

Creating a successful enforcement system for UK consumers

Foreword

For Which? the consumer rights framework is the backbone of everything we do. Since 1957, we've existed to make consumers more powerful and for us to succeed, we need a consumer rights system that works. This means a system that makes sure that consumers are protected from harm – whether that's scams or food safety risks. And if things go wrong for consumers, we want companies to take responsibility and be held to account, rather than passing customers from pillar to post, or hiding behind the small print.

Understanding the challenges consumers face and removing these barriers is central to our daily work. Which? has played a big part in helping to shape the UK's current consumer rights framework. From the appointment of the first Minister for Consumer Affairs to the Competition Act, Consumer Rights Act and creation of the Food Standards Agency, Which? has been leading the way in campaigning for protections for consumers.

Regrettably, it's well recognised that the enforcement system that underpins this framework is failing. Conscientious, dedicated individuals work hard to uphold the current system, but they face a losing battle against a broken regime.

Consumers have never had more choice or more convenience. The digital revolution has put billions of products and services at our fingertips and in this fast-paced marketplace, where new challenges for consumers are always emerging, everyone still wants, and deserves, to be treated fairly.

The current regime simply isn't good enough and leaves consumers exposed and at risk of harm. In these uncertain times it's more important than ever that we have systems we can rely on, with the flexibility to adapt to new consumer realities.

The case for change is clear but it's not enough to just look at individual aspects of the system or to tinker around the edges – we need a wholesale overhaul to properly protect and empower consumers.

The government is looking at the consumer landscape through its *Modernising Consumer Markets Green Paper*, which is a welcome move. They must get this right and take the opportunity to deliver fundamental reform that will shape the consumer landscape for years to come.

In this report Which? highlights the weaknesses of the current system and proposes seven changes to create a regime that will protect consumers effectively. These proposals include expanding the role of the Competition

and Markets Authority, and giving independence to the Office for Product Safety and Standards (OPSS), as well as wider supporting changes for a more effective regime for the future.

At Which? we're constantly questioning every aspect of consumer life to see if things can be made better. The government needs to take this opportunity to make things better for consumers.

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Contents

Seven priorities for change	5
A regime fit for the future	7
• A system under strain	7
• Elements of an effective enforcement system	9
• Establishing a robust public enforcement system	11
• An effective system for private enforcement	19
Annex 1: Overview of the current consumer enforcement system	22
Annex 2: Weaknesses of the current system	31
Annex 3: Challenges for the system	36

Seven priorities for change

The UK has one of the strongest consumer rights frameworks in the world, but the public and private enforcement systems that support it are no longer fit for purpose. The system is under strain at a time when the UK's exit from the EU makes it even more essential that there is a robust system in place that can deal with the complex threats facing consumers.

The government announced its intention to strengthen consumer enforcement in its *Modernising Consumer Markets* Green Paper (April 2018). It is, therefore, a crucial time to review what an effective landscape needs to look like in the coming years, including responsibilities, accountability and funding to ensure that the UK has a world class system.

Recommendations

The government needs to take the following steps to deliver an effective system that will ensure consumer confidence.

1. Expand the consumer enforcement remit of the Competition and Markets Authority (CMA) to create a Consumer and Competition Authority.

Expanding the consumer enforcement remit of the CMA, to create a Consumer and Competition Authority, would create a much-needed, strong, independent national consumer body to proactively lead on the enforcement of consumer rights and fair trading law.

2. Create an independent arms' length consumer product safety body which has a duty to put consumer interests first and operate transparently.

An independent, consumer-focused, arms' length body for consumer product safety must be established, and go further than the Office for Product Safety and Standards (OPSS) the government has set up within the Department for Business, Energy and Industrial Strategy (BEIS). This should operate on the same principles as the Food Standards Agency (FSA) and consideration should be given to putting consumer product safety within the FSA, which would continue close co-operation with Food Standards Scotland (FSS).

3. Enable central funding, oversight and support to local authorities.

Local authorities should continue to have a strong role in enforcement – but with clear accountability to these central regulators, and an effective two-way flow of intelligence and expertise. Responsibilities should be better allocated through centralised funding and formalised contractual arrangements between the central regulators and local authorities.

4. Review the skills and expertise needed across the enforcement landscape.

The government should ensure appropriate levels of expertise and skills are allocated across enforcement bodies to deal with the nature of the risks they are responsible for and which will impact on consumers, driving collaboration and sharing of expertise and intelligence, eg for border controls, as well as on-going support and oversight by the national bodies.

5. Introduce effective enforcement tools and powers.

Joined up and real-time intelligence systems need to underpin a future regime so that emerging trends can be quickly identified and resources targeted at the areas of most potential harm. All public consumer enforcers should have effective tools to incentivise compliance. This includes fining powers to enable swift and effective action to address potential risks and help deter non-compliance – and greater transparency about the relative performance of businesses.

6. Ensure reciprocal arrangements for cross-border co-operation on enforcement, including through trade negotiations with wider countries.

The UK must continue to be linked into key EU networks and intelligence sharing systems after its departure from the EU. This includes alert systems and databases such as the Rapid Alert System for Non-food Consumer Products (RAPEX) and the Rapid Alert System for Food and Feed (RASFF). It must also promote co-operation on enforcement of consumer rights as part of any future trade deals.

7. Deliver an effective alternative dispute resolution (ADR) system to sit alongside a robust public enforcement regime for consumers.

A robust and accessible ADR system is vital for people who have been unable to resolve their complaint directly with the business concerned. Key to a successful system is easier access to the relevant scheme through a central portal; streamlining and ideally a single scheme for each sector; an obligation on sectors (particularly where significant or essential purchases are involved) to be part of a scheme; fair and enforceable decisions by ADR bodies; and effective oversight of how they are operating by a robust regulator or competent authority. The court system should in turn be more accessible, and a viable UK collective redress mechanism is needed to enable people to enforce their consumer rights.

A regime fit for the future

The UK consumer law framework has evolved over many years so that there are comprehensive consumer rights in place, including requirements for fair trading practices, safety and quality standards. These will be transposed into UK law when the UK leaves the EU.

People need to have confidence that these rights are enforced in practice and that they have a means to obtain redress when something goes wrong. But the current landscape has a number of weaknesses and risks failing on both these counts. The government's *Modernising Consumer Markets Green Paper*¹ recognised that the system is under strain and proposed the creation of a new statutory consumer body. It also set out the government's intention to strengthen some enforcement powers and improve how Alternative Dispute Resolution (ADR) works for consumers.

This paper looks at the weaknesses of the system, challenges that make reform even more necessary and proposes the steps needed to create a regime that will effectively protect consumers.

A system under strain

Government reviews² have highlighted that a number of issues are falling through the gaps as the public enforcement system become increasingly complaints-led and is failing to proactively address areas of consumer harm in a complex and often global marketplace. UK consumers spend over £1,160bn a year on goods and services³ and are estimated to have lost at least £14.8bn in 2014–15⁴ through scams and e-commerce alone. But when things go wrong, the cost is not only financial. People spent around 1.2bn hours dealing with these issues in 2015. The total estimated loss of earnings was around £7.2bn and of lost leisure time, £5.1bn.⁵

Lack of compliance with consumer protection laws can also have deadly consequences. Around 3000 fires each year in the UK are caused by faulty electrical appliances. There were, for example, over 1000 fires caused by tumble dryers and 500 by fridge/freezers in 2014/15.⁶ Around a million people each year are also estimated to suffer from foodborne illness, with around 7500 hospitalisations.⁷

Breaking point

One of the major weaknesses of the current consumer enforcement system is that it relies too heavily on local authorities, even when issues are of national significance. Local authority Trading Standards Services (TSS) account for around 75% of public enforcement responsibilities – from scams to product

safety and food labelling. But these services have had to deal with cuts of more than 50% over the past seven years and some parts of the country have been hit particularly hard.⁸ The most recent workforce survey published by the Chartered Trading Standards Institute (CTSI) found that only 30% of authorities that responded considered that their staff had the expertise to cover the relevant legislation that they were required to enforce effectively.⁹

National Trading Standards (NTS) and Trading Standards Scotland (TSS) provide some central co-ordination. Central enforcement bodies exist for some areas. This includes fair trading issues where the CMA, as well as sector-specific economic regulators, have responsibility. The FSA also oversees food safety and standards. But these regulators can have limited ability to intervene or to direct local authorities, who set their own priorities as well as limited powers for some aspects of consumer enforcement. For other areas, such as consumer product safety issues, there is no national arms' length body, although an Office for Product Safety and Standards, based within the Department for Business, Energy and Industrial Strategy (BEIS) has recently been established to support local authority work.

Confusing ADR landscape

It should be possible for people to resolve some complaints themselves by privately enforcing their rights through a neutral third party in the form of an alternative dispute resolution (ADR) scheme or, when necessary, through a straightforward procedure through the courts.

The current system of ADR, which includes a wide range of different schemes including ombudsmen, is however also failing people and is hard to navigate. Which? consumer research has found that around a quarter of people (24%) think that they would need specialist skills or knowledge to be able to use an ADR or ombudsman scheme.¹⁰ ADR is mandatory in certain sectors (eg energy), but not others (eg buying a new house). There are multiple providers in some sectors that businesses choose which to join (eg aviation) but many are still not required to be part of any scheme (eg unregulated legal service providers).

