

Consultation response:

Sustainability and consumer and competition law: CMA Call for Inputs

Which? is the UK's consumer champion. As an organisation we're not for profit - a powerful force for good, here to make life simpler, fairer and safer for everyone. We're the independent consumer voice that provides impartial advice, investigates, holds businesses to account and works with policymakers to make change happen. We fund our work mainly through member subscriptions, we're not influenced by third parties and we buy all the products that we test.

Summary

Which? welcomes the CMA's initiative to look at how competition and consumer policy can better support the government's net zero strategy and sustainability objectives¹. Which? research² and other surveys³ have shown that most consumers in the UK recognise the urgent need to tackle climate change, but are looking for better support and more information to help them make the changes that are required.

To date the UK's progress in reducing GreenHouse Gas (GHG) emissions has been largely achieved through changes to electricity generation and has had a limited direct impact on individual consumers. However it is clear that the next phase is much more dependent on the buy-in and support of consumers, and will include significant change, and in some cases complex decisions, about products and services. It is therefore important that policy supports and motivates people in making the changes that are required.

The UK has a well developed competition and consumer protection framework and Which? welcomed the government's recent consultation that included proposals to address gaps in consumer law and make competition and consumer law enforcement more effective and efficient. In addition, in order to ensure the competition and consumer protection regimes better support the UK's Net Zero and sustainability goals, we recommend the CMA either take the following actions themselves or advise the government on necessary changes. Where it is relevant we have referenced regulations such as ecolabelling and ecodesign that are not the responsibility of the CMA. The CMA may have valuable input into the development of these regulations from a consumer perspective.

¹ In this response we focus on environmental sustainability and in particular the government's net zero commitment. This is sometimes shortened to 'sustainability' or 'environmental sustainability.'

² [Supporting Consumers in the Transition to Net Zero](#), October 2021, Which?

³ BEIS Public Attitudes Tracker: Wave 37 – Key Findings', <https://www.gov.uk/government/statistics/beis-public-attitudes-tracker-wave-37>

- **Consider sustainability as a benefit for consumers.**

Refining the interpretation and application of existing competition law to treat product sustainability as a qualitative benefit for consumers would mean that the creation of more-sustainable products would represent an efficiency gain. This might mean that some behaviours that would previously have been considered an infringement of Chapter I of Competition Act 1998 might be exempted from prohibition, for example the sharing of information between firms to facilitate efficiencies that lead to more sustainable outcomes. Equally, sustainability gains should be considered in the assessment of a merger. However, where there are trade-offs between consumer and societal benefits then the government rather than the CMA is best placed to make a decision on public interest grounds.

- **Providing accessible and reliable information.**

Ensuring consumers have the information they need to make informed decisions about the purchase, use and disposal, or reuse, of products is critical to their ability to support the government's sustainability goals

- Although not part of the consumer protection framework, consistent mandatory labeling, such as the UK energy label, provides consumers with accurate and comparable information. The CMA has a valuable role in supporting labelling schemes based on their knowledge and experience, including how labelling requirements should be presented online.
- We have welcomed the CMA's work to improve guidance on environmental claims made by companies, but we recommend additional clarity is provided by establishing in law how companies should use the terminology in claims and the level of evidence that will be required to substantiate the use of such claims.
- The provision of environmental information can be further strengthened by making it an offence under the Consumer Protection from Unfair Trading Regulations to omit product sustainability information that is required under statutory programmes, or present that information in an unclear, unintelligible, ambiguous or untimely manner.

- **Supporting the availability of more sustainable products.**

In addition to ensuring consumers have access to the right information about the environmental impact of products it is important that consumer law supports the availability of more sustainable products, including products that are more durable, repairable and with improved energy efficiency.

- The Consumer Rights Act (CRA) should be amended so that ecodesign regulations which require certain products to meet energy efficiency and reparability standards are considered an aspect of satisfactory quality.
- Consumers should be made more aware of their rights under the CRA and it should be easier to use these rights to get retailers and manufacturers to remedy faults.
- Guarantees should reflect the expected lifetime of products, creating an incentive for producers to design more durable products.

- Sections 40-43 of the CRA should be clarified to stipulate clearly that conformity with 'satisfactory quality, fit for purpose and as described' includes the provision of software and security updates that are essential for the functionality and security of smart products.
- **Protection to navigate new markets.**

Consumer protection is important to give consumers the confidence to engage with the new markets, products and services that will help the UK meet net zero.

 - The CMA should review markets that are expanding rapidly in response to the government's net zero and environmental commitments and identify actions they can take, or they should advise the government to take, to address gaps or weaknesses in the consumer protection framework. This should include new markets where consumers are being asked to make costly and complex purchases such as the purchase of an electric vehicle or changes to how they heat their home, as well as expanding markets for consumers to rent, resell and reuse products.
- **Tackling overconsumption.**

Business practices that cause consumers to make purchases they didn't want or need and that result in waste, are neither good for the consumer nor the environment.

 - Misleading practices, or 'dark patterns', are often designed to trick consumers into purchases that they wouldn't otherwise have made with the result that products and resources are wasted. This is bad for consumers and for the environment. The CMA should provide businesses with clarity as to which practices are unlawful and have the ability to stop abusive practices.
 - Offers create opportunities for consumers to save money however some offers can encourage consumers to purchase items they don't want or need or later regret purchasing, which can lead to waste. The CMA should conduct a review to assess the impact of different offers on consumers and the environment.

Introduction

Which? welcomes the CMA addressing this important topic and the opportunity to input on the changes that are needed to support businesses and consumers to meet the government's net zero strategy and other sustainability commitments. The climate crisis is possibly the greatest challenge facing humanity and the measures needed to avert the worst effects of climate change will have a major impact on UK consumers.

Which? research⁴ and other surveys⁵ have shown that most consumers in the UK recognise the urgent need to tackle climate change, but are looking for better information and support to make the changes that are needed. Our survey showed that more than half of consumers (51%) want the government to ensure that retailers and manufacturers support consumers

⁴ [Supporting Consumers in the Transition to Net Zero](#), October 2021, Which?

