Consultation response:
Reforming Competition and Consumer Policy

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

Summary

Which? welcomes the government's consultation on the reform of competition and consumer policy and the opportunity to contribute evidence and recommendations.

Economic recovery following the pandemic depends on confident consumers engaging in well-functioning, innovative consumer markets. But the current competition and consumer framework has failed to keep pace with the types of harms that consumers now face, particularly with regard to fast-moving digital markets. This consultation provides a crucial opportunity to overhaul the system and ensure that whether shopping online or in more traditional consumer markets, consumers and responsible businesses are appropriately protected.

Competition and consumer policy should work together to ensure markets operate fairly and efficiently creating thriving consumer markets and delivering the best outcomes for consumers. Competition policy creates the right conditions for companies to compete to win consumers' business. Consumer policy ensures consumers have the right protections to confidently engage with markets. These protections also ensure that responsible businesses that treat consumers fairly compete on a level playing field and are not undercut by unscrupulous competitors. By building consumer confidence and trust, consumers are more likely to engage with new products and services, driving innovation.

The UK has been a global leader on consumers' rights and has a well developed competition and consumer protection framework. But Which? research, investigations and consumer insight have exposed a number of gaps in the system, which have been particularly highlighted by the Covid-19 pandemic. New markets, such as online platforms, have emerged and rapidly become a mainstream route for consumers to access a wide range of goods and services. Although these markets offer many benefits, they are not covered by

the same consumer rights consumers should be able to expect and raise some fundamental challenges for the competition regime.

The Covid-19 pandemic has also highlighted how even when consumer rights are in place, and consumers are relying on more traditional business models, enforcement mechanisms are not effective in delivering business compliance. Public enforcers lack adequate powers and resources to respond quickly and forcefully to secure compliance on issues such as refunds for cancelled travel and events. Private enforcement mechanisms, such as alternative dispute resolution (ADR) are also too limited in terms of their scope and authority to be a viable route for consumers to resolve complaints in many sectors. As we build back from the pandemic, consumer confidence will not only be critical to getting the economy back on track, but also building a resilient and competitive economy for the longer term.

We welcome the recognition of many of these challenges within the consultation. The proposals set out will lead to some fundamental and long over-due improvements. However, as the UK re-examines its regulatory regime outside of the EU, we think that a more ambitious approach is also needed in some key areas to ensure that it is fit for purpose and able to deal with the challenges that will be facing consumers and businesses in the coming months and years.

1. **Effective enforcement powers.** We strongly support the government's proposals to give the CMA new administrative powers that will be an effective deterrent against non compliance with consumer law and enable the CMA to intervene more effectively when there are breaches. In too many cases, both during the Covid-19 restrictions and before, the CMA's current powers have been too weak to secure prompt responses from companies that are breaking consumer law. Stronger fining powers, similar to those used by other regulators in the UK and in other countries, alongside other important reforms, such as information gathering powers, will enable the CMA to respond quickly, reducing consumer harm and protecting responsible businesses who play by the rules. The government should also grant the Civil Aviation Authority (CAA) administrative powers so that it is able to take effective action to protect the rights of consumers in this sector.

2. **Strengthening private enforcement.** There should be a quick and effective route for consumers to enforce their consumer rights directly, but the current system of ADR fails consumers in many sectors. We agree that ADR should be made mandatory in the motor vehicle and home improvements sectors, but think that this should also be the case for aviation and package holidays, given the significance of these sectors and scale of consumer detriment. We are concerned that having more than one provider in sectors where ADR is mandatory works against consumers' interests and therefore authorities should seek to have a single provider. More generally, there should be better signposting to ADR schemes, they should be free to access, timescales for submitting a case and reaching a decision should be reduced and compliance with decisions improved. Effective competent authorities should be in place to over-see ADR schemes and consideration should be given to whether a

single body should be given an oversight role across all schemes to ensure effective delivery and to promote best practice.

3. **A flexible markets regime that tackles consumer harms.** We welcome the proposals designed to allow the CMA to make better use of market inquiries to tackle harms across the economy. We agree that the CMA should be given powers to implement a flexible range of remedies at the end of market studies. However, for this to truly deliver for consumers, the CMA's powers must allow them to implement remedies in markets where it finds consumer harms that may not be linked directly to adverse effects on competition. While updating the consumer enforcement rules is necessary, allowing the CMA to tackle a broader range of consumer harms through its market inquiry tools will address a continued deficiency in the consumer protection regime by allowing the CMA to act against new and emerging harms.

4. **Enabling collective redress**. We also strongly support the introduction of a collective redress regime for consumer protection cases, as already exists for competition cases. This should work on an opt out basis and cover all aspects of consumer law. Third party funding should be allowed to cover costs, and costs should be capped to ensure public interest organisations are able to bring cases to court.

5. **Digital consumer rights.** The consultation includes a number of welcome proposals for addressing exploitative online practices including fake reviews, subscription traps and drip pricing. However, as identified in the consultation, this is not an exhaustive list and new exploitative practices can emerge and rapidly become a source of serious detriment. The government must ensure that regulators and consumers have the legal tools they need to respond to these developments by reviewing and updating the Consumer Protection from Unfair Trading Practices Regulations (CPRs) (especially the list of banned practices) and encouraging regulators to use the flexibility already available to them. In addition, the government should consider whether the CMA requires additional tools that allow it to take action against new exploitative practices without having to wait for the development and adoption of new primary legislation.

6. **Platform responsibility.** Online platforms are now a significant way in which consumers access goods and services. While these platforms deliver many benefits for consumers , the lack of effective regulation in this area has led to a number of consumer harms in those platforms including the proliferation of fake reviews, scams and unsafe products. To address these issues the government should review the legal responsibilities of platforms to ensure that they are aligned with their ability to support consumer protection and place a proactive duty on platforms to take action to ensure compliance with consumer law on their sites.

7. **The role of Trading Standards services.** Local authority Trading Standards services (LATSS) working with National Trading Standards (NTS) and Trading

Standards Scotland (TSS) are a critical part of the consumer enforcement landscape and are responsible for the majority of consumer protection enforcement in the UK. However the current system lacks the structure and resources to address the challenges facing consumers in a modern economy. To address these issues the government should conduct a review of Trading Standards and how consumer enforcement can most effectively be delivered at the local, regional and national level. Although the government may be able to make some changes in the short term, the review should be carried out separately from legislation adopted as a result of this consultation so as not to delay progress on the important reforms that the government has already proposed.

Introduction

Which? welcomes the government's consultation on the reform of competition and consumer policy and the opportunity to contribute evidence and recommendations. The UK has been a global leader on consumers' rights and has a well developed competition and consumer protection framework. However action is needed to update this framework to address weaknesses and respond to the challenges that consumers face in a modern economy.

Consumer markets account for around 60% of UK GDP and giving consumers the confidence to engage in well functioning and innovative markets will be important in driving the country's economic recovery following the Covid-19 pandemic. Competition and consumer policy should work together to ensure markets operate fairly and efficiently delivering the best outcomes for consumers and a fair playing field for responsible businesses. As we build back from the pandemic, consumer confidence will not only be critical to getting the economy back on track, but also building a resilient and competitive economy for the longer term.

Which? research, investigations and consumer insight have exposed a number of gaps in our current system. Many of these gaps relate to the impact of new technology which, despite delivering significant benefits for consumers, can also create challenges for the consumer protection and the competition regime.