Some ADR schemes will operate as a mediation service between consumers and the business concerned. But ADR schemes which will adjudicate between the parties should, if working effectively, be a viable alternative to resolving a complaint through the courts – and help to take pressure off the over-stretched public enforcement system.

All too often, however, decision-making once a complaint has been made can be opaque, lengthy and unsatisfactory. The alternative of pursuing legal action through the courts, which will usually be through the small claims court process can, however, be costly relative to the scale of the claim, time-consuming and complex for consumers who will generally need to represent themselves. It may, for example, require a detailed understanding of consumer law and how to present your own case in order to be successful.

Summary of key weaknesses of the current system

The main weaknesses of the current system are described in Annex 2 and can be summarised as:

- Limited resources and expertise
- Limited central support
- Limited and inconsistent enforcement powers
- Limited independent challenge in some sectors
- It is too complex for consumers to enforce their rights

Brexit

Brexit has the potential to increase the consumer enforcement workload as the trading environment and trading patterns change. This is likely to make the reliance on local bodies for so many aspects of consumer enforcement even more unsustainable.

The already limited resources may also have to shoulder greater responsibilities and functions as co-ordination and co-operation arrangements shared with or carried out through the EU shift to the UK. And dealing with cross-border disputes could potentially be more challenging for both consumers and for public authorities. The UK should capitalise on opportunities to further improve our systems as we leave the EU.

Elements of an effective enforcement regime

An effective enforcement regime should ensure that consumers are adequately protected by providing targeted, independent oversight and challenge to businesses so that it is in their interests to comply with legal requirements. This is not only in consumers' interests, but will also give businesses confidence that rogue businesses and practices are likely to be discovered and tackled and good business practice will be recognised. The system should be preventative, promoting and supporting business compliance, while also ensuring an effective response and consumer redress when something does go wrong. It should therefore address the following:

- **Effective intelligence-gathering and sharing.** There needs to be a robust and systematic approach to enable understanding of the potential risks posed by different products, sectors and businesses – including analysing trends and identifying new and emerging issues and threats.
- **Targeted and risk-based.** There needs to be a risk-based approach to prioritisation which takes into account the nature of the business, scale and potential impact of any non-compliance, including the severity, number and nature of people affected and confidence in the management.
- **Appropriate national, regional and local oversight.** Responsibility, resourcing and prioritisation needs to be at the right level to be able to deal with the nature and scale of the issue, including both a 'top down' (where there are threats that apply nationally – or internationally) and a 'bottom up' approach (where issues emerge at a local level, but may then take on wider significance).
- **A mix of skills and expertise.** This will depend on the consumer issue and/or sector concerned, as well as the nature and scale of the enforcement

action needed (eg investigatory as well as technical; legal as well as audit capacity). Some issues (eg compliance with food hygiene rules or weights and measures requirements) will require physical checks or inspections, whereas other issues will rely more heavily on analysis of market data and centralised intelligence.

- **Robust tools to ensure compliance.** There needs to be effective deterrents and appropriate incentives for compliance. This includes appropriate legal powers, sanctions and remedies, user-friendly official guidance and advice, as well as the use of bad or good publicity (eg food hygiene ratings displayed by food businesses).
- **Co-ordination with regulatory responsibilities.** Legislative and policy approaches and decisions need to be informed by and reflect the on-the-ground realities, both in terms of business culture and practice, as well as enforcement capability (eg ensuring that it is realistic for new requirements to be enforced). This includes ensuring that the regulatory framework keeps pace with market developments and evolving risks.
- **A clear route for consumer complaints.** People need to know what to do when they have a problem – and consumer complaints need to be acted upon. These complaints should be fed into enforcement prioritisation to help identify emerging or common issues.
- **An effective system of redress.** There needs to be an effective route for people to seek redress when direct complaints to a company are not resolved, alongside more formalised enforcement where it is needed. Court procedures, which generally fall to the small claims court, should be accessible and straightforward to navigate for people who are pursuing complaints relating to consumer law. ADR schemes can potentially be a simpler route for people to resolve some types of fair trading and consumer rights complaints without resorting to private action or turning to public enforcement authorities. These schemes need to be:
 - **Accessible** – for consumers, by ensuring there are no barriers to people seeking the redress they are entitled to.
 - **Effective** – by having adequate enforcement powers to hold providers to account when things go wrong and by having the necessary skills to deal with consumers' complaints effectively.
 - **Transparent** – through the regular publication of decision criteria, complaints data and outcomes of cases.
 - **Independent** – by providing an impartial service to both consumers and companies.
 - **Accountable** – to a competent authority which should undertake periodic reviews on the effectiveness of ADR schemes and publish the results.
 - **Promote improvements** – by using the information gathered to (a) identify sector-wide issues and (b) encourage companies to act on complaints data.

Establishing a robust public enforcement system

The enforcement system urgently needs to be modernised, based on these key elements, to ensure that it can deal with the types of threat that will face consumers in the coming years – whether online threats or new product safety hazards. The current approach is heavily focused on the ‘local’ and while that will remain important in some circumstances, much greater central leadership, resourcing and expertise is also required.

Current responsibilities

The current landscape has evolved over many years. There was fundamental reform completed in 2014, most significantly with the creation of the CMA in place of the Competition Commission and the Office of Fair Trading (OFT) to combine both competition and consumer enforcement powers.

There is a complex system operating at national and local level – as well as current EU and wider international aspects (see Annex 1). This includes sector-specific and cross-cutting responsibilities and responsibilities relating to private, as well as public enforcement of consumer rights. Many of the bodies responsible for consumer enforcement also have much broader responsibilities.

This is particularly the case for local authority Trading Standards Services (TSS), which shoulder the largest responsibility across the three main areas where consumers need to be protected, but have faced severe cuts.¹¹ TSS also took on greater responsibility for national issues when the OFT was closed and the legislation they are responsible for is also constantly expanding as legislation is adopted eg the recent Package Travel Regulations (2018).

Strategic allocation and use of the existing expertise and resources to maximise its impact and target the main areas of consumer detriment is needed¹², along with reform of enforcement responsibilities within national regulatory bodies so these bodies are better placed to intervene and pursue issues of national significance, rather than leaving so much of this work to depleted TSS.

At the moment, if three key areas of consumer rights issues are considered:

- **Fair trading/ consumer rights** – there is a cross-cutting central body, the CMA, as well as sector-specific economic regulators (eg the Financial Conduct Authority (FCA), Civil Aviation Authority (CAA)). But the CMA has limited ability to intervene. It has a more limited role in consumer enforcement compared to its competition role and can generally only intervene where issues are market-wide or precedent-setting so most issues fall to TSS, with limited national co-ordination and most prioritisation decided at local level.
- **Product safety** – BEIS has boosted the Regulatory Delivery office and given it extra resources to deal with non-food product safety, creating an OPSS. But the OPSS still conducts product safety work alongside its wider role for better regulation and reducing burdens on business. The vast majority of work will remain with local authorities with the OPSS acting as more of a central resource to support them, rather than to lead national enforcement issues and prioritise the allocation of resources and expertise.¹³

- **Food** – The FSA and FSS are both arms’ length bodies with remits focused on protecting public health and consumer interests and requirements to operate transparently. They have closer involvement in food enforcement, but most responsibility still falls to local authorities (TSS and Environmental Health (EH) – and solely EH in Scotland). They have limited controls over how local authorities resource this work, although monitor performance and have powers to intervene.

A new approach

There are a range of options for the responsibilities and relationships that are now needed, taking into account the weaknesses to be addressed, the nature of the challenges facing the system (see Annex 3) and also considering the models that are in place in other countries.

Crucial to the success of a new model will be a strong focus on protecting consumer interests, including clear consumer duties placed on the responsible enforcement bodies, effective consumer involvement and representation in their decision-making and prioritisation processes and open and transparent ways of working.

Adjusting the current framework

One approach to establish a central oversight body would be to enhance the role of NTS so there is greater co-ordination and sharing of services and expertise across local authorities, building on the current NTS teams. This could, for example, be accompanied by enhanced status and more accountability for NTS, along with TSS. However, this would still rely heavily on local authorities to support a national framework and would be limited in terms of the status of consumer enforcement as it relates to central government and the level of strategic oversight and national level prioritisation that would be provided.

More fundamental reform

More fundamental reform is required. There are several options for how a new enforcement landscape could be arranged centrally with different strengths and weaknesses:

1. A boosted CMA + Product Safety Agency + Food Standards Agency/ Food Standards Scotland

The CMA could have a much stronger role for consumer enforcement, enabling it to more readily intervene and co-ordinate action across the landscape when there are significant cases involving unfair commercial practices, pricing practices or scams for example. This would be alongside its competition work so that it can use the most effective approach to deliver for consumers. It would still need to co-ordinate and co-operate with the sector economic regulators. There could be a separate arms’ length body to deal with product safety, along similar lines to the US’s Consumer Product Safety Commission (CPSC), with the FSA remaining in place for the majority of food enforcement. Food Standards Scotland would deal with food safety and standards in Scotland.