⁵ BEIS Public Attitudes Tracker: Wave 37 – Key Findings', <https://www.gov.uk/government/statistics/beis-public-attitudes-tracker-wave-37>

to do the right thing⁶. This will include ensuring that competition policy supports businesses in delivering affordable and sustainable products and services that meet consumers needs, and supporting consumers with an effective consumer rights framework.

Which?'s recent report 'Supporting consumers in the transition to net zero'⁷ highlighted the four areas where consumers will need to make some of the largest changes; how they travel, how they heat their homes, the products they buy and the food they eat. In some cases the changes that consumers will need to make in these areas are relatively simple, however others involve costly and complex decisions such as making the switch to an electric vehicle or switching from a gas boiler to a heat source pump. In these cases, and others, consumers need affordable choices that meet their needs, information to make an informed decision, and the confidence that there are effective consumer protections in place and they can get redress if something goes wrong.

- Our research revealed that more than half of consumers (56%) claim they take environmental sustainability into account when choosing white goods. Considerations such as durability and energy efficiency that offer environmental and consumer benefits were often important considerations. Durability is considered by 51% of consumers purchasing a washing machine and 41% of consumers purchasing a mobile phone.
- However the cost of making changes is often a major concern. For example, almost three-fifths (56%) of consumers say cost puts them off making a change to a low carbon heating system and 37% are put off purchasing energy efficient products as they expect them to be more expensive.
- Information is also critical with consumers' concerns about the performance of EVs and range anxiety, the greatest barriers to purchasing an EV. Consumers are also often unclear as to which changes have the greatest impact on the environment.

Competition law enforcement

(b) Are there changes to the CA98 regime that would help to achieve the UK's Net Zero and sustainability goals? If so, what changes should be made to the regime, and what would they achieve?

The enforcement of competition law will play an important role in the UK's progression to net zero. Competitive markets, supported by targeted regulation, will be the best way to meet green objectives, and well-informed and motivated consumers have a role to play in encouraging firms to compete on production standards that lead to more sustainable outcomes.

There may be occasions when the sharing of information between firms could facilitate efficiencies that lead to more sustainable outcomes. This might mean that some behaviours that would previously have been considered an infringement of Chapter I CA98 ought to be exempted from prohibition. We believe that this may be possible by refining the

⁶ [Supporting Consumers in the Transition to Net Zero](#), October 2021, Which?

⁷ [Supporting consumers in the transition to net zero](#), Oct 2021, Which?

interpretation and application of existing competition law, but that competition law enforcement must continue to be enacted on the basis of consumer welfare. Where there need to be judgments that require trading off consumer and societal welfare then competition law is unlikely to be the right means for making these decisions and the government will need to adopt alternative methods.

To encourage cooperation between firms in circumstances that could be both societal and consumer welfare improving, the CMA could consider further how the application of both block and individual exemptions should apply to sustainability agreements.

Where existing block exemptions for horizontal co-operation agreements are due to expire in 2022, the CMA should consider whether these could be amended to give businesses greater certainty on their application to sustainability.

With regard to the criteria for individual exemptions, we are not yet persuaded that there is scope for two of the criteria, indispensability and the non-elimination of competition, to be interpreted differently in the light of sustainability agreements in a way that will not be detrimental to consumers.

However, we believe that product sustainability should be treated as a qualitative benefit for consumers and hence more sustainable products would represent an efficiency gain. There is widespread evidence that consumers value sustainability, although a sustainability paradox has been recognised in which purchasing decisions and behaviours do not always reflect stated preferences for sustainability and so the value is often context-specific. Therefore credible evidence will be needed whenever sustainability is claimed to be a quality benefit.

Further, when considering whether consumers will receive a 'fair share' of efficiencies, the CMA should ensure that appropriate weight is given to the sustainability benefits for future users of a product and to benefits that manifest in other markets, for example reduced electricity use due to products with greater energy efficiency. The question of whether the CMA should consider benefits accruing to society as a whole is more problematic, both philosophically and practically, and as indicated above we do not think the CMA should currently be making these types of judgement calls. In some markets, sustainability agreements might lead to higher prices that fall particularly on lower income consumers, and questions that have distributional consequences, such as whether disadvantaged groups of consumers should pay higher prices to deliver a benefit to wider society, should lie with those with democratic accountability. In such cases, the government may need to use regulation to achieve the outcomes it wants.

Merger control regime

(c) Do you consider that the CMA's merger control regime could better contribute to protecting the environment and support the UK's Net Zero and sustainability goals? If so, please explain how.

(d) Do you consider that the CMA is an appropriate body to assess environmental sustainability factors in relation to merger control, for example, where it is a basis on which firms compete? Do you consider there would be a benefit in having an additional or alternative body or regulator being available to provide advice on such matters? Please explain the reasons for your response.

As above, we believe that it is appropriate, in contexts where it can be credibly evidenced, for sustainability to be recognised as a dimension of quality. As such, it has the potential to be a relevant customer benefit and should be taken into account in merger decisions.

Again though, we do not believe that the CMA is currently the appropriate body to consider whether a merger should be permitted on the basis of benefits that would accrue beyond consumers. In cases where the CMA determines a merger would lead to a substantial lessening of competition (not mitigated by rivalry-enhancing efficiencies or relevant customer benefits), then any decision to allow the merger on the basis of improved sustainability outcomes should be made by the government on public interest grounds and not the CMA. Such a decision would require trading off an overall societal benefit against the cost to groups of consumers made worse off by the reduction in competition and the government is best placed to make judgements that have distributional consequences.

Consumer protection law

(a) Does the current consumer protection law framework constrain or frustrate initiatives that might support the UK's Net Zero and sustainability goals?

Consumers are increasingly concerned about the sustainability of the products they purchase and seek to align their purchasing decisions with sustainability aims. A recent Which? survey found that over half (56%) of consumers claim they take environmental sustainability into account a great deal or a fair amount when choosing white goods; closer to a third (31%) claim to take sustainability into account when choosing to buy new technology products.⁸ In order to support consumers in meeting these aims it is critical that consumer law creates an enabling framework for consumers and manufacturers, supports consumers in making sustainable choices and does not encourage unsustainable practices and behaviours.

In general, consumer protection law provides a good framework for protecting consumers' rights in this area, however in some areas there is a need for additional guidance and changes to the law to ensure that consumer protection supports the government's sustainability objectives.

