g. withholding relevant information, or undue complexity in stopping a subscription) and passive practices which exploit normal expectations or inattention (e.g. drip pricing, or failure to send auto-renewal reminders). The current law does embrace misleading actions and omissions (i.e., active and passive deception), but is very limited on what we call hindrance.

Reliance on an extended blacklist, as opposed to fundamental principles, results in specification problems and avoidance strategies. For example, the consultation's proposed pre-contract solution for autorenewal issues is to require a default of 'no autorenewal' when entering a subscription contract. It is not obvious that this default is always to be preferred to the alternative as it may leave the consumer uninsured or anxious about disrupted supply – an issue accepted in the consultation [#2.29]. It then becomes contentious as to where to legislate the line between alternative defaults (see our answer to Q41). And when the line is drawn, products and offers might be redesigned to get around it. This micro-legislation specification problem applies more widely, including in relation to fake reviews and "exploitation of behavioural biases".

A second general issue is that the consultation considers consumers and businesses separately and in isolation. In fact, no questions are asked from the consumer perspective (implicitly assuming the government or regulator already knows what is best for them?), and each of Q31-Q33 is from the perspective of the seller. ***The separation of consumer and seller misses the fundamental interaction of market economies, which is the transaction between buyer and seller***. We address the following consumer rights consultation questions from this perspective of *'transactional fairness'*.[15]

Turning to current UK consumer legislation, this is founded on EU directives which are particularly weak in relation to practices that hinder a consumer from terminating a relationship with the firm or from transacting with alternative sellers. 'Aggressive commercial practices' are prohibited but they are defined rather narrowly, as practices that use 'harassment, coercion, including the use of physical force or undue influence' to impair consumer freedom of choice. 'Undue influence' is defined as 'exploiting a position of power in relation to the consumer so as to apply pressure'. This is difficult to apply to less aggressive, but nonetheless harmful, forms of hindrance; e.g., unnecessarily time-limited offers hinder a consumer from searching for alternative offers. One consequence is regulator hesitancy and conservatism in addressing business practices that hinder consumer choice. Other consequences are business uncertainty, and differences in interpretation amongst those who implement the law. Furthermore, it leaves a ***gap between competition law covering practices that exclude rival sellers from accessing consumers, and consumer law's weakness in relation to sales practices that hinder consumers from accessing alternative sellers. A deeper and wider definition of practices that hinder consumer choice is necessary***.

The consultation does not ask for views on ***another gap between the interpretation of unfairness as perceived by many regulators and what they feel confident in taking before the courts***. This seems to be the reason for the focus on extending the blacklist (Schedule 1 of the CPRs). In the wider context of the English common law of contract, a senior Law Lord has written: 'The modern view is that ***the reason for a rule is important***. The rule ought to apply where reason requires it, and no

transacting with alternative sellers (*No Hindrance*)." For the full paper, see Transactional fairness and pricing practices in consumer markets.

[15] This approach is also supported in the Penrose report (2021, p.48).

further'.[16] We suggest that a modern view of consumer rights should include an explicit statement of the ethical basis for transactional fairness to provide clarity in the normative *reason* for why specific practices are unfair and unacceptable. Consumers and firms can readily understand deception and hindrance, and agree that they are 'bad things'. Transactional fairness adds clarity in the normative *reason for a rule (i.e. prohibited business practice)*: the ethic of mutually beneficial transactions. The consultation ***misses the post-Brexit opportunity for a natural extension of the current legislation to make it ethically clearer, simpler, harder to finesse and future-proof***.[17]

We return to these themes in addressing the following questions, as well as commenting on some of the specifics relevant to an extended blacklist.

Q30. Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?

Q31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?

Q32. Would it make it easier or harder for traders to comply with the pre-contract requirements? And why?

Q33. How would expressly requiring consumers to be given, in all circumstances, the choice upfront to take a subscription contract without autorenewal or rollover impact traders?

Q34. 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

Definitely (b). We cannot see any virtue in limiting reminders to (a). The issue to be addressed is inattention to continuation with the current service provider, not a series of fixed-term contracts per se.

Q35. How would the reminder requirement impact traders?

Q36. 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?

We think (a) is sufficient. Introductory offers are a widely understood encouragement for consumers to appreciate the qualities of a product ('experience goods') or to compensate them for switching costs. Furthermore, the consultation is not proposing (b) for other auto-renewal cases without introductory offers.