2. A boosted CMA (with product safety) + FSA/FSS

Another option would be to enhance the CMA's consumer enforcement role and to also give it responsibility for product safety, taking on the work that has been initiated within part of the OPSS but significantly enhancing this (eg oversight of large multi-national manufacturers, including product recalls). Food would still sit with the FSA and FSS. This would be consistent with the approach in Australia, where the Australian Consumer and Competition Commission (ACCC) has responsibility for competition and consumer enforcement, as well as product safety.

3. A boosted CMA + a Food and Consumer Product Standards Agency + FSS

As with 1, the CMA could have a more significant role for consumer enforcement. Product safety could be put with food safety and standards along similar lines to the Netherlands Food and Consumer Product Authority (NVWA). This would therefore require the FSA to be significantly expanded, although its consumer-focused duties could remain the same. FSS would still deal with food in Scotland, but not product safety. This would also ensure that consumer product safety was dealt with by a non-Ministerial government department with a specific and unambiguous duty to protect consumers.

4: New Consumer Authority + Competition Authority + Product Safety Agency + FSA + FSS

Under this option, rather than enhancing the CMA, a distinct new body could be created that has responsibility for dealing with consumer enforcement, leaving the CMA with a narrower competition remit, but recognising the importance of co-ordination with consumer enforcement. This consumer body would also take on responsibilities from NTS and potentially TSS, and would work closely with the sector specific regulators. Product safety would be dealt with by a new arms' length body and the FSA would continue in its current form.

5: A new Consumer Authority + Competition Authority + Food & Consumer Product Standards Agency + FSS

This option also includes a new consumer body, but as with Option 3, would combine food and consumer product safety within one arms' length body by boosting the FSA.

6: Consumer Protection and Safety Authority + Competition Authority + FSA and FSS

This option would take the consumer enforcement responsibilities from the CMA and significantly enhance them within a new consumer body that could also be given responsibility for consumer product safety. The CMA would be a narrower competition authority, would work along with the sector economic regulators, and the FSA and FSS would continue to be responsible for food safety and standards.

Possible pros and cons of the creation or expansion of these bodies is set out on the next page.

Pros and cons of the different options for central reform

Model	Pros	Cons
Boosted CMA (stronger consumer duties and resources)	The CMA already has relevant expertise, so could relatively easily have this enhanced. There are benefits in combining competition and consumer powers to ensure impact. The CMA is authoritative and well-established, including offices across the UK nations. It would be less fundamental reform.	The CMA is taking on a much greater competition role after Brexit, so consumer enforcement could still be the weaker part of its work. The CMA is used to precedent setting work, rather than the more routine. Its duties are not solely focused on consumers.
New Consumer Authority	It would have a clear consumer focus and duties. It would boost the status of consumer protection. It is a familiar concept (the OFT). It could build specialist expertise and be proactive.	It would reverse the consumer landscape changes of 2014. The OFT was relatively weak, so this could be too, given the prioritisation of consumer issues, relative to other policy areas. There could be a risk of detachment from local authorities without appropriate governance.
...including product safety?	This would give a clear consumer protection focus within one agency. There is the example of the Australian ACCC where it is combined with consumer and competition issues, including product safety. A combined approach (technical/economic) could be beneficial.	The government has set up OPSS but has recognised it may need to go further. The nature of the work is different to a fair trading approach eg less economic and more technical advice, scientific risk assessment and there are different stakeholders and networks. There could be a risk of ‘watering down’ both areas.
An arms’ length product safety agency	This would bring a greater focus to a specialist area that has been neglected. It would provide much greater independence and consumer focus than is possible with the OPSS. It would be a clear, single point of contact.	The government has only just set up OPSS but has recognised it may need to go further. There may be a risk of multiple weaker agencies, rather than one strong one.
A food and consumer product standards agency (expanded FSA)	There are similar approaches to risk assessment and use of scientific advice for food and wider consumer product safety. Both would have regulatory policy functions (FSA is a non-ministerial government department). A combined approach to import checks would be beneficial. There is precedent with the Dutch model. Product safety would fall within a body with an unambiguous responsibility to protect consumers, be independent and operate openly.	It could ‘dilute’ the status of both areas or mean stretched resources. There are quite different stakeholder groups and some differences of approach (eg the heavy reliance on private standards for consumer product safety).

Relationship with local authorities

Consumer enforcement will still require a strong local presence, including gathering local intelligence and conducting physical checks and inspections. This in turn needs to feed into central and regional prioritisation so that issues of national significance are identified and dealt with effectively – and local authority work can also reflect national priorities. Under the new model, national enforcement bodies would however provide much greater support and strategic oversight, ensuring a co-ordinated approach.

Possible options for how enforcement could be managed include:

- For the new or boosted body(ies) to take on local authority functions of consumer law enforcement, as well as carrying out more intelligence gathering, data analysis and targeting, leaving TSS with a greater focus on their wider responsibilities beyond consumer protection.
- To retain the current local authority role, including potentially NTS and TSS co-ordination regionally or for specific issues, but with greater central oversight and resource, standards setting and intervention where necessary, supported by improved data collection and intelligence sharing. Work would be based on risk and action taken to support local authorities where they are failing.
- For local authorities to retain lower-risk, less complex and premise-based enforcement work, with central bodies taking the lead on more specialist and investigative work.

Lessons can potentially be learned from the approach to health and safety enforcement work. The Health and Safety Executive (HSE) has regional offices around the UK as well as specialist units within its Field Operations Division. Health and safety in lower risk premises still falls to local authorities (Environmental Health). This approach was, however, criticised in the Lofstedt review of health and safety.¹⁴ This raised concerns about a lack of consistency and also suggested the HSE be the Primary Authority for multi-site national organisations. This was rejected by the government in its response.

Proposed model

Overall, taking into account the issues highlighted, consumers would be best served by creating a stronger CMA as a Consumer and Competition Authority and an arms' length, consumer-focused body with responsibility for consumer product safety.

Recommendations

- **Expand the consumer enforcement remit of the Competition and Markets Authority (CMA) to create a Consumer and Competition Authority.**

Expanding the consumer enforcement remit of the CMA, to create a Consumer and Competition Authority, would create a much-needed, strong, independent national consumer body to proactively lead on the enforcement of consumer rights and fair trading law.

- **Create an independent arms' length consumer product safety body which has a duty to put consumer interests first and operate transparently.**

An independent consumer-focused arms' length body for consumer product safety must be established, and go further than the Office for Product Safety and Standards (OPSS) the government has set up within the Department for Business, Energy and Industrial Strategy (BEIS). It should operate on the same principles as the Food Standards Agency (FSA) and give consideration to putting consumer product safety within the FSA, with close co-operation with FSS.

- **Enable central funding, oversight and support to local authorities.**

Local authorities should continue to have a strong role in enforcement – but with clear accountability to these central regulators, and a clear two-way flow of intelligence and expertise. Responsibilities should be better allocated through centralised funding and formalised contractual arrangements between the central regulator and local authorities.

Skills and expertise

Enforcement bodies and officers need to have the skills, training and expertise that is relevant for the risks that face consumers in today's markets. There is therefore an opportunity to better realign some of the functions and responsibilities across the consumer enforcement landscape and make more of the skills and expertise that is currently dispersed around the country. This includes improving the ability to analyse trends and economic incentives as well as business behaviour to understand the routes to non-compliance and crime. There also needs to be investigative and legal skills to ensure that action can be taken swiftly, and prosecutions followed through, where needed. For some specialist areas, it will also be important for enforcement bodies to draw on external expertise – for example through networks of technical experts, as well as having access to testing capabilities.

Recommendation

- **Review the skills and expertise needed across the enforcement landscape.**

The government should ensure appropriate levels of expertise and skills are allocated across enforcement bodies to deal with the nature of the risks they are responsible for and which will impact on consumers, driving collaboration and sharing of expertise and intelligence, eg for border controls, as well as on-going support and oversight by the national bodies.

Enforcement powers and tools

Effective deterrents also need to be in place, but the mix of powers and sanctions that are available vary across the landscape. This is currently based on a mix of civil and criminal sanctions. The CMA, for example, has the ability to issue fines for breaches of competition law of up to 10% of turnover for the previous year, if it is satisfied that the breach was committed intentionally or negligently, but it does not have the power to impose fines for breaches of consumer law. The government has recognised the need for reform in the Green Paper. It has stated that it intends to introduce legislation to give civil courts the power to impose financial penalties on companies for breaches of consumer law.

The CMA, as well as TSS and the sector economic regulators (and Which?), can take injunctive action under Part 8 of the Enterprise Act 2002. This stems from the EU's Injunctions Directive which allows enforcers to obtain an order stopping traders from breaching consumer law. In the UK, this is a court-based process. The CMA, and TSS since the Consumer Rights Act 2015, also have the ability to seek bolt-on Enhanced Consumer Measures including compensation for consumers. Injunctions are now being used more by the CMA, but TSS use of their injunctive powers varies according to locality and there is a preference for criminal rather than civil action. The main reason for such limited use is because court action in the UK is very expensive. The enforcer has to bear its own costs of bringing proceedings, but if it loses the action then it also has to pay the trader's legal costs.