Consumer information

Trustworthy and clear consumer information will be critical to supporting the government's net zero strategy. In order to reduce their environmental impact consumers will need to be able to make informed decisions about the products and services they purchase and will therefore require better information about their environmental impact.

⁸ [Supporting consumers in the transition to net zero](#), October 2021, Which?

A Which? survey⁹ found that nine in ten consumers say having clearer information on their products' likely durability (90%) and clear energy labelling (87%) would be helpful. Eight in ten think more information on reparability of products (83%), recyclability (84%) or having a trademark/ badge to show a product had been manufactured in a sustainable way (81%) would be beneficial. More generally consumers may also want to know about a company's overall sustainability policies, practices and impact as they seek to align their consumption choices with their views on sustainability.

Consistent mandatory labelling is the most effective means for consumers to access verifiable and comparable information about the sustainability of products and the government's recent Net Zero Strategy has said that they plan to, *'help empower people to make informed choices about the goods and products they buy and services they use by exploring how we better label these with their emission intensity and environmental impact. We are also exploring the use of product labelling to show the durability, reparability and recyclability of products, as well as their environmental footprint with a view to stimulating demand for better quality items.'*¹⁰

We urge the CMA to support the government in making rapid progress in robust sustainability labeling so that it provides the information consumers need to make a sustainable choice including the embodied or lifecycle emissions of a product, a reparability score, expected lifetime, and recycling information.

We have welcomed the government's proposals and consultations on expanding sustainability labelling and have responded with our proposals on how these can best be made to work for consumers. This has included extending the energy label to cover more products and for standards to more accurately reflect how consumers use these products, as well as adopting a single label design for recycling labels.¹¹ We also welcomed the call within the proposals for a national food strategy from Henry Dimbleby to Defra for the government to develop an environmental labelling scheme for food products.

With consumers making more purchases online, and making more purchasing decisions based on information online, it is important that labelling schemes include clear requirements for how online retailers and marketplaces communicate this information to consumers.

Environmental claims

In supporting improved sustainability labelling we recognise that there are technical challenges in compiling and communicating the information required and progress will be incremental. Therefore, in the short term consumers will generally continue to be reliant on the sustainability information provided by companies in order to make purchasing decisions. Even where sustainability labelling is available, a company is likely to provide their own

⁹ [Supporting consumers in the transition to net zero](#), October 2021, Which?

¹⁰ Net Zero Strategy: Build Back Greener, Oct 2021, UK government. p274

¹¹ [Consultation response: Consistency in Household and Business Recycling in England](#), June 2021, Which?

information either on the packaging or through other marketing that will influence consumers' decision making.

Which? research has highlighted the influence that environmental claims can have on consumers' decisions. According to a survey conducted by Which? in December 2020, for some products, around two-fifths of consumers have made a purchasing decision based on sustainability considerations.¹²

Companies should have the opportunity to inform consumers about the sustainability credentials of their products and services, however this information must be truthful, relevant, credible and unambiguous. As the CMA has recognised, unfortunately 'green washing', or misleading and ambiguous environmental information, has left consumers confused and sceptical about many environmental claims made by companies. Our survey indicated that misleading green claims are an important concern for consumers, as more than half (55%) of those who had made or considered making a more sustainable purchase said that they didn't believe the green claims of companies at least some of the time.¹³

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) contain a general prohibition against unfair commercial practices and specific prohibitions against misleading actions or misleading omissions. These regulations are clearly relevant to sustainability claims made by companies, and we welcome the CMA's publication of new Draft Guidance on environmental claims¹⁴ that provide additional clarity as to the interpretation of these rules. However, in addition to this guidance we recommend that the CMA should consider advising the government to:

- Include specific definitions of commonly used sustainability terms in legislation to establish how companies should use the terminology in claims and the level of evidence that will be required to substantiate the use of such claims. This will provide consumers with greater confidence that terms are being used consistently and help to create a level playing field for responsible businesses.
- Establishing the importance of consumer research to test how environmental claims are understood and used by consumers. This is particularly relevant to implied claims which may be misunderstood by consumers.
- Making it a requirement that any caveats or conditions should be disclosed prominently and close to the main claim.

¹² Survey conducted by Populus on behalf of Which? between 4th and 6th December 2020. A sample of 2,094 consumers was surveyed and weighted to be nationally representative according to a range of demographic characteristics.

¹³ Survey conducted by Populus on behalf of Which? between 4th and 6th December 2020. A sample of 2,094 consumers was surveyed and weighted to be nationally representative according to a range of demographic characteristics.

¹⁴ [Draft guidance on environmental claims on goods and services](#), May 2021, CMA.

- Providing specific legal guidance for key sectors that have particularly high GHG emissions or other environmental impacts, and where there is evidence of widespread confusion or misunderstanding. In particular Which? has highlighted issues in the energy sector where there is evidence of considerable confusion.¹⁵ For example, Which? research has found that it is not currently clear to consumers what a 'renewable' tariff is. When we asked more than 3,600 people to choose from a list of possible definitions for renewable energy tariffs, a third said that they didn't know.¹⁶ Packaging is another key sector which we believe requires special treatment. Which? research has found issues where consumers may be misled due to the omission or lack of clear information on recyclability. For example, in February 2020, Which? analysed the recycling information of a basket of twenty common toiletries, and found that twelve of the products had no recycling information on the label, despite being wholly or partially recyclable.¹⁷

Introducing a requirement to provide sustainability information in consumer law

Alongside changes to tackle misleading environmental claims, the government should place a legal requirement on companies to provide information about the environmental impact of products and services as part of the 'material information' that a consumer needs in order to make an informed transactional decision. This would make it an offence under the CPR's to omit this information or present it in an unclear, unintelligible, ambiguous or untimely manner. The requirement should apply to both offline and online sales.

This change would reflect the fact that consumers increasingly consider information about a product's environmental impact when making a purchasing decision.

The CMA should consider the information that should be required, however we suggest that it should include information covered by mandatory labelling schemes and reporting requirements. This would help to ensure that:

- Information is calculated and presented according to consistent and agreed standards so that consumers can effectively compare the attributes of different products.
- The government has established that companies can access the information required.