Reform of the UK's competition policy is especially needed to fit our modern, rapidly-changing digital economy. A number of digital markets are dominated by very large firms with substantial market power, but there is also evidence that competition has weakened across the economy over the last 20 years. Where competition isn't working well, this leads to worse outcomes for both consumers and businesses.

Consumer legislation is also in urgent need of revision to meet the challenges facing consumers who are increasingly accessing products and services online, either with companies directly, or through online platforms, exposing them to new and emerging risks.

Finally, effective and efficient enforcement is critical to the competition and consumer regime. Consumers should have confidence that businesses that fail to comply with the law

will be held accountable by public authorities, and accessible and affordable redress mechanisms are available when needed.

COMPETITION

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

We agree that the delivery of a more active pro-competition strategy will require an appropriate evidence base and the CMA can help to produce this through regular State of Competition reports. The first report in 2020 shed light on levels of competition in the UK and provides a good starting point for future analysis, including by identifying many of the key metrics that will be needed in subsequent reports. However, it also draws attention to some of the shortcomings in the data currently available to the CMA, with some of the issues including:

- Imports and international trade - In industries in which a large share of supply is comprised of imports then measures of concentration among UK firms may be inaccurate, giving a misleading picture of market competitiveness. This could particularly matter in industries with large shares of imports supplied by only a small number of international competitors. To understand where this could be a problem the CMA might need to use firm-level trade data. The findings may have implications for the government's priorities in post-Brexit trade deals.
- Partial ownership - The CMA needs to conduct a more thorough assessment to understand the scale of partial ownership links between businesses and the impact of this on levels of competition across the economy and in particular sectors.

It will be essential that the assessment of the state of competition considers evidence from consumer surveys. While these do not typically give a direct indicator of the level of competition in the economy or a given market, evidence of poor consumer outcomes often indicates a failure of either competition or consumer protection, and can provide an important starting point for a more accurate diagnosis of a problem.

The CMA's work should be informed by an accurate measure of consumer satisfaction, trust and confidence in key markets, while the measurement and analysis of levels of consumer engagement is particularly important for understanding the state of competition. It is difficult to imagine healthy, competitive markets in which consumers have low levels of engagement or switching as they likely indicate a weak demand side.

The findings from consumer surveys are most usefully interpreted in relative terms, either cross-sectionally across nations or over time. The EC's Consumer Markets Scoreboard is therefore the most useful source of data and the UK should either seek to remain part of these monitoring surveys or replicate the methodology in a UK survey.

It is also important that there is a regular and robust measurement of the incidence and value of consumer problems. We are awaiting the publication by BEIS of the results of a nationwide survey on consumer detriment that was conducted earlier this year. Unfortunately, the commissioning of UK consumer detriment surveys has been ad hoc with the previous surveys being conducted in 2014 and 2016. The government should commit to conducting these on a regular cycle or instruct the CMA to do so.

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

Yes, we believe the CMA will need powers to obtain evidence for this purpose. For example, the shortcomings in data that we identified above may require specific requests and the CMA may not be able to not make these through its existing powers as it may not have reasonable suspicion of breach of competition law or be in a position to obtain evidence through market study or investigation powers. We particularly see the need for such a power so that the CMA can produce deep-dive analyses of levels of competition in specific industries, and we envisage this to be an important part of future reports.

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

We are concerned that more frequent and detailed steers could undermine the CMA's independence as well as increase uncertainty in a way that affects its ability to plan and prioritise effectively.

The CMA holds significant expertise in identifying competition issues and in identifying where there are areas which might be causing significant harm to consumers. Indeed, if the CMA will be producing regular state of competition reports then it will already be developing its ability to take a strategic approach to identify areas of the economy most in need of examination. If the CMA is to truly become a 'microeconomic sibling' to the Bank of England then it will be vital that it is able to do this work without undue pressure from the government. Like the Bank of England much of the CMA's strength and credibility lies in its independent, expert and evidence-based approach.

Rather than jeopardising the CMA's independence by taking a more active approach to strategic steers, the government could instead strengthen the mechanisms used to make the CMA's Board accountable for its choice of priorities. By comparison, the Bank of England has a clear objective, freedom in how to implement it but clear and well known processes to make it accountable to the government, for instance when it misses the inflation target. If the CMA Board was given similar mechanisms for accountability then the government would be better able to scrutinise how and why the CMA is deploying its resources, while still allowing the CMA to use its expertise to independently prioritise its workload.

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

Which? supports the overall aims of the government in the consultation to encourage better use of the markets regime to drive better standards and greater competition in the UK. Market inquiries can be a powerful tool, allowing the CMA to take a broad look at markets and consider a range of features which might affect consumers.

In particular we support the proposals to allow the CMA to impose remedies at the end of market studies as a way to maximise the benefit of the regime and allow the CMA to operate in a more flexible and agile way. The CMA is often in a position at the end of market studies where it has found ways in which the market is not functioning properly, and allowing it to impose remedies at this stage would allow for harms to be addressed more efficiently than under the current rules. Market investigation references may still remain a powerful tool for the CMA to have, but where the CMA has very good evidence of harms which can be remedied at the market study stage, it should be empowered to act.

However, we have some concerns that the overall proposals outlined in the consultation take too narrow an approach which misses an opportunity to drive up standards in markets in a way that would benefit consumers and businesses. We believe that the current test of 'adverse effects on competition' is too narrow to deliver on the potential benefits for consumers and that the CMA should be able to impose remedies where it finds adverse effects on consumers, even where it cannot be established that the consumer harm is linked directly to an adverse effect on competition.

The CMA currently takes a broad view during market studies, and it often finds issues which are not strictly related to adverse effects on competition. For example, the CMA identified multiple issues with consumer control over data in its Online Platforms and Digital Advertising market study and its Digital Comparison Tools market study found harms related to the presentation of clear and accurate information to consumers. That these cases are in digital markets is also unsurprising, where the pace of change can create consumer harms that are hard for the enforcement regime to keep up with. If the CMA had greater powers to intervene to address these harms then this would provide a much-needed level of flexibility to the CMA's role in protecting consumers.

Giving the CMA powers to tackle these harms could also be an extremely powerful tool to enable a wide range of markets to function better and promote higher standards across the economy. Such an approach is not without precedent. For instance, sectoral regulators undertaking market studies are able to respond to any consumer harms they identify by changing the rules within their sector. For example, in response to the FCA's market study on Credit Cards market rules were changed to put in place protections for consumers worth billions of pounds. Extending the CMA's remit to remedy adverse effects on consumers more broadly would allow it to apply similar standards and deliver consumer benefits to markets without a sector regulator.

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

Of the two options presented in questions 4 and 5, Which? substantially favours the CMA being given powers to impose remedies at the end of a market study. While we understand there may be some duplication of analysis between market studies and market investigations, we feel there would be greater benefits in making the market study a more agile and effective tool rather than creating a single stage market inquiry.

The more in-depth approach taken in market investigations still has merit, particularly in cases where structural remedies may be proposed on conclusion. In these cases it is particularly important that the CMA feels properly empowered to take substantial action on the basis of a significant amount of analysis. Efficiencies gained in reducing a timetable from three years to two years could also be lost if the remedies proposed at the end of single stage inquiry are left more open to challenge because of a loss of rigour in the process.

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

Which? supports giving the CMA the power to impose interim measures during a market inquiry. While we do not have any examples of instances where the CMA would have used such powers in market inquiries in the past, its use of them in some merger and competition act investigations suggests that there could be instances of firm conduct in the future where it will need them. This may be particularly important if, as the government envisages, market inquiries are to become a more important and more frequently used part of the CMA's toolkit.