Q37. What would be the impact of proposals regarding long-term inactive subscriptions have on traders' business models?

[16] Steyn (1997) 'Contract law: fulfilling the reasonable expectations of honest men' *Law Quarterly Review* 113(Jul) 433-442; quote 433.

[17] Annex 3 provides a short extract from Lyons & Sugden (2021), comparing our suggested approach with the EU Directive that is implemented in the UK CPRs.

Q38. What do you consider would be a reasonable timeframe of inactivity to give notice of suspension?

Warnings about inactivity seem appropriate, but this is another example of a detailed proposal where the answers may be dependent on circumstances. Instead of micro-legislation, firms and regulators need a set of general principles that can be applied to specific cases. Inasmuch as the firm can easily be aware that the consumer is deriving no benefit from the transaction, the issues discussed in #2.25 are examples of passive deception. Once broad principles are clarified, then regulators can tackle individual cases and develop guidelines which can be updated rapidly and as necessary.

Q39. 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)?

The process of cancelling a contract should be at least as straightforward as the process of entering one. This excellent principle is what the CMA has called entry/exit equivalence, and would provide a better approach than trying to legislate in detail how a regulator or the courts should interpret it.

Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?

Yes, but rather than legislate for each of the bullets in #2.28, it would be more effective and encompassing simply to specify the principle of entry/exit equivalence, then leave the details to guidance written by the CMA.

Q41. Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?

Exemptions are an example of the tangle created by micro-legislating. They also create opportunities for special pleading and lobbying by industry groups. Car insurance is often not on auto-renewal while house insurance (which provides some of the most egregious examples of price walking) often is. Auto-renewal creates a hindrance to search and switching for consumers who normally accept the default. Is the proposal to normalise both types of insurance on default auto-renewal? If so, is there any evidence that this would help consumers? While there may be a good argument for allowing auto-renewal to be standard for insurance contracts, it is also true that technology, intermediaries and consumer behaviour evolve in often unpredictable ways. Micro-legislation can then fall behind market realities and so create unfairness and inefficiencies that can be more immediately rectified with a principles-based approach founded on the 'reason for a rule'. The latter would also allow for more subtle and tailored remedies, such as limits on excessive price increases as a quid pro quo for default insurance auto-renewal.

[Incidentally, we are not sure what medicines the consultation has in mind for autorenewal.]

Q42. 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?

(c) is most appropriate. To facilitate entry, however, this blacklisted practice should still allow for commissioning market research or giving away free product in return for an uncensored review, *as long as this is clearly flagged in the review*.

However, it should be an alarm bell that there is lack of clarity in the Consumer Protection Regulations (CPRs) if it is so difficult to tie down why fake reviews are wrong [#2.35]. This would not be the case if transactional fairness underpinned the approach to consumer law. In the context of fake reviews, we note that #2.32 contains examples of 'deception' in relation to understanding the consequences of transacting with that firm (fake positive reviews) and of 'hindrance' in terminating a relationship with the firm or from transacting with alternative sellers (fake negative reviews). It is therefore clear that fake reviews are specific examples of the wider concept of transactional unfairness (no deception and no hindrance).

Q43. 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?

Q44. 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?

Q45. 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?

It would be very odd not to prohibit the advertising of an illegal service (e.g. fake reviews or street drugs) which ought to be treated as participating in the illegality.

Q46. 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?

The use of the concepts of 'nudge' and 'sludge' in #2.44 is scientifically questionable. Clearly, retailers (whether selling online or from bricks-and-mortar outlets) can choose between alternative ways of presenting their offers to consumers (alternative 'choice architectures' in behavioural terminology). It is well known that different choice architectures can activate different psychological mechanisms and thereby induce different patterns of choice. When a change in choice architecture is intended to steer consumers to choose options that are deemed to be better for them, it is now standard to use the term 'nudge'. Recently, some writers have started to use the term 'sludge' to describe changes in choice architecture that are intended to steer consumers to choose options that are worse for them. But the distinction between nudge and sludge is meaningful only if consumers' 'true' preferences or interests are well defined and known to the regulator. The distinction between the presence or absence of nudge/sludge is meaningful only in relation to some well-defined 'neutral' choice architecture. In many cases, neither of these conditions apply.[18]