Supporting ecodesign through consumer law

Whilst it is important that consumers have accurate and accessible information to make informed choices; information should not be relied upon to ensure consumers can make more sustainable purchases; consumers will also require that products with a lower environmental impact are available for purchase.

In the Net Zero Strategy the government committed to *'make green choices affordable and easy by working with businesses and industry to set strong regulatory signals and collaborating to reduce costs and provide better quality, longer lasting and lower*

¹⁵ 'The truth about green energy deals', print, November 2021, Which?

¹⁶ Differences between green energy suppliers, online, June 2021. This data is from an online survey of 3,622 members of the general public in September 2020, Which?.

¹⁷ 'Bathroom Plastics: it's time to clean up', print, February 2020, Which?

*environmental impact products, and services.*¹⁸ Ecodesign regulations have already been effective in improving the energy efficiency of some energy-using products by incrementally removing the least efficient products from the market. Ecodesign and associated legislation is also beginning to address the reparability of products by requiring manufacturers to make spare parts available and design products to make them easier to disassemble and repair. The government is also considering how ecodesign can be used to improve the durability of goods. Which? welcomes the introduction of these measures and encourages the government to rapidly increase both the number of products and the sustainability criteria covered by ecodesign and associated legislation.

In addition to these changes, the government should consider how ecodesign regulations can be supported by consumer law. This will help to drive the removal of unsustainable products from the market and create an incentive for manufacturers to meet basic standards of sustainability. For example,

- Section 9 of the CRA that requires goods to be of satisfactory quality should be amended so that criteria included in ecodesign regulations are considered relevant. This currently includes durability but should be extended to include minimum energy efficiency and reparability requirements, as well as other sustainability criteria as ecodesign is extended. The CMA should also consider whether there are other environmental requirements or standards that consumers could reasonably expect products to meet.
- As discussed below, section 30 of the CRA which sets out how manufacturers and retailers must communicate any guarantees that they offer to consumers, could also be amended so that the length of the guarantee reflects any future statutory minimum expected product lifetimes.

Supporting improvements to product durability

Improving the durability of products by extending their expected lifetimes has the potential to reduce the use of resources in manufacturing and reduce waste. Waste is a significant issue in the UK with an estimated 2 million tonnes of WEEE items alone discarded each year by householders and companies.¹⁹

The government has stated that it has plans to extend ecodesign requirements to include product durability which will be a positive step. Durability should also be supported by the government making amendments to the CRA that extend the period during which a consumer can return a product because it has a pre-existing fault. This will create an incentive for manufacturers to produce more durable products. In the future, if minimum lifetimes are established through ecodesign regulations or equivalent regulations, the CRA could also be amended to require guarantees to more closely reflect a product's expected lifetime.

The impact of protections and guarantees on product longevity

¹⁸ Net Zero Strategy: Build Back Greener, October 2021, UK Government.

¹⁹ <https://www.hse.gov.uk/waste/waste-electrical.htm>

Consumers typically have three routes to redress for purchased products, goods or services that become faulty or defective; the Consumer Rights Act 2015 (CRA), manufacturer guarantees and extended warranties.

The CRA: The CRA provides consumers with protections when buying products, services or digital content. Under the CRA, all products must be of satisfactory quality, fit for purpose and as described. Any product that does not satisfy any one of these criteria has been sold in breach of the CRA. Consumers have up to six years from the date they have taken ownership of a faulty product to make a claim against the retailer who sold it to them in respect of a fault that was present at the time of purchase. The CRA places obligations on retailers (not manufacturers) for remedying defective products. This can either be in the form of a repair, replacement or refund or price reduction, depending on how long consumers have owned a product. A fault that is discovered within the first six months of ownership is presumed to have been pre existing unless the retailer can prove otherwise. If a fault develops after the first six months, the burden is on the consumer to prove that the product was faulty at the time they took ownership of it. In practice, this may require some form of expert report, opinion or evidence of similar problems across the product range.

By making the following changes to the CRA there is an opportunity to strengthen consumer protections, and at the same time increase the lifespan of products,

- Extending the initial 6-month reversal of the burden of proof to at least 12 months (but ideally a longer period inside of the full 6 years of protection within the CRA) so that consumers do not face any unnecessary or costly barriers to redress. The 2019 EU Sale of Goods Directive (EU SGD) has a 12-month reversal of burden of proof for EU consumers' and the UK government should follow suit as part of its post Brexit commitments to maintain a level playing field.
- Bringing manufacturers into the scope so that they also have responsibilities for ensuring products conform with the Act and that consumers can obtain direct redress (prioritising repair rather than replacement, as manufacturers are best placed to do this than retailers) through them so that there is a stronger incentive to improve product durability.
- Requiring retailers and manufacturers to provide consumers with easily accessible information at the point of purchase about their rights under the CRA so that consumers are informed about their redress options when products develop physical or software faults and do not default to purchasing new replacement products. Rights will only be effective if consumers are aware of them and know how to exercise them.

Manufacturer guarantees and warranties can provide additional routes to redress alongside the CRA. The terms are often used interchangeably but there are important distinctions.

Guarantees are typically free and are usually provided by manufacturers' to cover defects/repairs for typically 1 or 2 years after purchase. Accidental damage is typically not included.

Warranties, and extended warranties, typically offer broader cover for longer periods but come at a premium cost. Guarantees and warranties are not required by law and complement rather than replace rights under the CRA. Often the CRA provides longer protection, in the case of manufacturer defects.

Both are considered contracts between the purchaser and the manufacturer. But they often have important exclusions or caveats (such as the extent of cover and additional costs), and consumers may be required to register their purchase along with personal details in order to validate it. Also, retailers may refund or replace an item within the timeframe of the guarantee as they will be able to obtain a refund from the manufacturer directly.

Extended warranties can be poor value for money.²⁰ For example, a 2011 investigation found that a five-year extended warranty could cost consumers up to 65% of the price of a washing machine, however there's only a 12% chance of appliances needing to be repaired in the first five years.