We also note the ability to impose interim measures can create a deterrent for firms to engage in bad behaviour or act as an encouragement for firms to accept binding commitments or remedies in competition enforcement cases. In the European Commission's investigation in chipset manufacturer Broadcom for instance, the application of interim measures effectively led to the EC accepting binding commitments from Broadcom to cease the behaviour under investigation.

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

We do not believe that it is necessary to enable the CMA to accept binding commitments during any stage of the market inquiry process. Market studies and investigations are already subject to relatively tight timescales and the CMA's focus during them should be on analysis and making findings before they should need to consider binding commitments offered by firms. Particularly in market studies, the CMA will reach its conclusions within 12 months according to the statutory deadlines and it is hard to see any efficiency benefits to it needing to consider binding commitments during this process.

Furthermore the CMA, rather than firms, is best placed to decide which remedies are likely to be needed to address specific harms that it finds. They are therefore also likely to be best

placed to design such remedies at the relevant points in their inquiries, rather than where firms wish to suggest binding commitments.

If the government feels it necessary to allow the CMA to accept binding commitments then it must ensure that proper safeguards are in place to ensure that such commitments are complied with and sufficiently remedy the harms identified. We suggest that the CMA should have powers to fine for breaches of commitments as well as enhanced information gathering powers so that it can verify compliance with the commitments. The government should also consider whether there should be a stronger evidentiary burden on the undertakings concerned to demonstrate that the commitments will remedy the consumer harm identified.

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

Which? supports the proposed reforms on remedies, both on creating a more flexible design process and on improved monitoring and review of remedies.

In 2016, Which? commissioned Amelia Fletcher to review the role that demand-side remedies can play in facilitating competition.[1] This review revealed the variation in effectiveness of different demand-side remedies over time, with many not as effective as had been desired. It also showed how difficult it is to predict consumer behaviour change in response to a remedy prior to implementation, even where the design process follows good principles.

This underlines the importance of being able to test remedies in advance and of maintaining the flexibility to alter them in the future if they are not having the desired effects. Thus far, the CMA has not been able to engage in the detailed design needed in its markets work, being tied to its relatively tight administrative timetables. However, it is notable that in both its Energy and Retail Banking market investigations the CMA recommended that Ofgem and the FCA respectively undertook randomised control trials to ensure the best packages of remedies could be introduced. In a market without a sectoral regulator, however, this would not currently be possible, underlining the need for the CMA to be able to have the requisite powers to compel firms to take part in trials.

Which? also notes that assessing the effectiveness of a remedy is rarely something that can be done statically. The way consumers react to an intervention the first time may not be the same once they have been exposed to it over an extended period of time. We also therefore suggest that CMA also has the powers to ensure that firms are monitoring and collecting data on the effectiveness of remedies over time, not just participating in one-off trials.

We also agree with the proposals to allow the CMA to review remedies after their implementation and vary, expand or supplement them when needed, as well as giving it the

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1 https://www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf

powers to request information from companies during these reviews.

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

No response

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

We welcome the proposals to tackle so-called 'killer acquisitions' and agree that the turnover and share of supply tests should be applied to any party to the merger. Changing this will be important to ensure that the CMA is able to investigate mergers in digital markets where we know that new firms may take some time to build their networks without generating income.

We do however have some concerns over the new proposed safe harbour proposals where every firm in a transaction has turnover of less than £10m. While there may be some benefit to providing certainty to smaller businesses, there may also be risk in tying the CMA's hands when it comes to exempting firms based only on their turnover.

Firstly, as in the case of 'killer' acquisitions, we know that some digital platforms aim to grow their businesses in early stages without generating any income for some time. It is notable for instance that, at the time of acquisition by Facebook, both Instagram and Whatsapp would have fallen below the £10m revenue threshold. Whatsapp at this time had the largest number of users of consumer communications apps on iOS and Android, with 600 million users worldwide and 20-30% market share in the EEA.[2] Had it tried to acquire a smaller rival then this may have warranted examination by the CMA, but an investigation would be prohibited under the safe harbour proposals in the consultation.

Secondly there may be small markets particularly in rural or island communities in the UK which provide essential services to a small number of consumers. This could be the case where a relatively isolated community has very few options for e.g. food, fuel or ferry services. In these situations, mergers of, for example, two firms to one could have large impacts for local communities even where neither party has more than £10m revenue.

If necessary to have safe harbour provision then, instead of a blanket exemption for mergers where both parties have less than £10m revenue, Which? would prefer that a higher share of supply test could be introduced instead. For example the test might be that merging parties with revenues below £10m would be exempted from investigation if their combined share of supply is less than 50%.

[2] European Commission (2014), 'Case No. COMP/M.7217 – FACEBOOK / WHATSAPP', available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

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

We are supportive of many of the government's proposals in its other consultation on a new pro-competition regime for digital markets that would see the creation of a new merger regime for digital firms that are designated as having Strategic Market Status. The UK is right to be considering changes to its merger regime to make it fit to assess the acquisitions of the largest tech firms. The current regime has been shown to be inadequate when dealing with the characteristics of digital markets. The largest digital firms have collectively bought close to 300 companies over the past five years, of which only seven were reviewed by the CMA or European Commission and none to date have been blocked.

The proposals include the introduction of new jurisdictional tests to include the use of transaction values. It is common for digital firms to offer their product for free while they build demand. Such businesses may have strategic value, but when this has yet to be monetised they would fail the turnover test meaning that the CMA is unable to review some mergers that are potentially harmful to UK consumers.

We encourage the government to move swiftly to introduce a new merger regime for firms with Strategic Market Status, including the new jurisdictional tests, so that it can better protect UK consumers from harm due to excessive concentration in some digital markets.

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

Restricting the CMA to issues identified at Phase 1
Which? does not agree that the CMA should be restricted in Phase 2 investigations to only examining issues it identified in Phase 1. If the CMA finds potential competition issues or possible issues with the merger having negative effects on consumers then it should be able to examine these as a matter of course. Restricting the CMA to issues only identified in Phase 1 might speed up some merger inquiries but to the likely detriment of its ability to make the most appropriate decisions. It cannot be the government's intention to tie the hands of the CMA so that it could not prohibit a merger it believed would substantially lessen competition simply because the issues were not discovered until Phase 2 of the investigation.

A new 'fast track' merger route
We understand the desire to create greater efficiencies in the merger process so that the CMA can prioritise its resources effectively and firms can benefit from faster decisions. However, we have concerns that the proposed fast track merger route would make it harder for consumer advocates like Which? to participate and feed into merger investigations.

Phase 1 merger investigations, even when cases are fast tracked, currently provide opportunities for third parties to comment and allow for the CMA to make its early

assessments public by publishing the text of its Phase 1 decision. It is important for organisations like Which? to have these opportunities to comment and to get access to information about the merger as soon as possible if we are to provide useful evidence on the consumer perspective to the CMA. If the first opportunity to respond to the CMA was on the Phase 2 issues statement then this could potentially hamper our ability to make useful contributions.

If the proposed fast track merger route is pursued then we agree that the CMA should have extended timelines to make up for the time it would have spent during Phase 1 of the investigation. We also suggest that any such extension period should have specific time set aside for third party engagement and public invitation to comment that would have been undertaken during Phase 1.