The systems that are in place for sharing of intelligence and early identification of possible risks, as well as monitoring what enforcement action is being taken around the country, also need to be developed. There is no

comprehensive system in place that joins up the data sources and analysis. The Consumer Protection Partnership (CPP) has a role, but this has been limited and does not cover all aspects of consumer enforcement. For some risks where there is an immediate risk to health, this will be particularly important – including linking into international early warning systems. The FSA’s Regulating Our Future (ROF) reforms (see Annex 1) place a lot of emphasis on making effective use of data to assess risk and target resources. As part of this, the FSA is intending to strengthen requirements for food businesses to register online so that there is a clearer picture of the nature of businesses and potential to inspect them before they start producing or selling food. It is also enhancing its monitoring of local authority performance.

Transparency about levels of compliance can also help drive up standards, but is only used to a limited extent across the landscape (examples include FSA hygiene ratings, Advertising Standards Authority published adjudications, use of CCTV to monitor compliance in slaughterhouses, European Commission focused enforcement ‘sweeps’ targeting specific issues or areas of consumer law).

Recommendations

Introduce effective enforcement tools and powers.

- Joined-up and real-time intelligence systems need to underpin a future regime so that emerging trends can be quickly identified and resources targeted at the areas of most potential harm. All public consumer enforcers should have effective tools to incentivise compliance. This includes fining powers to enable swift and effective action to address potential risks and help deter non-compliance - and greater transparency about the relative performance of businesses.
- All public consumer enforcers should have fining powers to enable swift and effective action to address potential risks and help deter non-compliance.
- The CMA (and future central consumer authority proposed above) should have powers to issue administrative fines that are sufficiently high to ensure deterrent and punitive impact, without having to resort to the courts.
- There also needs to be a simpler route for enforcement bodies and regulators to make effective use of their injunctive powers, including enhanced consumer measures provided for in the Enterprise Act and Consumer Rights Act which include the possibility of securing compensation for consumers. This includes cost protection for public enforcers acting in the public interest and reasonably so that they are no longer required to pay the trader’s costs if an action is unsuccessful, removing the high degree of risk that is currently preventing use of these powers.
- The FSA’s food crime unit should have investigatory powers.
- Transparency about relative performance should be used more widely to increase compliance and accountability, building on the example of food hygiene ratings. Regulators and enforcement authorities should also enhance the transparency of their enforcement decisions, including where informal undertakings are agreed. More specifically, the display of food hygiene ratings by businesses, currently a requirement in Wales and Northern Ireland, should be expanded to the whole of the UK to help improve compliance.

Independence

People need to be able to have confidence that there is an independent system of consumer enforcement in place that provides effective challenge to businesses. The move towards greater reliance on industry self-assurance in place of checks by public bodies in some sectors risks undermining the independence of the system, if taken too far.

The FSA, for example, proposed that certified regulatory auditors take over the role that local authorities currently fulfil for food inspections, but be paid for by businesses. It has put this proposal on hold and is instead proposing to collect fees from businesses for enforcement work and then use this to help sustain independent enforcement (currently through local authorities). Fees are already collected by some other economic regulators, such as the FCA and Ofcom.

In other parts of the system, such as enforcement of consumer product safety, the use of industry self-assessment and checks is commonplace. This includes the current system of CE marking (which will become a UK scheme). The government's approach to Primary Authority Partnerships (PAPs) in some areas also risks creating conflicts of interests. If taken too far, it can blur an important distinction between advice to businesses to encourage compliance and the ability of enforcement authorities to intervene in cases of non-compliance, particularly as advice given by a primary authority in effect becomes certified national advice that other authorities have to defer to. Consumers need reassurance that enforcement bodies can quickly step in to fulfil their enforcement responsibilities when needed.

Recommendations

- **Funding models that sustain independent oversight, and thus consumer confidence, are needed.**
This could include greater use of fees, if collected in a way that incentivises compliance.
- **The government should strengthen its approach to Primary Authority Partnerships (PAPs) and ensure there is a central point of contact for businesses, but this does not lead to conflicts of interest that compromise the ability of enforcement bodies to intervene to protect consumers.**
Central regulators should audit PAPs and intervene if they are not able to function effectively because of lack of resources or expertise. There also needs to be a simpler and more effective system for enforcement bodies to challenge Primary Authority (PA) advice if they feel that this is compromising protection through an independent and transparent appeal mechanism.

International collaboration and co-operation

There needs to be much closer collaboration across the landscape and between different enforcement functions to share intelligence and best practice. The evolving nature of how people shop, and increasing amount of cross-border trade in both goods and services, means that it will be essential that UK enforcers have reciprocal arrangements in place so that they can co-ordinate enforcement action through international partners. Consumers need to have confidence that if something goes wrong with something they have bought from another country, they can ensure the problem is rectified and have a route to redress. This includes the continued ability to take legal action through the UK courts where necessary.

Recommendations

- **The UK must continue to be linked into key EU networks and intelligence sharing systems.**
This includes alert systems and databases such as RAPEX and RASFF. It should also stay linked into valuable international initiatives such as the tripartite co-operation on consumer product safety between the EU, US and China.
- **Reciprocal arrangements for cross-border co-operation on enforcement need to be ensured.**
This includes continued UK participation in networks for joint actions, such as the Consumer Protection Co-operation (CPC) network.
- **The government should also work to enhance broader international networks such as the International Consumer Protection and Enforcement Network (ICPEN) and the International Network of Food Safety Authorities (INFOSAN) in order to ensure that the UK can collaborate with a wide range of countries after it has left the EU.**
- **The UK must also promote consumer rights and put in place reciprocal enforcement arrangements as part of trade deals it negotiates.**
This includes co-operation on joint actions and early warning and intelligence sharing systems.

An effective system for private enforcement

Alternative dispute resolution

An effective ADR system should sit alongside a robust public enforcement regime – and ensure that there is co-operation between the two elements of the system. This will mean people can pursue complaints about issues that can more easily be resolved and seek redress through an effective ADR provider, rather than having to escalate an issue to a more formal, public enforcement route, or seek redress through the courts. ADR schemes, if working well, should also help to drive up compliance and be a source of intelligence for problems that are occurring in a particular sector for targeting of enforcement resources. This requires radical reform of the approach to ADR in many sectors.

Recommendations

- **The government must create an effective alternative dispute resolution (ADR) system to sit alongside a robust public enforcement regime for consumers.**
- **There should be one single portal for people to easily access the relevant ADR scheme.**
This will ensure people can navigate the system and know where to go when they need to make a complaint – the proliferation of schemes in some sectors causes confusion. It should be easy for them to see which scheme is applicable to the sector and business they want to complain about.
- **The benefits of having a single scheme for each sector should be considered.**
A plethora of schemes in some sectors appears to be providing limited benefit to consumers and so the potential risks and benefits of simplification of the system should also be explored.
- **For significant purchases, in terms of the cost or nature of the product or service (or the nature of the consumer involved), schemes should be mandatory for businesses to join.**
The purchase of new homes, new cars, car maintenance and funerals, as well as the rail and air travel sectors are priorities for mandatory schemes.
- **Decisions should be fair and enforceable.**
ADR schemes providing adjudication services should have the power to require compensation. Compensation levels should reflect the level of harm caused to the consumer and decisions should be binding on firms.
- **Each ADR scheme needs to be overseen and routinely monitored by a robust regulator or competent authority.**
There needs to be greater oversight of the schemes to make sure they are working effectively for consumers. This includes regular monitoring of their complaints handling and performance in line with the requirements of the ADR Regulations. Schemes that are failing consumers need to be dealt with robustly and closed down when necessary.
- **ADR schemes should feed in to and influence public enforcement.**
They should help to inform wider enforcement work about areas of consumer detriment and incentivise compliance.

Factors determining when a scheme should be mandatory

The consumer benefits of ADR are likely to depend on:	Indicators
1. Nature of the purchase	Complexity of the purchase Level of competitiveness
2. Nature of consumers	Vulnerability of consumers Importance to consumer (eg essential or high cost purchase)
3. Consumer experience	Consumer confidence and trust in the sector Level of complaints/reports of consumer problems
4. Availability of other types of consumer protection/enforcement	Availability and effectiveness of other routes for consumers to seek redress

Action through the courts

The court system should in turn be more accessible for people pursuing the enforcement of their consumer rights, usually through the small claims track and without legal representation. This can currently be a daunting, costly and complex route for consumers to seek redress.

Recommendations

- **The cost of consumers taking action through the courts must not be prohibitive relative to the size of the consumer dispute.**

Recent research for BEIS found that the direct costs to consumers can be between £101-£500 to use the courts.¹⁵

- **People need clearer government information about the process to help them navigate the procedural and legal landscape as most people will represent themselves.**

This includes clarity about the level of service they should expect from representatives where they are used.

A collective redress mechanism

People currently have no mechanism to seek collective redress for consumer law breaches. A collective redress regime has been introduced by the Consumer Rights Act 2015, but only for competition law infringements.