In general, guarantee length tends to be consistent with the brand, though there are some exceptions. Some manufacturers offer longer guarantees on some products on a promotional basis. For instance, Miele provides a 10-year warranty on some washing machines. While Samsung offers a 5 years warranty on a range of selected appliances including washing machines and dishwashers purchased between September 2019 and August 2020²¹. Beko offers an extended 2 year guarantee on products that are registered online within 90 days of purchase.²² This covers repair and parts but not a replacement product. Sonos offers 6 years on all products at no extra cost.²³ If a product is not able to be repaired, consumers will be offered a store credit to the value of the product.

However there is potential detriment with guarantees. They cannot be transferred to new owners and there is limited time to register the product for guarantees to be activated. For example, some consumers need to register their product within 30 days to access the longer promotional guarantee. Further, the length of time it takes for broken appliances to be repaired might be prohibitive. This can cause consumers problems with essential appliances like washing machines, hobs, and ovens and may lead to them purchasing new products.

Section 30 of the CRA sets out how manufacturers and retailers must communicate any guarantees that they offer to consumers. It does not stipulate how long a guarantee period should be or specify what the terms and conditions must be. This does not encourage durable design or place manufacturers under any legal responsibilities to ensure longer lasting products and allows manufacturers to decide terms that are favourable to them rather than the consumer. The CRA can be amended to reform guarantees by introducing the following prescriptive measures:

²⁰ [Extended warranties are poor value, says Which?](#) Dec 2011, Which?

²¹ Samsung 5 year warranty

²² <https://www.beko.co.uk/guarantee-terms>

²³ <https://www.smarthomesounds.co.uk/blog/sonos/the-smart-home-sounds-6-year-guarantee>

- Require manufacturers to offer consumer guarantees that cover the expected lifespan of products without the need for expensive warranties. Minimum expected lifetimes could be established in ecodesign regulations or similar legislation. Manufacturers should prioritise repair of faulty products at no cost to the consumer for the physical hardware.
- Ensure that consumers can activate guarantees easily and that any claims are not subject to onerous terms or conditions. Currently, consumers must usually register guarantees within a set timeframe for them to be valid and terms and conditions might restrict the level of redress they can obtain. For example, requiring only proof of purchase to obtain redress might encourage more consumers to seek repair of faulty products in the first instance. Further, allowing guarantees to be transferred between owners will encourage a second life for smart products and minimise e-waste.

Extending the lifetime of smart products

The Department for Digital, Culture, Media & Sport (DCMS) defines smart products/devices as 'consumer products that are connected to the internet and/or home network and associated services'.²⁴ The terms 'smart product' and 'connected product' are often used interchangeably however there are subtle differences between the two. Connected devices may make some simple actions based on what they detect in the environment but their primary purpose is to send and receive data. Smart products feature software that enables them to react to real-world situations and to react to the needs of their users. They often have a much more complex hardware architecture, including things such as sensors, microprocessors, data storage, controls, and embedded operating systems. Most smart products are connected to the Internet (although they don't have to be), but not all connected devices are smart. Smart products also require manufacturers to provide ongoing security update support if they are to be used safely. This added complexity of smart products compared with non smart products can therefore impact negatively upon how long such devices last.

We know the smart product market is growing. For some products, such as smartphones and televisions, it is mature or maturing. For other devices, such as fridge freezers, ovens and smaller consumer goods, it is still nascent. As of 2020, 91% of UK consumers now have access to a smartphone, 83% of adults have access to a connected entertainment device (smart TV / e-reader / games console) and 21% of adults have access to a connected home device (thermostat / lighting / security system).²⁵

However many smart products currently sold are not updated or supported for as long as consumers might expect. This means that products which physically still work may be discarded as consumers are concerned that they have old and potentially insecure software, or consumers continue to use the product exposing themselves to potential harms including:

²⁴ [Consultation on regulatory proposals on consumer IoT security](#), May 2019, UK government.

²⁵ [The connected home: just getting started](#), Deloitte.

- Financial harm - if consumers replace products before they would expect to and before it is physically necessary because the smart component is no longer supported.
- Financial and emotional harm - if unsupported and insecure smart products expose personal data which leaves consumers vulnerable to scams.
- Emotional harm - consumers might experience frustration if products do not last as long as they are expected to, and fear of financial necessity means they have to continue using insecure products knowing these may expose them to risk.

Currently update provision varies by manufacturer and product type and can typically fall well below the period of time a consumer would expect to keep a phone. Which? research in 2020 found that a third of people kept their last phone for four years, while some brands only offer security updates for a little over two years.²⁶ Manufacturers have told us that they will support smart products for the lifetime of the product without setting out what that means in practice.²⁷

The DCMS has proposed new laws for the security of smart devices. If passed, brands would be required to state at the point of sale how long you can expect your phone or any other smart product to receive security updates, however there is no requirement to provide updates for a set period of time. The EU SGD mandates that smart products must be provided with updates for a period of at least 2 years from date of ownership.

We recommend that the CMA advises the government to take the following actions to clarify consumer rights in relation to smart products and improve their durability:

- Consult with stakeholders to determine suitable minimum support periods for smart products.
- Clarify sections 40-43 of the CRA to stipulate clearly that conformity with 'satisfactory quality, fit for purpose and as described' includes the provision of software and security updates that are essential for the functionality and security of smart products and not just for digital content a consumer purchases or downloads.

(b) What changes to business-to-business protections are required, to address the current issues of supply chain transparency?

In order for businesses to provide accurate information to consumers, actors in the supply chain need guidance and clarity as to the information they should provide and the level of substantiation, as well as who is ultimately responsible for compliance. For example, retailers and online marketplaces may make environmental claims about products which they have not manufactured where the claim is based on information provided by the manufacturer or wholesaler, or information that is displayed on the products that they stock or sell.

²⁶ [Mobile phone brands putting customers at risk with inadequate update support](#), Dec 2020, Which?

²⁷ [Security updates for smart appliances could end after just two years, finds Which?](#), June 2020, Which?

Guidance should cover the full range of ways in which consumers access information about products including price comparison websites and review websites. For example a Which? investigation in 2018 found that price comparison websites were adding to the confusion around energy tariffs, with options for 'green' or 'renewable' plans whose definitions varied.²⁸

(c) What other opportunities are there to develop the consumer protection law framework to help to achieve the UK's Net Zero and sustainability goals?