A right to be heard for consumer associations

More generally, we believe that there should be greater provision for involvement of consumers and consumer advocates in merger investigations. Indeed, earlier this year the CMA's Chief Executive said that "the evidence we receive in mergers and antitrust cases comes overwhelmingly from the businesses concerned and their advisers...But the consumer voice in this process is largely silent." As a consumer association, it can be difficult to input into merger inquiries during the relatively short administrative timetables, particularly when much of the relevant information in cases is held by firms and not made publicly available until the conclusion of the merger (or not at all).

Making it easier for the consumer voice to be heard during merger investigations can both improve the legitimacy of the regime and help the CMA to make better decisions in cases. Proper consumer input will improve the credibility of investigations as a tool to protect competition and consumers. The CMA's assessments also often rely on analysis and predictions of how the customers of merging parties will behave post-merger and the CMA is likely to come to more accurate conclusions if it is actually receiving evidence from consumers or their advocates.

Which? recommends that the government take this opportunity to make it easier for consumer associations to participate in merger inquiries by affording them a right to be heard. Such provisions were available to us under European legislation prior to the UK's departure from the European Union, but have since been lost. Preserving such rights in the UK competition regime would be a significant positive step to ensuring that consumers and consumer associations are able to participate in merger investigations.

We recommend that such a right to be heard in merger should be similar to that in Article 18(4) of the EU Merger Regulation and Article 11(c) of the EU Merger Implementing Regulation which states:

> *In so far as the CMA deems it necessary, it may also hear other natural or legal persons. Natural or legal persons showing a sufficient interest shall be entitled, upon application, to be heard*. The following parties are distinguished for these purposes:

third persons, that is natural or legal persons, including customers, suppliers and competitors, provided they demonstrate a sufficient interest, which is the case in particular:

For consumer associations, where the proposed merger concerns products or services used by final consumers.

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

Which? already has some concerns over the lack of representation from consumer experts on the CMA's panel. Most panel members have business, competition law or economics backgrounds. The CMA is likely to come to better reasoned decisions if the panel members working on cases come from a plurality of backgrounds, particularly if a smaller panel is going to be working on many more cases. With a renewed focus on remedies on market study cases, consumer expertise will be needed to ensure that demand-side remedies have the best chance of having their intended effect.

The panel therefore should have greater representation from individuals who have acted as consumer advocates rather than just those with purely academic, regulatory or business backgrounds. Which? is concerned that a smaller panel could mean that the limited consumer expertise already on the panel will be diminished or eliminated altogether. The government should ensure that it has some safeguards to ensure that any panel resulting from changes will have representation from consumer experts given that failings in competition ultimately lead to worse outcomes for consumers.

Q14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

Yes, we agree that the jurisdictional requirement of the Chapter I and Chapter II prohibitions should be changed as outlined in the consultation. This would bring the UK into line with the EU and US competition regimes and ensure that UK consumers are given greater protection in cases which span borders.

This change is vital in light of globalisation in the delivery of both digital and non-digital services to consumers. However, updating the jurisdictional requirements on its own may not be enough to ensure consumers are protected in complex, cross border cases. The government should consider whether the CMA itself will need additional resources to deal with the increased workload and additional technical challenges that will arise from enforcing under the new jurisdiction. Simply redeploying existing resources is unlikely to be enough to

deliver meaningful change.

Q15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

We agree with the proposals to reduce the immunity threshold to firms with annual turnover less than £10m. As noted in the consultation, small markets can be very important to the consumers who use them, particularly where there is a small geographical market. Furthermore, as outlined in our response to Q10 above, emerging market players with low revenues might still have many customers.

Financial penalties are one of the strongest tools that the CMA has to deter bad behaviour, and may be particularly effective in their deterrence to smaller companies. The reduction in the turnover threshold therefore not only preserves the ability of the CMA to impose financial penalties but the deterrent effect may also create greater levels of compliance with the rules among firms more generally.

Q16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

Which? prefers option (b) to preserve the greatest deterrent for companies against engaging in illegal behaviour. The effects of the behaviour of a small turnover company are also likely to be much greater if the agreement is with a much larger business. This could be important in technology markets where market participants could be at different stages of their growth process, with a 'smaller' company potentially serving many customers but not yet monetising their position. An agreement between such a firm and an incumbent could cause significant harm and thus there should be strong disincentives, including financial penalties, for any firm engaging in the behaviour.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

We do not support granting of immunity against private damages to support leniency applications. The government has not provided evidence to support the case that additional immunity from damages would incentivise a greater number of leniency applications and deliver any benefits for consumers or businesses. Without such supporting evidence it is hard to see a case where removing vital rights of redress can be justified. It may also be useful for the Government to consider further means to encourage 'whistleblowing' on

competition law matters, such as dedicated anonymous reporting mechanisms and expanding the current legislative framework allowing for whistleblowing protection for individuals to include board members and contractors.

It is vital that consumers have access to redress when firms have engaged in conduct that damages them. The US competition regime has recently been changed to provide leniency against damages, but only from so-called 'treble damages' which act as a punitive disincentive to engage in cartel behaviour. But it is notable that even in these changes designed to encourage leniency applications, the right for consumers to claim for the actual damages caused has remained.[3] Moreover, competition law regulations were amended in 2017 to allow for more 'leniency' protections, including on safeguards for SMEs receiving immunities.

Q18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

The CMA should be empowered to step in to protect the public interest before the conclusion of an investigation if necessary. In cases against companies with very high market shares of customer bases this might be particularly important given the potential for harm on a very large scale. In digital markets this might also be important given the relative size of some incumbents in comparison to newer competitors. Foreclosure of rivals might take place very swiftly and therefore the CMA should feel confident to step in and prevent practices where it sees the potential for harm.

Changes to access to file seem like a positive step in allowing the CMA to take action early. We also support changing the standard of review if a decision is appealed. We also note that public interest regulators like the CMA should, more generally, have greater protection from adverse cost risks if challenged. So long as the CMA has acted in good faith then it should not need to spend inordinate amounts on defending its decisions.

Q19. Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms the government should be considering?

No response.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

In all instances where a case is settled or resolved early, there must be sufficient safeguards

[3] See https://www.lexology.com/library/detail.aspx?g=272c114f-a158-4570-9f52-9cf393f677ca

in place to ensure that any concessions given or settlements agreed are genuinely in the interests of consumers. Enforcing competition law efficiently is important for the CMA but early resolution of cases should not come at the expense of significantly weakening deterrents or failing to secure protections for consumers.

Given the uncertainty around the effect of the changes proposed, safeguards should be built into any process taken forward. Should the government proceed with its proposals for Early Resolution Agreements, then Which? agrees that the Competition Appeal Tribunal should approve such agreements before they become binding as proposed in para 1.184 of the consultation.

Q21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

Which? does not support any proposals that unjustifiably weaken consumers' ability to recover damages which are owed to them as outlined in our response to Q17. There are already incentives for businesses to enter into voluntary redress schemes, such as the possibility of CMA penalty discounts. We believe that the current strict rules of court enabling the disclosure of documents are necessary and proportionate to ensure fair and just outcomes, and that courts are able to take into account voluntary redress schemes appropriately when dealing with individual claims. This is shown by the experience of litigation in financial services cases where issues on voluntary redress schemes have arisen.

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?
No response

Q23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?
No response.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?
No response.

Q25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?
No response.

Q26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

No response.

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which the government should be considering?

Which? agrees that penalty caps for non-compliance with CMA information requests should be increased. The CMA's competition act cases, merger investigations and market inquiries all rely heavily on information provided by firms, and therefore it is paramount that the CMA has the requisite penalty levels to ensure compliance with their requests. Dishonest or untimely responses to information requests can have a serious impact on the CMA's ability to make accurate findings in the best interests of consumers and therefore the associated penalties should be similarly serious.