Recommendation

- **A viable UK collective redress mechanism is needed to enable people to enforce their consumer rights.**

The UK should build on the recent European Commission proposals within 'A new Deal for Consumers' which would extend the scope of representative consumer actions, as the UK leaves the EU. This should operate on an 'opt-out' basis, where a representative can bring a claim on behalf of all consumers. After the claim has been won and the defender has been ordered to pay compensation, affected people can come forward and claim the proportion of the compensation that is rightfully theirs.

Annex 1: Overview of the current consumer enforcement system

A broad range of bodies across the consumer landscape are involved in dealing with the enforcement of different consumer rights and protections. The table below gives an overview of the main ones that have responsibility. There is a complex system operating at national and local level – as well as current EU and wider international aspects. This includes sector-specific and cross-cutting approaches, and the systems that cover private as well as public enforcement of consumer rights.

Table 1: The main bodies responsible for consumer enforcement: fair trading, product safety and food

	Fair trading/consumer rights	Product safety	Food
National (cross-cutting)	Competition and Markets Authority (CMA) National Trading Standards (NTS) Advertising Standards Authority (ASA) Office for Product Safety and Standards (OPSS) Information Commissioner's Office	Office for Product Safety and Standards (OPSS)	Food Standards Agency NTS Office for Product Safety and Standards (OPSS)
National (sector-specific)	CAA, FCA, Ofcom, Ofgem, ORR, Ofwat, PSR, PSA	Driver and Vehicle Standards Agency Vehicle Certification Agency Health and Safety Executive (chemicals)	Animal and Plant Health Agency (Defra), ASA
Regional	National Trading Standards		
Local (local authorities)	Trading Standards Services (TSS)	Trading Standards services	Trading Standards and Environmental Health Services and Port Health
Private	ADR (Ombudsmen schemes) Which?, Citizens Advice		
Devolved	Northern Ireland Trading Standards Service, Trading Standards Scotland, Water Industry Commission for Scotland		Food Standards Scotland, DARD (NI – meat inspection), Public Health England, Scotland, Wales, Public Health Agency (NI)
EU	Consumer Protection Co-operation (CPC) Network	RAPEX	RASFF, TRACES and DG Sante audits
International	ICPEN, OECD	OECD, ICPHSO	INFOSAN (WHO)

CAA – Civil Aviation Authority; FCA – Financial Conduct Authority; ICPEN – International Consumer Protection Enforcement Network; ICPHSO – International Consumer Product Health and Safety Organisation; INFOSAN – World Health Organisation International Network of Food Safety Authorities; Office of Communications – the communications regulator; OECD – Organisation for Economic Co-operation and Development; Ofgem – the gas and electricity markets regulator; ORR – Office of Rail and Road; PSA – Phone-paid Services Authority; PSR – Payment Services Regulator; RAPEX – Rapid Alert System for Non-Food Consumer Products; RASFF – Rapid Alert System for Food and Feed; TRACES – Trade Control and Expert System.

Fair trading and consumer rights

Many parts of the consumer landscape underwent a substantial review, completed in 2014, which largely affected issues relating to fair trading and competition enforcement, although had knock on effects for other areas. The reforms resulted in a greater reliance on local authority **TSS** for consumer enforcement as a result of streamlining of responsibilities at national level. The Office of Fair Trading (OFT) and the Competition Commission (CC) were merged and the **Competition and Markets Authority** (CMA) was created as the national body for competition and consumer enforcement.

The stated intention of merging the OFT and CC was to ensure a more co-ordinated approach between use of consumer and competition powers to make markets work more effectively. The reforms resulted in a more limited role for the CMA in consumer enforcement, compared with the OFT's remit and a primary focus on its competition role which has been reflected by the strategic steers it is given by the Secretary of State.

TSS has most of the responsibility for on-the-ground consumer enforcement – whether protecting people from misleading practices and marketing or checking to make sure that food products are properly labelled and a vast swathe of legislation in-between. TSS also has much broader responsibilities beyond consumer enforcement. A high-level summary of how their role is spread across consumer and wider public interest responsibilities, is set out in Table 2.

National Trading Standards (NTS) coordinates action across TSS, including teams on scams and border controls, but this relies on a local authority taking this work on (with some additional funding) on top of their local work. NTS has no official status or accountability mechanisms. Powys County Council is, for example, the national regulator for enforcement of estate agents.

A Trading Standards lead officer scheme also operates through the **Chartered Trading Standards Institute** (CTSI). Officers take on national responsibility and support specialist work in areas such as metrology or pricing practices on a voluntary basis. In Northern Ireland there is a national trading standards service which is part of the Department for the Economy. In Scotland, Trading Standards Scotland has a more centralised and formalised status than NTS, rather than operating through individual authorities. It is managed by the Confederation of Scottish Local Authorities (COSLA).

Table 2: Overview of Trading Standards consumer and wider responsibilities

	Issue	Examples of regulations that TSS currently enforce
Consumer responsibilities	Fair trading	Consumer Protection from Unfair Trading Regulations 2008, Consumer Credit Act 1974, Price Marking Order 2004
	Food safety and quality	Food Labelling Regulations 1996, Food Safety Act 1990
	Product safety	General Product Safety Regulations 2005
Borderline (some consumer aspects)	Weights and measures	Weights and Measures Act 1985
Other public interest areas	Child protection/under age sales	Children and young persons (protection from tobacco) Act 1991, Gambling Act 2005, Criminal Justice Act 1875, Tattooing of Minors Act 1969
	Trading requirements/restrictions	Christmas Day (Trading) Act 2004, Companies Act 2006, Licensing Act 2003, Money Laundering Regs 2007
	Public safety/health	Crossbows Act 1987, Firearms Act 1968, Fireworks Act 2003, Poisons Act 1972, Knives Act 1997
	Animal welfare and protection	Animal Welfare Act 2006, Brucellosis Order 2000, Cat and Dog Fur Regulations 2008, Breeding of Dogs Act 1973, Rabies Control Order 1974
	Environmental protection/performance	Clean Air Act 1993, Energy Performance of Buildings Regs 2012

The **Office of Product Safety and Standards (OPSS)** was created in January 2018 by the Department for Business, Energy and Industrial Strategy (BEIS), which is ultimately responsible for policy and enforcement in this area. It was formerly known as Regulatory Delivery. It has responsibility for the over-arching framework for how regulators and enforcement bodies should operate. This includes a Regulators' Code, Growth Duty and a strong emphasis on Primary Authority (PA) Partnerships between local authorities and businesses.

The **Consumer Protection Partnership (CPP)** is hosted by BEIS and coordinates and allocates responsibility for issues that fall between the different regulatory enforcement bodies. Citizens' Advice is also a member.

There are also a number of sector-specific economic regulators that operate within the consumer enforcement landscape. Their work is co-ordinated with the CMA through a **Consumer Concurrences Group (CCG)**.

- The **Civil Aviation Authority (CAA)**'s consumer protection role sits alongside its economic regulation, airspace policy and safety regulation responsibilities. This includes compensation for flight delays and cancellations.
- The **Financial Conduct Authority (FCA)** has the strategic objective to ensure that relevant markets function well. One of its three operational objectives is to secure an appropriate degree of protection for consumers.
- **Ofcom** is the communications regulator. It regulates the TV, radio and video-on-demand sectors, fixed-line telecoms (phones), mobiles and postal services, plus the airwaves over which wireless devices operate.
- **Ofgem** regulates the energy sector. Its principal objective is to protect the interests of existing and future consumers in relation to gas conveyed through pipes and electricity conveyed by distribution or transmission systems, wherever appropriate by promoting effective competition.
- **Ofwat** regulates the water sector and enforces the licence conditions which water supply and sewerage companies must meet. WICS does this in Scotland.

- The **Office of Rail and Road (ORR)** enforces the licence conditions which train companies must meet, which includes consumer obligations relating to complaints handling and information provision.

The **Information Commissioner's Office (ICO)** is also the independent authority with responsibility for information rights and data privacy.

Product safety

The main, and significant, distinction between consumer enforcement in relation to consumer product safety, compared with fair trading issues, is the lack of an arms' length regulator to provide central oversight and take on issues of national significance. The most responsibility for enforcement of product safety obligations falls to **TSS**. **NTS** supports work on safety at ports and borders. Responsibility for product safety is not devolved.

The government recently expanded the Regulatory Delivery team within BEIS, to form the **OPSS**, including providing additional resourcing for product safety work. This is alongside its wider responsibilities. A Strategy for 'Strengthening National Capacity for Product Safety' was published by OPSS in August 2018.¹⁶ This included establishing a national incident management team for product safety incidents, increased support for local authority enforcement teams at borders and the development of tools and guidance for local authorities to improve risk assessments. The government also set out its intention to formally consult on proposals for the longer-term operation of Safety and Standards in terms of governance, funding and scope.