Consumer protection in new or rapidly expanding markets

The transition to net zero will lead to major changes and, in some cases, rapid growth in some markets. This can create particular challenges for consumers who lack the knowledge and experience to make informed decisions and has the potential to lead to consumer detriment if consumers make poor choices or are treated unfairly. New markets may also create gaps in consumer protection as products or services don't fit previous definitions.

The risk of detriment is particularly high in markets where consumers are making expensive purchases such as purchasing an electric vehicle or reducing the carbon emissions from their home by changing their heating system, installing insulation or solar panels.

The CMA should undertake a review of these markets to understand where there is potential for consumer detriment and ensure that there is a robust consumer protection framework that meets the needs of current and future consumers.

New business models: Renting, reuse and second hand markets

The renting, resale and reuse of products has the potential to significantly reduce consumers' impact on the climate and deliver consumer benefits including cost savings and convenience. Businesses have developed a number of new business models and expanded the provision of existing models to meet this need with many businesses using online platforms to link sellers, lenders and consumers or provide a rental service.

Whilst consumers have adopted many of these new models with enthusiasm there can be a lack of clarity around consumers' rights in these new markets which could undermine confidence and the growth of this innovative sector in the long term.

Given that these business models are relatively new and sometimes disrupt the traditional definitions of seller and consumer it is important that consumers are aware of their rights in relation to each transaction so they can make an informed decision and make returns or seek refunds if required.

We encourage the CMA to review this area and advise the government on changes or clarifications that should be made to consumer law to ensure consumers are aware of their rights and have strong protections in place:

- Online sellers should have clarity as to when they should register as businesses and how this affects their responsibilities towards consumers.

²⁸ The Energy Tariff Greenwash, print, October 2019, Which?

- Any party selling or renting a product should clearly specify whether they are a business or an individual and provide information to the other party as to what impact this has on their rights. Where the service is mediated through an online platform, the platform should require the parties to provide this information in order to participate in a transaction and ensure it is communicated to the other party.
- Rental agreements should have clear pricing that enables consumers to compare the cost of the rental service with alternative ways of procuring the product or service. Consumers should have legal rights if the product is faulty or not as expected and these should be clearly communicated to the consumer prior to an agreement being signed. The CMA should encourage the government to enact its proposals on subscription traps to ensure consumers are not locked into rental agreements that they no longer need.

(d) To what extent should the consumer protection law framework be prescriptive, for example, by mandating provision of particular forms of information, or by prohibiting particular types of conduct, in order to help to achieve the UK's Net Zero and sustainability goals?

Which? research demonstrates that consumers support the urgent need for action to tackle the climate crisis and other environmental challenges, and need robust and clear information and support to make the changes required. Many of these changes will require consumers to engage with new markets and involve complex and costly decisions with the potential for significant detriment due to consumers' lack of knowledge and awareness. In these circumstances, there is clear synergy between the need to strengthen consumer protections and the UK's Net Zero and sustainability goals, and a strong argument for the government to introduce mandatory provisions to provide consumers and businesses with clarity and certainty to support the transition to net zero.

For example the government should consider:

- Introducing legislation to establish how companies should use the terminology in environmental claims and the level of evidence that will be required to substantiate the use of such claims.
- Introducing a requirement for companies to provide sustainability information and meet sustainability criteria as set out in energy labelling and ecodesign regulations and for these requirements to track the expansion of these schemes to cover more sustainability criteria and products.
- Clarifying misleading business practices that result in consumers making purchases that they had not intended to make.
- Clarifying the responsibility of platforms to provide information to consumers about the status of a seller and the impact that this has on the consumer's rights.

We do recognise that in some cases there may be contradictions between consumers' immediate interests and sustainability goals. In these cases the government should consider the impacts of different options including the distributional impacts.

(e) How far should the consumer protection law framework go to address:

(i) the planned obsolescence of products;

Planned obsolescence refers to actions taken by a company that intentionally shortens the lifetime of a product with the aim of making customers replace it. Actions can include choices made in the design of a product that result in it having a shorter lifespan than it otherwise would, or actions, such as software updates, that limit the functionality of the product such that consumers need to replace it before the end of its expected life. Countries including France and Italy have introduced legislation to ban planned obsolescence.

The government's proposals to improve the repairability of some products will tackle one way in which products can become obsolete. In addition, amending the CRA to extend the period during which a consumer can return a product because it has a pre-existing fault, and extending guarantees to reflect a product's expected lifetime, would create a strong incentive for companies to design more durable products. However, as it may be difficult for consumers to identify when a product has failed as a result of an action taken by the manufacturer, these actions are unlikely to be effective in addressing all forms of planned obsolescence. Therefore placing an explicit legal obligation on companies not to make products obsolete unless there is a legitimate reason would provide clarity for both consumers and companies.

Where a safety or security issue arises *after* the point of sale that requires a product to be made obsolete (for example when Samsung issued an update that prevented recalled Galaxy Note7 devices from recharging)²⁹ consumers should receive a replacement or compensation.

(ii) commercial practices which promote over-consumption?

Misleading consumers into purchases that they do not want or need is an abuse of consumer law and is likely to result in overconsumption and waste. The CMA should consider how it can provide businesses and consumers with greater clarity as to practices that are misleading and break consumer law.

Offers that encourage overconsumption

Offers are designed to encourage consumers to purchase products and are a popular way for consumers to save money. However some offers may encourage consumers to purchase products in greater quantities than they prefer in order to obtain a discount. From a consumer perspective this could lead to 'overconsumption' in two senses: 1) consumers purchase more of a good than they can reasonably consume, which results in unnecessary use of resources and waste. 2) consumers purchase in quantities that they later regret, even if not leading to waste. This may be the case where consumers' present-bias leads them to overweight the immediate financial appeal of an offer despite the future negative consequences of their consumption. Such behaviour is more commonly thought about in relation to goods with negative health impacts e.g. cigarettes, alcohol, unhealthy foods. However such principles could similarly apply to products with negative environmental

²⁹ [Samsung Taking Bold Steps to Increase Galaxy Note7 Device Returns](#). Sept 2016, Samsung.

consequences, where consumers' behavioural biases may be targeted in a way that leads to future regret about the environmental impacts of their purchases.