We have some concern that the proposed penalty caps may be too low to deter non-compliance. As John Penrose noted in his review of competition policy, other countries also apply turnover-based fines of between 1% and 5% for non-compliance with information requests, and the consultation's proposed 1% cap is at the lower end of this range. Sector regulators, too, often have very wide discretion on the levels of fines that they can apply.

Q28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?
Yes / no / maybe

Which? strongly supports the proposals to give the CMA powers to impose civil penalties on companies that fail to comply with directions, orders, undertakings or commitments. Updating these powers will be key to ensuring the CMA has the appropriate tools to remedy the harms that it identifies across its competition functions. It will be particularly important if the CMA is to be tasked with greater use of its market inquiry powers, including possible remedies at the market study stage or use of binding commitments. In order for the CMA to make greater use of remedies for the consumer interest, it is vital that it is able to enforce any breaches to ensure compliance.

However, as in Q27, we do have some concerns that the proposed penalty caps may be insufficient. The suite of undertakings, directions and orders that the CMA can issue may be used to correct serious competition harms to consumers and as such should be set at a level which reflects this. There is no clear reason why the penalty cap should be set below the turnover threshold in the CMA's own competition investigations, given that some breaches of these remedy measures could be similarly egregious in creating consumer harm. Fining powers for sector regulators are also routinely set at 10% of turnover or higher in some cases.

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

Which? agrees that the CMA needs to be appropriately equipped to cooperate with its international partners in an increasingly globalised economy. This is likely to become increasingly important over time as digital services which operate across borders become larger elements of the economy. Therefore the government should act as quickly as possible to ensure that the rules enable international cooperation. We agree that reciprocity is an important principle and that Part 9 of the Enterprise Act should be updated to ensure it is not working against consumer interests in international cases.

CONSUMER RIGHTS

General comments

We welcome the proposed updates to consumer rights included in this consultation and the opportunity to contribute to the development of government policy in these areas. The UK has a strong tradition of consumer rights supported by legislation, most recently the Consumer Rights Act (2015) (CRA). This legislation ensures that consumers are protected from harm, supports responsible businesses by creating a level playing field and promotes innovation and economic growth by giving consumers the confidence they need to engage with new products and services.

Given the importance of consumer rights, it is vital to ensure that regulation is regularly updated to address new and emerging sources of consumer harm. We are pleased that the government has made a number of proposals to strengthen consumer rights in relation to subscriptions, fake reviews and exploitative online practices. The government should take this opportunity to also address some of the more fundamental developments in consumer markets that threaten to undermine consumer rights if no action is taken.

Online platforms.

Online platforms are now a significant way in which consumers access goods and services and deliver many benefits for consumers and small businesses, however the lack of effective regulation in this area has led to a number of concerns including the proliferation of fake reviews, scams and unsafe products. These practices are a concern in their own right, however the fact that they are so prevalent in one of the fastest growing sectors of the consumer economy should make this an urgent issue for the government.

Some of the issues highlighted in relation to platform responsibility are currently being addressed in consultations and legislation that is being brought forward by different government departments. We are working with the government to support progress in these specific areas, however there is a risk of creating anomalies and gaps.

Legal responsibilities: We therefore recommend that the government review the legal responsibilities of platforms to ensure that they take appropriate responsibility for protecting consumers' rights. Online platforms are important economic actors alongside other businesses, but crucially they are uniquely placed to ensure not only their own compliance with consumer law but also the compliance of the businesses that they host on their sites. By taking proactive measures to check the compliance of third party companies who they host, and taking action against companies that are found to be non compliant, platforms have the ability to create strong incentives for these companies to meet legal requirements and ensure that consumers are better protected when using their platform.

This reform is urgently needed to address the current loopholes in UK legislation that have allowed the proliferation of online scams, unsafe products and fake reviews. It will also contribute towards a more level playing field for traditional companies that offer these services, as well as responsible companies that currently have to compete with unscrupulous actors on these platforms

Transparency requirements: Improving transparency on online marketplaces can empower consumers to make more informed decisions, supporting competition and improving outcomes for consumers. In particular, consumers are increasingly reliant on rankings provided by online marketplaces and comparison sites in order to navigate the large number of options available online, however they are often unaware of how these rankings are assembled and whether they are influenced by payments. The CMA has been active in investigating these and the government is right to seek views on these practices in question 47.

There should also be greater transparency as to whether a consumer is making a purchase from a professional trader or a personal individual and the impact that this has on their consumer rights. Online marketplaces have led to an increase in private individuals trading with other consumers, selling products that they have made themselves or products that they have bought for resale. Whether a trader is a professional trader or a private individual affects the rights that a consumer has in the event that something goes wrong and therefore marketplaces should ensure that information about the seller's status is clearly available to consumers and, critically, the impact this has on their consumer rights.

Online marketplaces also have a responsibility to ensure that sellers are aware of the legal definition of a trader, as this may be different from the definition that the online marketplace uses for their own administrative purposes. The government could support this process by providing a clear definition as the current definition under the Consumer Contracts Regulations 2013 and the CRA is very broad.

Responding to emerging exploitative online practices

We welcome the inclusion of a number of consumer rights issues in the consultation that have emerged as a result of the growth of online markets, including fake reviews, subscription traps, and online exploitative practices. These issues should be addressed in legislation that is introduced as a result of this consultation. However, going forward, the

government should consider whether a new approach is needed as it is increasingly clear that the timetable for proposing and adopting new legislation is ill suited to the pace of change in digital markets where new exploitative practices emerge and become widespread in a much shorter time than was the case in non digital markets.

The government should ensure regulators have the tools they need to respond fairly, effectively and efficiently to emerging practices as and when evidence supports an intervention, rather than wait for new legislation. In our response to Q46 we suggest some ways in which the government can support regulators in responding to 'dark patterns' which are a particular form of exploitative online practices, however a similar approach could be followed in relation to other exploitative online practices that may emerge in the future.

For example the government should consider whether it will be more effective for legislation to provide definitions of exploitative or harmful practices rather than seek to list specific practices. This would allow regulators the flexibility to interpret regulations in order to address new developments. If further clarity and specificity is required the government should consider whether non-statutory guidance will be sufficient or whether the CMA should be given a duty or conferred powers to issue a Code of Conduct or something of a similar nature, which would have greater legal force. A code could comprise high-level objectives supported by principles and guidance, as is proposed in the DCMS consultation on 'A pro-competition regime for digital markets.'

Unfair contract terms

The CMA produced guidance on unfair contract terms in 2015, giving their interpretation of the relevant sections in the CRA, and this consultation proposes a number of further additions. However, we are concerned that there are still too many examples of companies failing to comply with the law. We suggest that, in addition to ensuring the law addresses new challenges in this area, it also delivers better business advice and enforcement to ensure that companies are compliant with this important aspect of consumer law.

In particular the CMA should update the list of examples of unfair contract terms[4] that was originally published by the Office for Fair Trading (OFT) in 2008 and is attached as an annex to the 2015 CMA Guidance. Compliance could also be supported through more detailed guidance than is currently available in the Business Companion. Ultimately the CMA and Trading Standards should be prepared to enforce contraventions of the law to ensure consumers are not treated unfairly as a result of contract terms, with a particular focus on sectors where unfair contract terms are widespread.