Throughout the lifetime of every consumer, firms have designed advertising, packaging and store displays to steer consumers towards buying their products. All these forms of steering are 'behavioural techniques' (i.e., techniques that work by activating mechanisms of human psychology), chosen with the intention of benefiting the firm, subject to the constraint that consumers ultimately

[18] See Sugden (2015) 'Looking for a psychology for the inner rational agent' *Social Theory and Practice* 41: 579–598; Sugden (2018) *The Community of Advantage: A Behavioural Economist's Defence of the Market*, Oxford University Press.

choose whether or not to buy. Only an extremely naïve consumer would not already be aware of these facts of economic life. We conclude that the concepts of 'nudge', 'sludge' and 'dark patterns' are not useful for normative policy advice.

In contrast, we believe that the concept of transactional fairness, with 'no deception' and 'no hindrance' at its heart, is both a natural extension of current consumer law and, most crucially, stands on firm normative foundations. Furthermore, both consumers and firms can readily understand deception and hindrance, and agree that they are 'bad things' (in our terms, they go against the ethic of mutually beneficial transactions).

> **Q47. Do you think government or regulators should do more to address (a) 'drip pricing' and (b) paid-for search results that are not labelled accordingly, as practices likely to be breached under the CPRs?**

Yes, but these should flow through from the underlying principles of transactional fairness, and not by 'micro-legislation' for every new practice (needless to say, at least five years after it emerges as a new problem).

> **Q48. 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?**

The more complex the legislation becomes, the higher the uncertainty and compliance costs. The drift of the current consultation is to add more to that complexity, while failing to anticipate future problems. We suggest that much could be achieved, including in compliance and judicial review, by modest changes to the CPRs in accord with a focus on the principles of transactional fairness. This should include an explicit statement of the ethical basis for transactional fairness to provide clarity in the normative reason for why specific practices should be understood as unfair and unacceptable. The wording around 'aggressive commercial practices' could also be simplified and broadened by replacing it with 'practices that hinder consumers from terminating a relationship with the firm or from transacting with alternative sellers'. Consumers and firms can readily understand deception and hindrance, both active and passive, and agree that they contravene the ethic of intended mutual benefit. Less would then be required of legal argument around a rigid, explicit blacklist. This would also encourage self-reflection when a firm considers and designs a novel business practice, and so would facilitate self-enforcement before any harm is done. This natural extension of the current legislation would make it ethically clearer, simpler, harder to finesse and future-proof.

This approach is supported by Penrose in his independent report: "This 'transactional fairness' approach probably isn't a complete or final answer to future-proofing our laws so they will stay fair for consumers, as well as predictable for businesspeople and regulators too. But it is a valuable step towards something that is vital to make sure our digital economy remains trusted and useful for everyone."[19]

> **Q49. Are there perverse incentives or unintended consequences from our existing consumer law?**
>
> **Q50. 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?**

[19] Penrose, 2021, p.48

Q51. 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?

Q52. What other sectors might new powers regarding prepayment protections be usefully applied to?

Q53. How common is the practice of using terms and conditions to delay the formation of a sales contract?

Q54. 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?

Ch.3 Consumer Law Enforcement

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

Yes, but only subject to the right administrative model.

Q56. 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?

Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

A staff investigation may be followed by an agreed settlement (undertakings). Failure to settle should result in the evidence being taken to a three-person group (selected from an independent panel) who should also receive evidence from the relevant parties, including in oral hearings. The group should then decide the case with respect to both a finding of breach of consumer law and the appropriate fines and/or remedies. For most cases, the time required for the group's decision should be weeks rather than months. While there may be some value in overlap with the competition panel, the panellist should include wider expertise in behavioural science, marketing and consumer law.

For civil cases brought by (a sufficiently well-funded) trading standards, it would be advantageous for them to follow a concurrent procedure, also taking non-settled cases to the CMA panel. This would promote regulatory consistency and certainty, as well as justifying a lighter level of judicial review.

Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

Lighter touch judicial review is justified if the first instance decision has been made by an independent group. If the decision-maker is a staff member or executive of the CMA, then the lack of independence would require appeals on the merits (with the further possibility of judicial review of that decision). The reasons are exactly the same as for executive decisions on competition issues. For convenience, I repeat my comments from Q24:

There are generally two sets of factors to be balanced, as set out by the England and Wales Court of Appeal.[20] First, the seriousness of the consequences of the first instance decision. This includes fines and remedies affecting property-rights, as well as the reputational damage associated with quasi-criminality. Secondly, the expertise, processes, and independence of decision-making behind the first instance determination, especially relative to that of the appeals body. This is why the independence of decision-making within the CMA is crucial to determining the appropriate level of judicial scrutiny. Fully independent panels would balance fairness and efficiency in process and so permit a reduced level of judicial review.[21]

Q59. 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?

The economic issues are not as complex as for competition cases, so the CAT (or consumer sister to the CAT) is not necessarily required. If CMA decision-making is truly independent, then judicial review by the High Court might be as effective as by the CAT.

Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

Yes, except the final decision should be taken to a group from an independent panel to ensure consistency and predictability in decisions made across regulators. This would best be achieved by using a common CMA-based panel as suggested for competition concurrency decisions. See answer to Q13.

Q61. 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?

Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

Option 2A (introducing monetary penalties for breaches of undertakings) is fully justified – an undertaking should be viewed as an enforceable contract with a stipulated damages clause that broadly reflects the wider social costs of breach (including deterrence).

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

There may be cases where an honest trader genuinely believed that a novel trading practice was beneficial to his customers, but where the CMA or TSS decided otherwise (recognising the trader's argument but finding against on the balance of effects). In such circumstances, the trader should be

[20] A review on merits "will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision-making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged". Dupont de Nemours v Dupont (2003) EWCA Civ 1368, para 94.

[21] This is also the view of the Furman Review, which is unfortunately omitted from #1.203 of this consultation: "As a counterpart to this change, the CMA's structures for antitrust cases should enhance the role of the independent members of its decision-making panels, to safeguard decisions against the potential for executive overreach." [Furman, p.14]

able to change his practices in line with the CMA or TSS decision while not admitting liability. An admission of liability would, however, be appropriate for more egregious cases where consumer private action could be relevant.

Q64. 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?

Q65. What more can be done to help vulnerable consumers access and benefit from Alternative Dispute Resolution?

Q66. How can regulators and government balance the need to ensure timely redress for the consumer whilst allowing businesses the time to investigate complex complaints?

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

Q68. What further changes could government make to the ADR Regulations to raise consumer and business confidence in ADR providers?

Q69. 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?

Q70. 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?

Q71. How can government best encourage businesses to comply with these changes?

Q72. 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?

Q73. 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?

Q74. 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?

Q75. 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?

Clarity is fundamental to compliance. Increasing the complexity of consumer law will not help. Setting out the fundamental principles of transactional fairness, accompanied by CMA guidelines, would lay the essential foundation for self-enforcement.

Annex 1: ***Coherent Institutional Reform for the CMA*** – extract from Lyons (2021) 'Unfinished Reform of the Institutions Enforcing UK Competition Law'[22]

…

Much of the problem derives from the way the CMA squeezed together the OFT and CC. If it had been designed from scratch, there would be a common approach to decision-making across the enforcement and markets and mergers directorates. The current differences are a historical artefact. In cases requiring similar economic analysis, and with similar effects on consumers and firms, there is no good reason to have different decision structures according to legal instrument.[23] From this perspective, the challenge is to draw on the best of the two institutional traditions to create a common approach to determining cases.

All non-cartel first instance determinations under CA 1998 and EA 2002 should be made by groups drawn exclusively from the independent panel, with a mix of backgrounds including law and economics. For full independence, panel members should continue to be appointed for fixed terms without possibility of renewal. Each decision group should be selected independently by the panel chair, who should not be a member of an executive committee, particularly of the CPC which initiates cases.

While this arrangement looks like the current decision-making for phase 2 mergers and market investigations, there should be a qualitative change in the distance between the decision group and investigation staff. Prior to the CMA, there were separate staff investigation teams in the OFT for phase 1 and in the CC for phase 2. One of the aims of creating the CMA was to allow staff continuity for speed and efficiency of investigations. However, the institutional arrangements did not change sufficiently to balance the increased potential for confirmation bias. This requires a greater element of staff challenge by the decision group, and a reduced level of the group's control of the investigation. This applies equally to CA 1998 and EA 2002 cases.[24]

Parties should continue to have access to decision groups in hearings and, if appropriate, on site visits. Decision groups should be able to revise the first phase SO, or theories of harm for second phase mergers and market investigations, and request further evidence gathering or analysis from CMA staff. They should not be involved in the production of technical working papers but should fully consider and, if necessary, challenge CMA staff analysis. The current openness and publication of non-confidential evidence, analysis and decisions should be preserved.