From an environmental perspective consumer offers often lead to 'overconsumption' when the price of a product fails to reflect the social cost of production (such as carbon emissions, pollution, resource use etc) even though this may result in short term benefits for the consumer. In these cases where there is a trade-off between consumer and societal benefits the government rather than the CMA is best placed to make a decision on public interest grounds.

An offer is more likely to encourage consumers to purchase products in greater quantities than they prefer when discounts are conditional on the purchase of a particular quantity of items or total spend. Examples of this include offers where a consumer receives a 'free' additional product or service with their purchase e.g in the case of multibuy offers or 'free' delivery over a certain spend.

In contrast, percentage reductions maintain a relationship between the price and the quantity that is sold as the same percentage reduction is applied whether the consumer purchases one or more products.³⁰ As such the consumer has less financial incentive to purchase more than they prefer.

It should also be noted that offers can also be used to encourage more sustainable behaviour, for example by offering reductions on energy saving products or for using a reusable cup.

Which? recommends that the government review the different types of offers that are available to consumers to better understand their impact on consumers and the environment and consider whether action would be proportionate and effective in addressing any detriment that is identified.

Misleading techniques

Consumers are spending an increasing amount of time online and are making an increasing number of purchases online.³¹ This heavier reliance on online goods and services means that consumers are more exposed to behavioural techniques and choice architecture that can influence their purchasing decisions in a detrimental manner. These techniques are built into user interface designs^{32,33}, sometimes referred to as dark patterns, are deceptive in nature and designed to mislead or trick consumers by exploiting their biases and heuristics to push them into doing something that they would otherwise not have done if they had been properly informed.

³⁰ Consumers can also benefit from a reduction in the unit price of a product when it is bought in a larger quantity or size. Further investigation would be needed to understand whether these reductions are different from a sales promotion in that the reduction in unit price is more closely linked to the reduction in the use of packaging materials and therefore more closely relates to the use of resources.

³¹ Ofcom Online Nation 2021 Report

https://www.ofcom.org.uk/_data/assets/pdf_file/0013/220414/online-nation-2021-report.pdf

³² Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns* (2020)

³³ <https://arxiv.org/pdf/1907.07032.pdf>

These techniques can result in significant financial and emotional consumer detriment. However, something that has been less considered is the impact that such dark patterns have on sustainability. By manipulating consumers into purchasing products and services that they otherwise would not have purchased, dark patterns push for unnecessary consumption and excess. This artificial demand can lead to overconsumption of goods and services. Although the impact on sustainability has not been quantified, there is significant evidence that these practices are widespread. A 2019 study that tested automated techniques that identify dark patterns discovered 1,818 instances of the use of dark patterns on 1,254 websites out of a sample of 11,000 shopping websites.³⁴

There are several techniques used to manipulate consumers that have been categorised to create a taxonomy of dark patterns. The following are examples of techniques that specifically relate to the consumption of products that consumers had not intended to purchase³⁵:

- **Trick questions:** While filling in a form a consumer responds to a question that tricks them into giving an answer they did not intend. When glanced upon quickly the question appears to ask one thing, but when read carefully it asks another thing entirely. This is very common when registering with a service. Typically a series of checkboxes is shown, and the meaning of the checkboxes is alternated so that ticking the first one means "opt out" and the second time it means "opt in".
- **Sneak into Basket:** A consumer attempts to purchase something, but somewhere in the purchasing journey the site sneaks an additional item into their basket, often through the use of an opt-out button or checkbox on a prior page. This Dark Pattern is also known as 'negative option billing' and 'inertia selling'. It is now illegal in the UK and various EU countries, due to the Consumer Rights Directive.
- **Confirmshaming:** The act of guilt-tripping the consumer into opting in to something. The option to decline is worded in such a way as to shame the consumer into compliance. The most common use is to get a user to sign up to a mailing list, and it is often found in exit intent modals (pop-ups that arise when you are about to leave or finish up on a website) and other pop-ups. Amazon for example gave the option to join Amazon Prime or 'No thanks, I don't want Unlimited One-Day Delivery' as the alternative.
- **Forced Continuity:** When a consumer has signed up to a free trial for a service, and upon the end of the free trial their debit or credit card is automatically charged without any warning. Cancellation of the automatic renewal is then also made difficult and not straight forward.

³⁴ Mathur et al 2019, [Dark Patterns at Scale: Findings From a Crawl of 11K Shopping Websites](#)

³⁵ Harry Brignull, [Types of Dark Pattern](#)

Although there is some evidence that consumers are aware of these manipulative design techniques, there are several reasons why awareness is not a sufficient form of consumer protection in this case:

- Dark patterns are purposefully difficult to spot as their purpose is to manipulate. Even if consumers are aware of their existence, it is unreasonable to expect them to know all dark patterns and be able to identify them online.
- Consumers have difficulty spotting some dark patterns and even if they do spot them awareness is unlikely to be sufficient to protect them from the effects.
- The widespread nature of dark patterns means that consumers often do not have an alternative to using websites and apps that employ them even if they feel manipulated and suffer detriment. There are also indications that consumers may find it hard to conceptualise harms from dark patterns.
- Whether consumers accept different types of dark patterns is associated with the perceived harm that can result from it (e.g. 'nagging' is more accepted as it's seen as just annoying, whereas sneaking or hiding additional costs is not acceptable).

Misleading actions are banned under the CPRs, which stipulates in Regulation 5(2)(b) that a commercial practice is a misleading action if it causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise. This suggests that elements of dark patterns are already covered by way of interpretation; however, greater clarity and specificity is clearly needed as dark patterns continue to be heavily used despite the existence of these provisions in CPRs.

The Digital Markets Task Force previously suggested that the government could consider reforms to the CPRs by expressly introducing certain manipulative design practices into them³⁶. Schedule 1 annexed to the CPRs contains a list of commercial practices which are in all circumstances considered to be unfair according to Regulation 3(4)(d). Which? proposes that manipulative design practices and behavioural techniques that amount to dark patterns be introduced into Schedule 1 of the CPRs to provide greater specificity for businesses, enforcement agencies and consumers. By including a definition, rather than a definitive list of individual dark patterns, certainty is provided to consumers and businesses, whilst retaining a degree of flexibility for regulators to address developments in this area. This approach has been proposed as an amendment to the EU's Draft Digital Service Act³⁷ and was adopted in the California Consumer Privacy Act³⁸.