Travel

The pandemic and the failure of many companies to issue refunds to travellers as legally required has highlighted serious gaps in consumer protection and enforcement in the travel sector. This has resulted in a significant decline in consumer trust and confidence in this sector. We are aware that the CAA is undertaking a consultation on ATOL reform that

[4] Historic Annex A to Office of Fair Trading guidance on unfair contract terms, September 2008.

includes some important changes; however, alongside other stakeholders we are concerned that reform is being conducted in a piecemeal fashion and will fail to provide a joined up approach to the serious issues in this sector.

The government should take a cross departmental approach, develop a plan that provides effective protection for consumers and help to build back a competitive and resilient sector. If necessary this plan can be implemented through different instruments such as the upcoming Aviation Strategy, Airline Insolvency Bill, reform of Package Travel Regulations and ATOL reform, but with coordination and a clearly defined outcome.

This consultation presents the opportunity to make progress in addressing key elements of this plan including strengthening the enforcement powers of the CAA, mandating a single mandatory Ombudsman scheme for the aviation sector and the holiday sector, and reforming the system of prepayments that hindered companies from making refunds and also threatens the protection of consumers in the event of a large scale business failure or mass disruption and cancellations. The government must establish close and effective collaboration between BEIS and DfT officials to ensure that the multiple reviews of travel regulations that are currently underway or planned are not a missed opportunity to drive positive change for consumers and rebuild trust and confidence in the sector.

Subscription traps

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

Subscriptions can be a convenient way for consumers to receive products and services however, as a result of investigations we have conducted, and members contacting us for advice, we are aware that consumers are often unable to exercise control over subscriptions in the way they would like. These include problems with subscriptions for catalogues[5], anti-virus software[6] and gym membership[7].

The description of a subscription contract in the consultation document provides a good basis, however the following points should also be considered:

- There should be clarity over whether a subscription has to involve the consumer making a financial payment for the products or services. This would help to differentiate between a subscription and other services such as a mailing list. Although a consumer may be 'paying' for the information in a mailing list by giving the trader access to their data, and some of the same principles may apply, we don't see this as being the focus of these proposals.

In addition it is important to note how differences in subscription models, and the products,

[5] Easylife catalogue 'stealth sign-up' left vulnerable customer paying for an unwanted subscription, June 2021, Which?
[6] Are you due a refund for an unexpected anti virus charge? June 2021, Which?
[7] How to cancel your gym membership, March 2021, Which?

services or content that have been subscribed to, may impact on the recommendations for example:

- Whether a subscription includes delivery of a physical product, or access to a service or digital content may significantly affect a consumer's awareness of a subscription, and a traders ability to monitor how the subscription is being used.
- Subscription contracts can be for different lengths of time from a rolling monthly or annual subscription, to a fixed term contract and may have different cancellation policies. This may impact when notifications should be sent to remind consumers about their subscriptions and the consumers' ability to cancel payments at a time that suits them.

Some sectoral regulators have established requirements for subscription contracts in their sector. The implementation of the proposals in this consultation should not reduce or water down the protections that consumers in these sectors currently enjoy, for example requirements for some utility companies to provide information about alternative plans at the point of renewal. A minimum standard should be set that sectoral regulators are able to go beyond if the circumstances in their sector require it.

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

We agree with the proposal to require companies to provide pre-contract information and give consumers the choice of a fixed term contract or an auto renewal contract. We don't think that this requirement places a significant additional burden on traders and any additional burden is justified by the need to ensure consumers receive clear and accessible information and can make an informed choice regarding their contract. Information should be prominent, not hidden in lengthy contract information and written in clear and accessible language. (see consultation's own reference to small print in 2.19)

There may be a need for greater clarity in relation to what is meant by 'early stage in the process'. If the contract includes an initial period that is free or charged at a reduced rate, the pre-contract information should make the consumer aware of when the higher rate will be applied and how much this will be and their rights to cancel at this point.

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

Clarifying the terms of the contract with the consumer in advance of signing the contract should not have any impact on the traders ability to comply with pre contract requirements as set out in the Consumer Contracts Regulations. We understand that traders may need to present different information depending on whether a consumer chooses a fixed term contract or an auto renewal contract, however this should not create any major difficulties and should be weighed against the significant benefits in terms of consumer choice.

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

Traders will be best placed to assess the impact of these proposals on their business, however the government should consider whether it is appropriate for businesses to incentivise consumers to take auto-renewal contracts by offering a reduced price or free gifts with this option, and whether this undermines the objective of the proposal.

Q34. Should the reminder requirement apply where (a) the contract will auto-renew or roll-over, at the end of the minimum commitment period, onto a new fixed term only, or (b) the contract will auto-renew or roll-over at the end of the minimum commitment period?

The consumer should be informed of any change in the nature of their contract therefore we would support the reminder being sent in both circumstances. It is not clear how this requirement would relate to contracts where the consumer pays on a monthly basis. We would propose that specific requirements are developed for these contracts including an annual notification that reminds the consumer about their subscription and the cost. The consumer should also have the ability to cancel at any point with a reasonable notice period that should not be less than one month.

Q35. How would the reminder requirement impact traders?

The reminder will result in some administrative cost however this is potentially very small as many communications are automated and digital.

The reminder may result in the loss of some subscriptions however this should be balanced against the benefit that will accrue to consumers who have been reminded to cancel a subscription they no longer require.

Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?

Consumers should be notified when a free trial or introductory offer has finished and they are about to pay a full or higher price. This notification should clearly indicate that this is the subject of the communication and include an accessible link or set of instructions on how to cancel the subscription at this point, if that is what the consumer wishes to do.

The government should test consumers' preferences in relation to the need to provide explicit consent to continue a subscription after a trial period at a fixed or reduced rate. For example, consumers may prefer to indicate whether they want this option at the point at

which they begin the trial. If the trial is for a short period of time and the consumer is familiar with the service they may choose to receive a notification but allow the subscription to roll over without their explicit consent. If the trial period is longer and they are not familiar with the service they may prefer to give their explicit consent before the subscription converts to a higher price.

With consumers increasingly having several subscriptions, it is important to find the mechanism that ensures consumers are effectively informed and can easily take action to manage their subscriptions, without causing excessive requirements that lead to frustration and annoyance.

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

We cannot comment on traders' business models, but if the subscription is genuinely inactive then it seems unreasonable for a business to profit from a service that the consumer either no longer needs or is no longer aware of.

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

We agree with the need to address the issue of long term inactive subscriptions - particularly where the subscriber has deceased, however we are aware that it may be difficult to identify inactive subscriptions in some cases. For example subscribers may receive regular delivery of a product for years without having any contact with the company, or they may have signed up to an insurance policy or break down cover for peace of mind but will not have had any need to use it for several years. In these cases consumers could be contacted on an annual basis with a requirement to respond or the subscription will be suspended, however this does potentially create a burden on consumers, particularly if they have several subscriptions, and raises the possibility of consumers forgetting to renew subscriptions or not getting around to it in time.

Identifying inactive subscribers of digital content such as information sent digitally or access to streamed content should be easier. In these cases it should be possible to establish a reasonable period after which a subscription could be considered as inactive. Therefore, we suggest that further work is needed to define an appropriate response, due to:

a. the difficulty in identifying inactive subscribers in relation to subscriptions for some non digital products.
b. The fact that expectations of engagement will differ greatly between different services. For example, in the case of some insurance or peace of mind services, consumers may be happy to pay for the service for several years without making any use of it.