…

[22] Lyons, Bruce (2021) 'Unfinished Reform of the Institutions Enforcing UK Competition Law'. Chapter 8, section 6.3 in: Angus MacCulloch, Barry Rodger and Peter Whelan (Eds) *The UK Competition Regime: A Twenty-Year Retrospective* Oxford University Press

[23] Price-fixing and market-sharing cartels are an exception because such agreements are per se illegal even if they have no economic effects.

[24] While this is close to Nazzini's option 2 (see (n 9) 30), he offers this only hypothetically as a contrast to the staff dominated CDGs. He does not mention the current independent CMA Panel, or decision-making in the mergers and markets directorate. He only says, in passing, that EA 2002 determinations are subject to judicial review because they 'do not involve a finding of liability but are of a regulatory or administrative nature'; (n 10) 4.

Annex 2: ***Decision-making in antitrust concurrency cases at Ofgem and the FCA***

Ofgem has an Enforcement Decision Panel (EDP) of around eight independent experts, many of whom have experience of making similar decisions at the CMA or FCA. The CAA uses the same panel. The EDP is appointed by the Board for fixed terms, but with no apparent bar on reappointment. The chair of the EDP selects a group of three, at least one of whom is legally qualified, to decide on contested CA98 cases (and certain other regulatory decisions). EDP groups receive written representations from the Ofgem case team and the parties and may, at their discretion, also hear oral representations from them. No new evidence is permitted during oral hearings. Decisions may be appealed on merits before the CAT.

The FCA's Competition Decisions Committee (CDC) is broadly similar to Ofgem's EDP, with a similarly constituted independent panel of experts from whom a three-person group is chosen for each case. Panel members are appointed by the Board for fixed periods, though again there is no apparent bar to re-appointment. The CDC is more active in evidence gathering than in the Ofgem system, but its independence is less clear. Once FCA staff have taken a CA98 case up to issuing a Statement of Objections, a three-person CDC group is appointed by the highest FCA executive committee. The group reviews all the evidence and holds oral hearings. It can then ask the case team to investigate further or issue a modified SO before deciding.

Annex 3: *Transactional Fairness and Consumer Law* – Section 6 of Lyons B & Sugden R (2021)[25]

In many but not all respects, transactional fairness is aligned with the principles of [UK] consumer law. In this section, we consider these similarities and differences, focusing on the EU *Unfair Commercial Practices Directive* 2005/29/EC (for short, 'the Directive').[26] [27]

The most fundamental articles of the Directive require that unfair commercial practices are prohibited, and define a practice to be unfair if it meets two conditions: (a) it is 'contrary to the requirements of professional diligence' *and* (b) it 'materially distorts or is likely to materially distort the economic behaviour with regard to the [firm's] product of the average consumer whom it reaches or to whom it is addressed' (Articles 5.1, 5.2). The 'average' consumer is defined separately for classes of clearly identifiable consumers who are 'vulnerable' by virtue of mental or physical infirmity, age or credulity (Article 5.3). 'In particular', a practice is unfair if it is 'misleading' or 'aggressive' (Article 5.4), terms that are then given more detailed definitions. An Annex blacklists specific misleading and aggressive practices which 'shall in all circumstances be regarded as unfair' (Article 5.5).

'Professional diligence' is defined in terms of consumers' reasonable expectations about the 'skill and care' of traders, 'commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity' (Article 2(h)). Our concept of normal expectations is similar to the Directive's 'reasonable expectations'. Our concept of acting with intentions for mutual benefit can be interpreted as a way of clarifying the Directive's 'good faith'.

On one reading of 'material distortion', the reference point of undistorted behaviour is the behaviour that would be induced by consumers' *true* preferences. Contrary to our principle that transactional fairness should not refer to latent preferences (Section 2.7 above), that reading would assimilate 'distortion' to the concept of 'bias', as used in behavioural welfare economics. However, when the Directive defines misleading and aggressive practices, it uses the more precise expression 'causes or is likely to cause him [the average consumer] to take a transactional decision that he would not have taken otherwise' (Articles 6.1, 6.2, 7.1, 7.2, 8). The implication is that, in relation to any specific practice, undistorted behaviour is defined as what the consumer would have done *in the absence of that practice*, not what he would have done if he were rational. That does not invoke latent preferences and so provides a more objective basis for 'material distortion'.