Food safety and standards

Enforcement of many aspects of food safety and standards legislation also falls to local authorities. There is generally a distinction in that issues relating to standards, such as food labelling and composition (but also animal feed controls) fall to **TSS**. Food hygiene enforcement generally falls to **Environmental Health Services** within local authorities. Port Health Officers are specialist Environmental Health Officers (EHOs) employed by local authorities, and are responsible for border controls. There is a distinction in Scotland, where both responsibility for food safety and standards fall to EHOs within local authorities. The Scottish Food Enforcement Liaison Committee (SFELC) co-ordinates enforcement action in Scotland.

The **Food Standards Agency (FSA)** is the national competent authority for food safety and standards and oversees the enforcement carried out through local authorities. The FSA was set up to be independent and to protect public health and other consumer interests in relation to food following the BSE crisis. The FSA directly undertakes some enforcement work for high risk food businesses. This includes slaughterhouses and cutting plants, for example. In Scotland, its responsibilities fall to **Food Standards Scotland (FSS)**. Both bodies have national food crime units, established following the horsemeat crisis. There are some other devolved nation differences – the Department for Agriculture, Environment and Rural Affairs (DAERA) is for example responsible for meat inspection in Northern Ireland.

The Department for the Environment, Food and Rural Affairs (Defra) also has responsibility for some on-farm enforcement, as well as enforcement of animal welfare legislation, through the **Animal and Plant Health Agency** and also includes the Veterinary Medicines Directorate (VMD).

Both the FSA and FSS have been reviewing their approaches to food law enforcement and are in the process of implementing changes. The FSA is for example introducing a national system that will require businesses to register online, creating a national database and will take on a more proactive role setting standards for enforcement and monitoring local authority performance under its Regulating our Future (ROF) proposals.¹⁷

Self-regulation

Self-regulation and self ‘policing’ does play a greater role in some aspects of the consumer landscape. Control of most forms of advertising, for example, falls to the Advertising Standards Authority (ASA) which is funded by an industry levy. The ASA enforces the self-regulatory advertising Codes (CAP and BCAP). Trading Standards does still provide a legal backstop.

Industry guidance and Consumer Codes

Guidance on business compliance can be developed through a variety of routes across the landscape: specific sector regulators; the CTSI which has responsibility for guidance and consumer codes; individual local authorities acting as Primary Authorities; BEIS/the OPSS or in some cases the British Standards Institution – as was recently the case in relation to product recalls (non-food). The status of this guidance varies according to the authority of the body that developed it, as well as its legal standing.

Consumer complaints

Citizens Advice operates the Consumer Helpline, which provides consumer advice, and is also the main route for all consumer complaints, which may then be referred to local authorities or other relevant bodies in the landscape. Complaints can also be received directly by regulators, eg the FCA.

Enforcement by private consumer bodies

Alongside public authorities, some independent consumer bodies have more limited enforcement powers for some aspects of consumer protection which can supplement the public enforcement system. This includes Which?, as under the Enterprise Act 2002, it has Part 8 powers which enables it to make an informal request for a trader to cease activity where there is a breach of consumer protection legislation; a formal request for undertakings to cease an infringement and have the possibility of seeking a court order if no undertakings are given or they are breached. Which? and Citizens Advice also have super-complaint powers under the same legislation which enables them to submit a written request to the CMA or a sector economic regulator to investigate where there is evidence of consumer detriment. The regulator then has 90 days to respond.

European and international aspects

The current consumer enforcement system is heavily influenced by EU membership for consumer rights, food and product safety. This includes requirements for market surveillance by national authorities, and the EU legislation relating to market surveillance for product safety is currently under review.¹⁸ In some areas, such as food, specific provisions for the competencies that are needed by enforcement bodies (eg the role of veterinarians in meat inspection). UK enforcement bodies also operate through EU networks that enable co-operation on cross-border issues and intelligence sharing, for example:

- The Consumer Protection Co-operation (CPC) Network is a network of authorities responsible for enforcing EU consumer protection laws in EU and EEA countries. The CMA currently represents the UK.
- The Information and Communication System on Market Surveillance (ICSMS) is an EU system for sharing information about product safety enforcement between national authorities. The EU's TRACES system is a management tool for trade in animals, food, feed and plants.
- The Rapid Alert System for Non-Food Products (RAPEX) and the Rapid Alert System for Food and Feed (RASFF) enable alerts about safety issues to be shared across member states as an early warning system. Summaries of these notifications are also made available to the public unless this would prejudice court proceedings.¹⁹ These systems will also feed into targeted, joint enforcement actions.

For some aspects, such as food enforcement, the European Commission has a more direct role. European Commission officials conduct audits in countries that export to the EU to help to ensure compliance with EU requirements and also co-ordinate market surveillance activities across EU member states. The UK is also currently represented in some international forums through its EU membership – for example trilateral co-operation between the EU, US and China on product safety.

At international level, the International Consumer Protection and Enforcement Network (**ICPEN**) is a network to share information and intelligence between consumer protection agencies. **INFOSAN** (the International Network of Food Safety Authorities) is also jointly managed by the UN's World Health Organisation (WHO) and Food and Agriculture Organisation (FAO). The Organisation for Economic Co-operation and Development (OECD) co-ordinates some work on product safety and also has a Committee on Consumer Policy.

Alternative Dispute Resolution

If working effectively, Alternative Dispute Resolution (ADR) schemes can be a simpler route for people to resolve some types of complaints without resorting to public enforcement authorities or private action through the courts. ADR helps businesses and consumers resolve problems through a neutral third party. The schemes, including ombudsman schemes and Consumer Codes that underpin them, should also incentivise businesses to comply.

Three main approaches are currently in operation:

- (i) **Sectors where ADR schemes have been established by law.** This is the case for the Financial Ombudsman Service; the Pensions Ombudsman; the Legal Ombudsman and the Scottish Legal Complaints Commission.
- (ii) **Sectors where consumers have mandatory access to ADR.** All businesses operating in these sectors must be members of an approved ADR scheme - energy; public communications services (eg phones, broadband); postal services; letting agents, estate agents and property management
- (iii) **Sectors where ADR is voluntary and businesses may choose to join an ADR scheme.** Some trade bodies require their members to participate in a particular scheme, for example the Glass and Glazing Federation or the National Association of Funeral Directors. Other sectors have set up voluntary arrangements, for example all water companies are members of the voluntary Water Redress Scheme (WATRS), and ombudsmen exist in the motor retail and maintenance sector and in the furniture and home improvement retail sector.

Depending on the scheme and sector, the ADR approach can include mediation, conciliation, arbitration, adjudication and ombudsman schemes (third parties who can use a combination of the above approaches). Some trade associations are also part of the CTSI Consumer Codes Approval Scheme. Any traders who are part of this scheme agree to provide good standards of service and must provide ADR for disputes between consumers and traders.

Under the ADR for Consumer Disputes regulations 2015²⁰, based on the EU ADR Directive, most firms that sell goods, services or digital content²¹ must provide details of an ‘approved’ ADR provider²² to a customer with an unresolved complaint. This approval is done by CTSI (the appointed UK-competent authority for ADR sectors) when there is no designated appropriate authority. The Regulations set out criteria for assessing schemes based on: people’s access to the scheme; expertise, independence and impartiality; conflicts of interest procedures; transparency; effectiveness; fairness and legality.

Businesses don’t have to agree to use ADR to resolve the complaint – they only have to tell the consumer whether they will do so. CTSI currently lists 44 approved ADR schemes which range from ABTA (The Travel Association) to Bus Users UK and the Independent Football Association.

ADR across borders

The European Commission’s Online Dispute Resolution (ODR) platform enables people to access dispute resolution bodies to deal with online purchases across borders. This has been active since 2016 and lets people submit their disputes online in any of the 23 official languages of the European Union. The ODR platform transmits the disputes to the ADR schemes put forward by Member States. The EU also operates a European Consumer Centres Network, which provides online advice and a helpline to consumers for queries about their rights for goods or services purchased in another European country. In the UK this is hosted by CTSI.²³

Private enforcement through the courts

When people need to resort to the courts to enforce their rights, there are three possible tracks where civil claims are allocated based on size and complexity:

- The small claims track – the normal track for claims with a financial value of no more than £10,000 – with a limit of £1,000 for claims for personal injuries and housing disrepair.
- The fast track – for claims with a financial value of £10,000 to £25,000 and the trial is likely to last for longer than one day.
- The multi-track – for claims that don't meet the criteria for small claims for fast track.

Most consumer complaints will fall under the small claims track. Legal costs are not recoverable from the losing party when taking this route, but the costs of issuing the claim, court fees, expert fees, reasonable travel expenses and loss of earnings can be. Small claims will be heard by deputy district judges and district judges, and are relatively informal. Fast-track cases will be dealt with by district judges and recoverable cost trials are fixed. The consequences of this are that people pursuing complaints through the small claims route will generally have to navigate and represent themselves.

The broader approach to enforcement

Specific requirements laying down enforcement and market surveillance responsibilities are set out across a broad range of legislation. The OPSS, however, now sets out the overall approach for how regulatory enforcement bodies should operate, building on the work of its predecessor, Regulatory Delivery. There are some differences in approach in Scotland and Northern Ireland. Overall, there has been a stronger focus on regulators' roles in supporting businesses to comply with legislation in recent years and reducing the burdens on business.