In the case of subscribers who have died the trader should deal with the issue promptly and sensitively as soon as they are informed.

Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?

We agree with the proposed requirements for cancelling a subscription and the position that a subscription contract should be quicker and more straightforward to cancel than to enter into. However the requirements only appear to apply to an online process. Similar requirements should be developed to ensure that consumers can easily cancel a subscription by email, telephone or letter if they wish.

Traders should have the opportunity to highlight alternative services or payment options before a consumer cancels; however this should not create a barrier to consumers that wish to go ahead and cancel. Equally traders should have the opportunity to offer alternative products or services after a cancellation, however they should not harass consumers who have cancelled a subscription by repeatedly sending products or communications that the consumer has not agreed to receive.

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

The proposal should improve the current situation where consumers can find it difficult to cancel a subscription. The government's proposals to deal with online exploitative practices will also be relevant to this issue as the use of dark patterns, sludge etc can be used to frustrate consumers ability to cancel subscriptions. Consumers should have a choice of different ways in which to cancel their subscription so they can use the channel most suitable to them for example by logging in to their account, by email, by telephone or by letter. Some companies may require a short period of time to establish the necessary processes. This period of time should be clearly defined in the legislation establishing this requirement.

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

We agree that subscription contracts for goods or services where an interruption in supply could result in serious harm, such as home or car insurance, should be excluded from rules preventing auto renewal. Clear criteria should be established for products and services that should be excluded and it should be clearly stated in the contract. However, subscriptions that are excluded from these rules on this basis, should still have to meet rules such as the loyalty penalty remedies that were introduced to ensure consumers aren't penalised for staying with the same provider. Consumers should still be able to easily find information about how to cancel these services and the process should be straightforward. Warnings about the repercussions of cancelling the services without agreeing a subscription with a

new provider should be clear, relevant and proportionate.

Fake Reviews

Q42. Should government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of (a) commissioning consumer reviews in all circumstances or (b) commissioning a person to write and/or submit fake consumer reviews of goods or services or (c) commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services?

Which? investigations and research have identified fake review practices across many of the largest online platforms, and across multiple sectors. The practices are widespread, persistent and cause substantial consumer harm, while the CMA has been shown to be unable to tackle the problem effectively. We therefore strongly support the government taking additional steps to update consumer protection regulations to list these practices as unfair and ensure review hosting sites are taking action to ensure reviews on their sites are genuine.

Online customer reviews are a widespread tool used by consumers when purchasing online. More than 7 in 10 consumers use online reviews to inform product or service purchases at least sometimes, and fewer than 1 in 10 say they never use them.[8] As such, customer reviews have become an integral part of the internet economy.

The manipulation of reviews misleads consumers and undermines legitimate businesses that are unable to signal the true value of their products or services. A large-scale Which? behavioural experiment with 10,000 consumers found that fake reviews were highly effective at manipulating people's choices.[9] In our experimental setting we found that fake reviews made consumers more than twice as likely to choose poor quality products, even when such choices were the demonstrably worst option available. Consumers therefore risk wasting their money and effort in engaging with fake reviews when shopping. Harm can also go beyond making poor quality choices, with previous Which? research finding suspicious reviews present on unsafe products which could pose a danger to consumers.[10]

The potential for serious and widespread consumer harm is vast. The consultation notes the CMA's previous research which estimated reviews influencing £23bn of online purchases. However, this estimate is related to only a small number of online markets, while the growth of e-commerce means this figure is likely to be substantially higher than when this estimate was made, with average weekly online retail sales 160% higher in 2020 than they were in 2015.[11]

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[8] Opinium, on behalf of Which? conducted a survey of 2,000 UK adults, weighted to be nationally representative, between the 10th and 13th September 2021
[9] Which?, The real impact of fake reviews, May 2020
[10] For instance, https://www.which.co.uk/news/2020/03/ebay-customer-reviews/
[11] Which? analysis of data from Office for National Statistics, Internet sales in Great Britain by store type, month and year, August 2021

On balance we believe that option (c) is the most suitable option, as it makes it clear that commissioning or incentivising any person to write a fake review is against consumer law, whilst still leaving the option open for companies that are new to a market to generate genuine reviews for their product, for example by offering a free product for review. This has the potential to improve competition and choice for consumers.

However we are concerned that this option creates a grey area that could be exploited, therefore we recommend that the government carefully review the implementation of any change and reserve the right to introduce Option (a), a ban on commissioning reviews, if this is required. Regardless of the option that is chosen it should always be made clear to readers when a review has been commissioned or incentivised, and no reward should ever be offered for writing anything other than an honest review. Companies should not offer to trade reviews and platforms should take reasonable and proportionate actions to ensure that reviews hosted, linked or referenced on their site meet legal requirements.

Q43. What impact would the reforms mentioned in Q42 have on (a) small and micro businesses, both offline and online (b) large online businesses and (c) consumers?

The impact on consumers will be positive as long as such changes are enforced appropriately by the CMA, Trading Standards and therefore complied with by the sites hosting reviews. Fake reviews are effective at changing consumer behaviour and creating harm and any such policies to remove them will improve consumer decision making and reduce harm. By making it clear that the procurement of fake reviews is against the CPRs in all circumstances this should provide a clearer disincentive for companies to engage in such behaviour.

We also note that fake reviews are not only a problem for consumers directly but also create clear damage to legitimate businesses who lose custom to rivals engaging in bad practices. The impact of this is considerable with more than one in five small businesses confirming that fake reviews are a problem for them when they sell online.[12]

Q44. What 'reasonable and proportionate' steps should be taken by businesses to ensure consumer reviews hosted on their sites are 'genuine'? What would be the cost of such steps for businesses?

Which? supports the amending of the CPRs to ensure businesses should not host reviews "without taking reasonable and proportionate steps to ensure that they originate from consumers who have actually used or purchased that good or service". However, in addition to hosting reviews we suggest the amendment to the CPRs also covers 'linking to reviews or using reviews in rankings and endorsements'.

[12] FSB (2019) *Destination Digital: How small firms can unlock the benefits of global e-commerce*

We remain concerned that platforms are not doing enough to tackle this problem. The ongoing CMA enforcement action against Amazon and Google suggests that there are still widespread issues with the processes in place at large platforms, and our investigations have shone a light on issues at many other companies too. It is clear that a lot more could be being done within the constraints of 'reasonable and proportionate' steps. Consumers, too, have little faith that platforms are doing enough, with half (49%) of UK adults said they trust little or not at all that online platforms are taking effective steps to protect consumers from fake reviews on their websites.[13]

As a minimum Which? believes businesses hosting customer reviews should:

- have effective and adaptive policies and processes in place for preventing and removing fake reviews.
- take swift and effective enforcement action against those that breach these policies, including rogue sellers, businesses that incentivise illegitimate reviews and those offering 'black hat' services that offer to manipulate platforms' policies and processes in order to inflate product ratings and reviews.
- only accept reviews from customers who have made genuine transactions and equally be transparent about reviews that have been incentivised and ensure such reviews reflect genuine consumer experiences.
- only use reviews for genuine transactions in determining rankings and endorsements awarded by sites. Sites should also be clear about how such rankings are determined.
- be transparent about their business models, including the services offered to firms that pay to use their sites, and how they display reviews.