The Directive's definition of a 'misleading practice' is broadly similar to our concept of deception, and includes both active deception (Article 6 on 'misleading actions') and passive deception (Article 7 on 'misleading omissions'). This definition is consistent with each of the principles we proposed in Sections 2.1 to 2.7.

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[25] Lyons B & Sugden R (2021). Transactional fairness and pricing practices in consumer markets. CCP Working Paper 21-03A

[26] A Directive is a legislative act that sets out a goal that all EU countries must achieve. It is up to the individual countries to devise their own laws on how to implement this. For example, this Directive was translated into UK law by the Consumer Protection from Unfair Trading Regulations 2008.

[27] USA consumer law is complicated by state legislation and case law, but is broadly similar. Section 5(a) of the FTC Act underpins federal consumer protection: '…unfair or deceptive acts or practices… are declared unlawful' [15 U.S.C. 45(a)(1)]. An FTC Policy Statement on Deception, drafted in 1983 but still prominent on its website, explains 'the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment' (FTC Policy Statement on Deception | Federal Trade Commission).

However, the Directive defines 'aggressive commercial practices' rather narrowly, as practices that use 'harassment, coercion, including the use of physical force, or undue influence' to impair consumers' freedom of choice (Article 8). 'Undue influence' is defined as 'exploiting a position of power in relation to the consumer so as to apply pressure' (Article 2(j)). Clearly, such coercive practices are contrary to our Principle of Voluntary Market Transactions. In terms of our definition of transactional fairness, pressure-selling hinders consumers from transacting with alternative sellers. To the extent that more aggressive practices go beyond this to force unwanted purchases that would not otherwise have been considered, then, like outright theft, they are beyond the scope of a discussion of *fairness*.

There is little in the Directive that corresponds with less aggressive forms of hindrance. The closest approach is when the Directive defines a sub-class of aggressive practices as 'onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader' (Article 9(d)). But notice that, in the case of switching, the relevant 'transactional decision' is the consumer's exercise of a right conferred by an existing contract; the fact that he is being hindered from contracting with another supplier has no special significance. The Directive's definition of 'aggression' does not include practices (such as the unnecessarily time-limited offers discussed in Section 4.3 above) which affect consumers who are not yet in a contractual relationship with the relevant firm, but which hinder them from searching for alternative offers.

Our concept of hindrance fills a gap between consumer law and competition law. European competition law prohibits (i) anticompetitive agreements between firms and (ii) the abuse of a dominant position.[28] The associated concept of exclusionary abuse (i.e. practices that unfairly hinder rivals or entrants) applies to business-to-business relationships and requires firms to have substantial *market* power.[29] As we have emphasised, transactional unfairness can occur in markets in which competition prevents firms from earning excess profits and where a firm has only a small market share. Transactional fairness assimilates hindrance to the class of unfair practices that is the traditional domain of consumer law.

In the wider context of the English common law of contract, a senior Law Lord[30] has written: 'The modern view is that the reason for a rule is important. The rule ought to apply where reason requires it, and no further' (Steyn, 1997: 433). Furthermore, 'in a contract case that means approaching the case from the point of view of the reasonable expectations of the parties' (p.441). He stresses the importance of fulfilling these reasonable expectations as 'the central objective of the law of contract' (p.433). We see no difference between reasonable expectations and what we have called normal expectations. What transactional fairness adds is clarity in the normative *reason* for a rule in the form of mutual benefit.

[28] Articles 101 and 102 (respectively) of the Treaty on the Functioning of the European Union. These powers are mirrored for the UK in Chapters 1 and 2 of the Competition Act (1998). Sections 1 and 2 of the Sherman Act (1890) provide broadly similar powers for the USA, except Section 2 prohibits only business practices that maintain or acquire a dominant position by excluding competitors or preventing new entry – it is not illegal for a firm to exploit its monopoly power.

[29] See European Commission (2009).

[30] A role equivalent to a current Supreme Court judge.