The Regulators' Code

The OPSS's role includes the implementation of the Regulators' Code, which came into effect in 2014 under the Legislative and Regulatory Reform Act 2006 and was updated in 2014. All regulators, including local authorities, must have regard to it. The Enterprise Act 2016 makes it a requirement for regulators, other than local authorities, to formally report on the way they exercise their regulatory functions and the impacts of this on business, but this has not yet been brought into force by BEIS.

The Code has a strong emphasis on regulators working to support businesses. Regulators should:

- Carry out their activities in a way that supports those they regulate to comply and grow.
- Provide simple and straightforward ways to engage with those they regulate and hear their views.
- Base their regulatory decisions on risk.
- Ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply.
- Ensure that their approach to their regulatory activities is transparent.

The growth duty

The growth duty came into effect in March 2017 under the Deregulation Act 2015 and applies to certain regulators, including the FSA, but not to local authorities. These regulators have to have regard to the desirability of promoting economic growth, alongside the protections they are responsible for. Under the Enterprise Act 2016, they will have to report on how they exercise their regulatory functions and the impacts of this on business.

Primary Authority Partnerships

A major government focus continues to be primary authority partnerships (PAPs). These enable businesses to receive assured and tailored advice on meeting environmental health, trading standards or fire safety regulations through a single point of contact. They are based on legal partnerships between businesses and local authorities.

The scope of Primary Authority (PA) was extended in 2017 so that all businesses can establish these partnerships. In Scotland, matters that have been devolved to the Scottish government are not covered by PAPs. Fair trading and product safety matters are therefore included, but food matters are not. The OPSS administers a PA register on behalf of the Secretary of State.

A business that receives advice from its PA is able to rely on that advice in dealings with all local authorities. If another local authority proposes enforcement action, it must notify the PA, which can direct that it does not take the proposed action if it is inconsistent with the PA advice. PA was expanded in the Enterprise Act 2016 so that relevant national regulators, including the CMA and FSA, are now specified as 'supporting regulators'.

The OPSS will also act as a supporting regulator for product safety. This means that it can provide support to a local authority in its provision of PA advice. If local authorities disagree over proposed enforcement action (eg the PA and another local authority that wishes to take enforcement action over non-compliance in conflict with the PA advice), questions can be referred to the Secretary of State.

Regulatory Futures

A Cabinet Office Regulatory Futures review in 2017²⁴ proposed a greater shift towards regulatory self-assurance and earned recognition so that businesses who 'do the right thing' should be regulated with a light touch. It emphasised the desirability of external assurance schemes that consolidate different regulatory inspection and assurance functions.

Where regulatory self-assurance is feasible, it also advised that government should implement a policy of funding regulators by charging those that they regulate, instead of around half the cost of running regulators being met by government grant. This should be cost-reflective charging, with those that impose the greatest cost on regulators bearing that cost themselves. Greater use of self-assurance is emphasised, accompanied by a reduced charge for regulation. The Review also stressed the importance of greater collaboration and sharing of intelligence across regulators.

Annex 2: Weaknesses of the current system

The current enforcement system has a number of weaknesses:

Limited resources and expertise

For the majority of consumer issues, the system is heavily reliant on local authorities, particularly TSS who have a broad remit and local priorities. At a time when the risks facing consumer protection have become more complex, between 2010/11 and 2016/17, local authority resourcing of environmental and regulatory services was reduced by 54%.²⁵

These services have also experienced a depletion of skills and expertise, with a loss of 56% of full-time equivalent staff since 2009. Twenty services in England have reduced funding by over 60% since 2011 and some now only have one qualified officer.²⁶ Some 43% of services say they cannot deal with consumer detriment in their area.²⁷

There is limited sharing of data between local authorities, regulators and enforcement bodies more generally, which means it is currently impossible to have a clear understanding of the consumer detriment across the landscape and know which aspects of consumer enforcement are carried out. Expertise is not developed and allocated in a strategic way that reflects the nature of risk nationally.

The latest CTSI workforce survey found that only 30% of authorities that responded considered that their staff had the expertise to cover the relevant legislation that they were required to enforce effectively.²⁸ Some local authorities have increased collaborative working and, in some cases, sharing of services, but often driven by a need to help reduce costs rather than to improve effectiveness or maximise expertise - although there is the potential for that to be achieved.

Limited central support

The current structure means that local enforcers are responsible for dealing with issues of national significance and in many areas, but they have limited central resource to support them.

NTS was set up to provide a national focus for Trading Standards issues and manages national teams. Unlike Trading Standards Scotland, which operates centrally, NTS relies on individual authorities taking on additional responsibility and, potentially, risk, with additional funding provided by central government.

While this has had some success in ensuring that core areas of enforcement are pursued, such as scams or animal feed controls for example, NTS has limited resources and has no official status or accountability.

For fair trading and consumer rights issues, the CMA, as well as sector regulators such as the CAA, FCA and Ofcom, have responsibility for consumer, as well as competition enforcement. But when the CMA was created by the merger of the CC and OFT, it was not given the same scope to intervene as the OFT. To intervene, issues have to be sufficiently market-wide or precedent-setting, otherwise the responsibility is with TSS.

The FSA and FSS are the competent authorities for food enforcement. They audit local authorities and in theory has the power to take over responsibility for enforcement if a local authority, but has never used these.

In its Regulating our Future proposals for reform of the system, the FSA has set out a more proactive role for itself, taking on greater responsibility for national issues and more closely monitoring and auditing the work of local authorities. There will be a centralised system of food business registration. The FSA and FSS are still in the process of developing and implementing many aspects of the new proposals.

Product safety stands out as the main area where there is no arms' length regulator with a clear consumer focus. Although the government has set up the OPSS, this has multiple functions including spear-heading primary authority partnerships and lacks a clear duty to put consumer interests first. The vast majority of work will remain with local authorities with the OPSS acting as more of a central resource to support them, rather than to lead national enforcement issues and prioritise the allocation of resources and expertise.²⁹

Limited and inconsistent enforcement powers

There is inconsistency and some significant gaps in the powers that are available to enforcement bodies. The CMA, for example, has the ability to issue fines for breaches of competition law of up to 10% of turnover for the previous year, if it is satisfied that the breach was committed intentionally or negligently, but it does not have the power to impose fines for breaches of consumer law. It also has the power in the competition sphere to fine businesses for failing to provide information or surrender for interview when issued with notices.

This also differs from the powers of some other sector regulators in the UK that have fining powers, such as the FCA and the Claims Management Regulator. The government has stated that it intends to introduce legislation to give civil courts the power to impose financial penalties on companies for breaches of consumer law.

The CMA, as well as TSS and the sector economic regulators (and Which?), can take injunctive action under Part 8 of the Enterprise Act 2002. The CMA, and TSS since the Consumer Rights Act 2015, also have the ability to seek bolt-on Enhanced Consumer Measures including compensation for consumers.

Injunctions have only been formally sought by the CMA (and its predecessor the OFT) a handful of times if at all. TSS use of its injunctive powers varies according to locality. The main reason for such limited use is because court action in the UK is very expensive, both in relation to court issue fees and in relation to the costs and adverse costs risks.

There are also limitations for food enforcement. Following the horsemeat scare and the issues that this raised for tackling food crime, the FSA set up a dedicated food crime unit, but this has been constrained in that it can analyse and collect data and advise local authorities, but has had no investigatory powers. It is now being strengthened.³⁰

Powers can also vary across the UK because of devolution. In Wales and Northern Ireland, food businesses are required to display their hygiene ratings, given to them following local authority inspections. But mandatory display has not been made a requirement in England (or in Scotland where a different hygiene rating system currently operates).

Limited independent challenge in some sectors

There is a strong focus on the role of regulators in supporting businesses which in some cases risks going too far and detracting from core consumer protection functions. Consumers and responsible businesses need to have confidence that enforcement bodies are focused on protecting their interests and will intervene when needed to tackle consumer detriment.

The current approach to PAPs can create conflicts, leading to a close relationship that may limit the ability of the local authority when it needs to act in its enforcement capacity – rather than as a business adviser.

This was illustrated by Peterborough City Council's role as both PA and enforcing authority for product safety when Whirlpool, which it has a PA Partnership with, faced a major fire safety issue with millions of its tumble dryers and failed to undertake a product recall. This also illustrated how it can be difficult for a local authority to have sufficient resources and expertise to deal effectively with national product safety issues.

There are also some fundamental differences in the extent to which businesses are responsible for assuring their own compliance. At one end of the spectrum, there is a high level of supervision for meat safety because of the nature of the risk. However, for other products, where people may assume there are independent checks, compliance is largely delegated to businesses – eg CE marking to indicate compliance for many aspects of consumer product safety which will become a UK scheme after EU exit.

There has also been a move towards greater reliance on industry self-checks and assurance in place of checks by public bodies in some sectors, in response to the challenges of resourcing.

The FSA recently proposed the concept of certified regulatory auditors that would take on some aspects of the role that local authorities currently fulfil for food hygiene inspections, but be paid for by businesses. The FSA has pulled

back from this approach, although it does still see third-party assurance as having an important role. Recent meat scares have highlighted that too much reliance on third-party auditors can lead to breaches to legal requirements being missed.