Additionally, dark patterns could be clarified in an update of non-statutory guidance for businesses on consumer protection from unfair trading³⁹. The CMA could also potentially be given a duty or conferred powers to issue a Code of Conduct or something of a similar nature, which would have greater legal force. A code could comprise high-level objectives supported by principles and guidance.

³⁶ CMA, A new Pro-competition Regime for Digital Markets: Advice of the Digital Markets Taskforce

³⁷ European Parliament, [Draft Report, DSA Amendments](#)

³⁸ [CIV - 1798.140. - TITLE 1.81.5. California Consumer Privacy Act of 2018 \[1798.100. - 1798.199.100.\]](#)

³⁹ Business companion, [Consumer protection from unfair trading](#)

(c) Are there other opportunities within the UK's competition and consumer policy toolbox that would support the UK's Net Zero and sustainability goals, which the government should be considering?

Consumer enforcement

In addition to the steps required to strengthen consumer law it is important that consumers have the confidence that these protections will be enforced and consumers will have access to redress should anything go wrong. This is particularly important when consumers are being asked to make new, complex and costly decisions as part of the transition to net zero including investing in new heating systems, switching to an electric vehicle or engaging in a new market as part of the the circular economy by, for example, renting a product or selling a product themselves.

In our response to the government consultation on Competition and Consumer Policy reform Which? supported the government's proposals to enhance CMA enforcement powers and introduce mandatory ADR in home improvements and used car sales and servicing. If implemented, these changes could be effective in raising standards and taking action against companies and traders that should support consumers making the necessary changes to meet net zero.

However, given the importance of these decisions and the potential for consumer detriment, the government should be prepared to introduce further measures where necessary by, for example, introducing enhanced enforcement, requiring membership of accreditation schemes and providing additional guidance. The far reaching nature of these changes will require coordination across the consumer enforcement regime and sufficient resourcing particularly in local authority trading standards.

Two key areas where the government should address gaps in ADR include:

- Home heating: for many people making the transition to low carbon home heating will involve an expensive purchase and the potential for considerable disruption as the necessary changes are made in people's homes. In order for consumers to have confidence in this process they will need robust consumer protections and confidence in the reliability and safety of the products and their installation, including access to skilled, trusted installers. This includes clamping down on rogue traders and scammers.
- Electric vehicles: purchasing a new or second hand eclectic vehicle is an expensive purchase and consumers may have concerns, particularly given previous mistakes regarding government advice in relation to diesel cars and some of the misconceptions surrounding electric vehicles. It is therefore important that consumers are aware of their rights and can seek redress if anything should go wrong. These rights should also extend to the servicing of the vehicle and the EV charging infrastructure.
- Proposals to make ADR mandatory in the home improvements and the used car sales and servicing sectors should cover disputes that consumers may experience as a

result of work that is done to housing to reduce emissions, and the purchase and servicing of second hand EVs.

Consumer awareness

Improved awareness of consumer rights can support sustainability objectives as it will encourage consumers to act on their rights and, in turn, create an incentive for companies to adopt improved practices. This could help to challenge misleading techniques that encourage overconsumption and, if consumers are empowered to use their rights to return faulty products, encourage companies to design products with a longer life.

Better awareness may be particularly important in new markets that are emerging to provide the products and services that consumers need as part of the transition to a low carbon future. Greater awareness of consumer rights, including the right to redress if something goes wrong, may act as reassurance and build consumers' confidence to engage with these markets.

The government's Net Zero strategy proposes an increased role for the government, working in partnership with others, to ensure consumers have the information they need. Which? urges the government to make awareness of consumer rights an integral part of these plans.

In addition companies should be encouraged to provide consumers with information about their legal rights. Through our engagement with consumers we consistently find that consumers want information that is accessible and available at the point at which they are considering a purchase or have a problem. Where possible this should be promoted through requirements placed on companies to provide this information to consumers. This could be achieved through license conditions or membership of accredited schemes. If possible this should include an agreed description of how and where consumers rights are described and presented.

Markets regime

(a) How should the CMA use its Markets powers to support the government's strategic priorities on environmental sustainability and Net Zero?

(b) How can the CMA identify markets that may be particularly relevant and important in supporting the UK's strategic goals on environmental sustainability and Net Zero? Are you aware of specific examples?

(c) Are there changes to the Markets regime, other than those highlighted above, which would better allow it to support Net Zero and environmental sustainability objectives? Please be as concrete as possible in your answers.

The markets regime provides an effective toolkit for the CMA to help the UK to achieve its Net Zero commitment. Within the Markets regime the CMA can and should take into account environmental sustainability to the extent that it leads to economic harm to consumers. We were pleased that the CMA conducted a market study into electric vehicle charging as we

have found this market to be disjointed, confusing and costly, and not fit to support the millions of drivers who'll soon need it.⁴⁰

More generally, the UK needs consumers to participate in fast-growing markets such as electric vehicles and heat pumps so it is important that these markets work well, and are seen to work well, for consumers. Consumer adoption of greener technologies will be hastened if consumers are fairly treated in these markets, while the government has an obligation to make sure that consumers do not suffer detriment in markets it is compelling them to participate in.

Unfortunately, the ability of the CMA to use the Markets regime to support the UK's strategic goals on environmental sustainability and Net Zero is hindered by the limits that currently exist on the CMA's powers in market studies and investigations. Further, the government's current proposals to reform the Market regime will not address this deficiency. We welcome the proposals made in the recent consultation on '*Reforming Competition and Consumer Policy*' to give the CMA powers to implement a flexible range of remedies at the end of market studies. However, the CMA's powers need to allow it to implement remedies in markets where it finds consumer harms that may not be linked directly to adverse effects on competition. Allowing the CMA to tackle a broader range of consumer harms through its market inquiry tools will address a continued deficiency in the consumer protection regime by allowing the CMA to act against new and emerging harms and enable the CMA to play its fullest role in the UK achieving its Net Zero commitment.

Which? November 2021

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⁴⁰ Shock to the system, print, April 2021, Which?