It is too complex for consumers to enforce their rights

For those issues where people could potentially seek resolution privately, rather than by resorting to TSS or other regulators, the system is unnecessarily complex and difficult to navigate.

Alternative Dispute Resolution

Which? research has found that only 20% of UK consumers had a good understanding of how ADR/ombudsman schemes work.³¹ Citizens Advice also found that only 5% of unresolved complaints were referred to a third party in 2016.³² The weaknesses of the current system of ADR can be summarised as:

1. It is too difficult to navigate: Most people will be unaware of ADR schemes – and even when they are, it can be difficult for people to find the relevant scheme for their particular circumstances. While some sectors, such as financial services have a single scheme, other regulated sectors have multiple approved ADR schemes (eg communications and aviation). In non-regulated sectors, it can be difficult for people to easily find out which schemes apply to the business they want to complain about. The companies concerned do not always publicise which scheme they are part of and the applicable ADR schemes may not list their members.

2. Many businesses are not part of ADR schemes: For many complaints consumers have, there isn't an ADR option because the business is not required to be part of a scheme or there is no scheme for the sector. ADR is not mandatory for many sectors. This currently includes rail and aviation, although the government has recently announced plans to establish a binding scheme to deal with rail complaints.

3. Other sectors have multiple schemes: Some sectors, in contrast, have a plethora of schemes. This has sometimes been encouraged on the basis that competition can help drive quality – but means a confusing landscape for consumers. Aviation is one example of where multiple schemes are not helping consumers. This is also the case with communications and postal services – although it's a regulated sector, with schemes subject to approval by Ofcom. There are also multiple schemes that deal with estate and letting agent complaints. The government has recently consulted on how redress in the housing market could be strengthened.³³

4. The process can be frustrating and lengthy: ADR is intended to be a simpler and easier route for people to pursue a complaint with a company, rather than taking a legal route. But in some cases the process can be very slow – and people may not be kept informed of how their case is progressing. Pursuing a claim through the small claims court may even be a better, quicker option.

5. Decisions can be weak, inconsistent and the basis of them unclear: The nature of the scheme determines how much statutory underpinning there is to the decisions that are reached – and whether the decision has to be complied with. There is also a lot of variation in robustness of the process and independence of the decisions. The complaints process can be opaque and it may not be clear how decisions are reached.

6. Inadequate oversight: Despite the ADR Regulations setting out that there should be on-going oversight by the relevant competent authority – and other schemes being closely associated with the relevant economic regulators (eg financial services, energy, aviation) – there is limited evidence that the relevant authorities routinely check how schemes are working and make sure they are performing effectively for consumers.

Pursuing complaints through the courts

The alternative of trying to resolve a dispute through the courts is potentially even more demanding for consumers. Recent research for BEIS found that many people who take disputes to court have previously tried to resolve them, unsuccessfully, through ADR, and that the most common problems people encountered when using the courts included that it took longer than expected and that there was a lack of communication and information on the process.³⁴ People interviewed did, however, have slightly more confidence where they had used the court, rather than the ADR route – and a larger proportion of people who used ADR said they encountered a problem (46%) compared with those who used the courts (16%). Two aspects can make the court system particularly difficult to access and navigate:³⁵

- high and potentially prohibitive costs – research for BEIS found that direct costs amount to between £101-£500 for people using the courts, which compares to less than £50 for those using ADR.
- self-representation as litigants in person – most cases will fall to the small claims court and as costs are not recoverable, people will generally represent themselves. This can be stressful and if claims are poorly formulated this can lead to unnecessary delays.

Collective redress

The possibility of collective redress by way of representative action is very limited in the UK. An opt-out collective actions regime was recently introduced by the Consumer Rights Act 2015 (amending the previous opt-in only regime available under the Competition Act 1998), but only for infringements of competition law.

Annex 3: Challenges for the system

There are some fundamental challenges facing the system which the current framework is not set up to deal with.

Complex risks

The threats facing consumers are becoming increasingly complex and wide-ranging as trading practices and patterns change. The UK e-commerce market is, for example, the largest in Europe and third largest globally. Some 36% of non-food retail business is now conducted online³⁶ and people are increasingly buying products online from overseas sellers.

This makes it more complicated for consumers and protection bodies to identify traders, their location and the applicable jurisdiction to take enforcement action. E-crime is the most recorded crime in the UK, with an estimated 5.6 million incidents of online fraud and computer misuse in England and Wales in the year ending June 2016.³⁷

The rise of e-commerce has also seen a rapid growth in peer-to-peer trading via online marketplaces. More than 30 million people in England and Wales bought at least one item via an online marketplace in 2015 and it is estimated that the UK's sharing economy could deliver revenues of £9bn a year by 2025.³⁸

A recent survey commissioned by BEIS³⁹ found that two thirds (67%) had purchased from a website with multiple sellers, and half (48%) had purchased from a single retailer website in the previous 12 months. People aged between 25 and 44 were particularly likely to have purchased from a multiple retailer website. Between 2011 and 2014 the number of small parcels passing through UK customs increased by 48%.⁴⁰

Citizens Advice estimates that up to one in six products advertised on some e-trading sites are potential scams.⁴¹ But scams can also occur in more traditional supply chains. The horse meat scare of 2013, where beef products sold across supermarkets were found to illegally contain horse meat, showed how complex and globalised food supply chains have become. This brings benefits for consumers through choice and lower prices, but also raises challenges for their integrity and assurance.⁴²

Brexit

Brexit will place some additional pressures on the current, strained system but also presents an opportunity to fundamentally review and establish a world-leading system that better protects consumers. The impact will depend on the extent to which the UK stays aligned with, and continues to co-operate with, the EU. The government's technical notices published as contingency planning for a no-deal scenario, however, highlight that without an agreement with the EU there could be a range of issues for consumers' rights and protections.⁴³

- **Competition enforcement**

Leaving the EU means that the CMA will take on greater responsibility for competition enforcement that is currently carried out at EU level by the European Commission. This means that the CMA will need to dedicate significant resources to its competition remit, as well as ensuring it can fulfil its consumer enforcement work. There is a potential risk that based on its current constitution and duties, it will be even less proactive on consumer protection enforcement.

- **Networks and co-operation**

The global and cross-border nature of many threats to consumer protection, including the scale of cross-border sales, make it necessary for UK enforcement authorities to co-operate with their international counterparts.

The UK is currently part of the EU's Consumer Protection Cooperation (CPC) network, which enables joint and co-ordinated actions with authorities in EU and EEA countries, as well as intelligence sharing about possible threats. It is unclear what the relationship will be with the CPC once the UK leaves the EU. If it were to leave without any agreement in place, people would be faced with the prospect of having to pursue complaints in the country where the business was based. The UK could also leave EU market surveillance mechanisms for product safety and bilateral and trilateral initiatives the EU has in place to co-operate with other countries.

There are also several important networks for co-operation on food. The European Food Safety Authority (EFSA) is responsible for scientific risk assessment and communication, and through its networks it links member states and focuses on identifying emerging risks. The European Commission also co-ordinates joint enforcement initiatives and checks in countries that export to the EU to ensure compliance.

- **Early warnings and alert systems**

It is also unclear what the UK's future relationship will be with EU early warning and alert systems for sharing information about unsafe products (currently through ICSMS, RAPEX (non-food) and RASFF (food), as well as through the EU food fraud network. The UK would leave these at the end of March 2019 if there is no deal. But it would continue to participate if there is a transition period.

- **Trading patterns**

Leaving the EU could also mean that trading patterns (including supply chains) may become more complex, making effective controls over imported products essential. Controls on imports into the EU currently apply at the point that products first enter the EU. Products can then freely move around the EU. Products destined for the UK may therefore be checked in ports in other member states, such as Rotterdam.

Trade between the UK and the rest of the EU is not subject to border controls while the UK is a member, but whether this continues to apply or not after it leaves will depend on the nature of the UK-EU trade deal. If there is no deal, the government has said that checks would apply to goods “in transit” through the EU, which originate in a third country, but not to imports from the EU as continued supply would be a priority.

- **Border controls**

A range of consumer enforcement takes place at borders that could have to be significantly increased when the UK leaves the EU – potentially requiring more specialist enforcement officers, including Trading Standards Officers, Port Health Officers (who are specialist Environmental Health Officers) and Veterinarians – as well as pre-notification systems to identify high risk imports, currently operated EU-wide. For some type of products, specialist facilities may also need to be put in place to enable physical checks, sampling and testing to be conducted.

- **Consumer enforcement of their rights**

Consumer rights will be preserved within UK law. However, negotiations on the future relationship need to deal with issues such as cross border co-operation to help people who have purchased products or services from another EU country, ensuring that they continue to have right to redress and that these rights are still enforceable.

Areas where potential gaps could arise include resolving cross-border infringements of consumer law where enforcement bodies currently co-operate and people can make their complaint to their own national body, and the ODR platform. Failure to reach agreement on civil judicial co-operation would create a very difficult situation for consumers who need to pursue legal action against a company based in an EU member state. Without reciprocal arrangements in place, enforcement and private legal action would need to be pursued in the country where the business is based.

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