Fundamentally, businesses procure fake reviews because there is a strong incentive to do so. Fake reviews are effective at driving sales and the disincentives to engage in this behaviour are weak as it is too rare for businesses to suffer serious consequences for engaging in bad behaviour. Businesses hosting reviews should therefore have policies and procedures in place which tackle this from both sides:

- **Effective policies to disincentivise fake reviews**: review hosting platforms should first and foremost be looking to detect and remove fake reviews on their sites. When detected, the punishments for engaging in this behaviour should be swift and severe.
- **Effective policies to reduce the effectiveness of fake reviews:** review hosting platforms should be exploring ways to provide information to consumers which makes them less likely to be influenced by fake reviews when they appear. Which?'s behavioural experiment on fake reviews showed that a simple warning banner regarding the presence of fake reviews on retail websites could be effective in reducing how many consumers are affected by them. There has also been research showing that displaying information on historical fake review content can also lead to consumers choosing restaurants with lower historical fake review activity, again

[13] Opinium, on behalf of Which? conducted a survey of 2,000 UK adults, weighted to be nationally representative, between the 10th and 13th September 2021

reducing the incentives for companies to engage in this behaviour.[14] Companies need to be doing more to explore the effectiveness of these consumer-facing remedies at weakening the effectiveness of fake reviews.

Q45. Should the government add to the list of automatically unfair practices in Schedule 1 of the CPRs the practice of traders offering or advertising to submit, commission or facilitate fake reviews?

Which? agrees that this should also be added to the list of unfair practices. As noted above, Which? investigations have found a thriving online marketplace for fake reviews, with companies selling hundreds of thousands of 'reviewers' and some claiming they had processed millions of pounds worth of refunds connected to fake reviews.[15]

Which? believes that these 'black hat' services play an important role in the fake reviews ecosystem and thus to effectively deal with fake reviews they need to be included. Firms engaging in these activities should be left in no doubt that their actions are in breach of the CPRs.

The CMA is right to engage in enforcement action where review hosting platforms are not meeting their responsibilities, but should also be empowered to take action against firms which may not host reviews themselves but facilitate the trade of fake reviews online.

Behavioural techniques

Q46. Are consumers aware of businesses using behavioural techniques to influence choice that affect their purchasing decisions? Is this a concern that they would want to be addressed?

Consumers are spending an increasing amount of time and are making an increasing number of purchases online, a phenomenon that has only increased during the pandemic. In line with these changes consumers are also making many more purchasing decisions online.[16] Heavier reliance on online services means that consumers are even more exposed to online harms, including behavioural techniques and choice architectures that influence their purchasing decisions and choices in a detrimental manner.

Some companies are taking advantage of this change by adopting and continuing to use a range of techniques that exploit individuals' biases and heuristics to push consumers into doing something that otherwise they would not have done if they had been properly informed. These practices, sometimes referred to as dark patterns, are deceptive in nature and designed to mislead or trick consumers. Detriment includes emotional harm (e.g.

[14] Uttara M. Ananthakrishnan, Beibei Li, Michael D. Smith, A Tangled Web: Should Online Review Portals Display Fraudulent Reviews?. Information Systems Research 31 (3) 950-971

[15] Which?, How a thriving fake review industry is gaming Amazon marketplace, February 2021

[16] Ofcom Online Nation 2021 Report https://www.ofcom.org.uk/__data/assets/pdf_file/0013/220414/online-nation-2021-report.pdf

anger), financial (e.g. purchasing items accidently) and privacy (e.g. sharing more data than the user would like).There may also be societal harm in the form of undermining trust in organisations and markets. There is significant research showing the prevalence of dark patterns on the web and their effectiveness in thwarting consumer choice[17] and a taxonomy has been created[18].

The potential for detriment from dark patterns is high. Dark patterns are more alarming than brick and mortar manipulation because businesses can keep testing different options to make them as effective as possible. There is widespread use of them on websites and applications that consumers use everyday. A 2019 study tested automated techniques and discovered 1,818 instances of the use of what they defined as dark patterns on 1,254 websites out of a sample of 11,000 shopping websites[19].

For example, in June 2019 1,199 Which? members were surveyed and it was found that 28% had accidentally signed up to Amazon Prime[20]. 23% did not realise until they checked their bank account and saw that they had been charged. On investigation it was found that Amazon threads the Prime sign-up journey into the process for choosing a delivery option for regular purchases, making it easy for people to sign up to the service without realising. Once consumers are signed-up, the cancellation process is considerably more onerous - with a complicated navigation menu, multiple steps, confusing choices and skewed wording, designed to deter consumers from unsubscribing. Several European and US consumer organisations have also raised concerns about Amazon's practices.[21] [22]

Which? research found that dark patterns are widely being experienced by consumers and a majority expressed concern. We showed more than 2,000 online participants example images and descriptions of eight of the most common dark patterns, and for each dark pattern 50% or more recalled seeing it sometimes or regularly when using websites or apps. The most commonly remembered were activity messages and trick questions, followed by low stock messages, countdown timers and nagging[23]. However, the nature of dark patterns means that consumer detriment is not contingent on awareness alone and requires the government to address the harm.

There are several reasons why awareness is not a sufficient form of consumer protection:

- Dark patterns are purposefully difficult to spot as their purpose is to manipulate. Even if consumers are aware of their existence it is unreasonable to expect them to know all dark patterns and be able to identify them online.

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[17] Jamie Luguri & Lior Jacob Strahilevitz, Shining a Light on Dark Patterns (2020)
[18] https://arxiv.org/pdf/1907.07032.pdf
[19] Mathur et al 2019, Dark Patterns at Scale: Findings From a Crawl of 11K Shopping Websites
[20] Which? Article https://www.which.co.uk/news/2019/07/accidentally-signed-up-to-amazon-prime-youre-not-alone/
[21] Forbrukerradet, Report: You can log out but you can never leave
[22] TransAtlantic Consumer Dialogue, https://tacd.org/tacd-and-16-members-take-action-against-amazons-use-of-dark-patterns/
[23] The fieldwork was conducted by Yonder on behalf of Which between 20th and 22nd August 2021. A nationally representative sample of 2,078 consumers was surveyed.

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

An area where dark patterns are having a significant impact on consumer choice is data protection and privacy. Which? research 'Ctrl. Alt. Delete.' showed that consumers face feelings of growing fatalism when it comes to being in control of their data. Which?'s Consumer Insight Trackers throughout 2020 showed that data protection was the leading concern amongst issues that worried them.

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

The Digital Markets Task Force previously suggested that the government could consider reforms to the CPRs by expressly introducing certain manipulative design practices into them. Schedule 1 annexed to the CPRs contains a list of commercial practices which are in all circumstances considered to be unfair according to Regulation 3(4)(d). Which? proposes that manipulative design practices and behavioural techniques be introduced into Schedule 1 of the CPRs to provide greater specificity on dark patterns for businesses, enforcement agencies and consumers.

This is an area where legislation is also developing in other jurisdictions. Proposed amendments to the draft EU Digital Service Act (DSA) proposals include a definition of dark patterns as 'an online interface or a part thereof that via its structure, function or manner of operation subverts or impairs the autonomy, decisions-making, or choice of recipients of the service'.[24] This bares similarities to the definition included in the California Consumer Privacy Act[25]. A similar definition should be introduced into Schedule 1 of the CPRs to protect UK consumers. By including a definition rather than a definitive list of individual dark patterns

[24] European Parliament, Draft Report, DSA Amendments https://www.europarl.europa.eu/doceo/document/IMCO-AM-695158_EN.pdf
[25] CIV - 1798.140. - TITLE 1.81.5. California Consumer Privacy Act of 2018 [1798.100. - 1798.199.100.

certainty is provided to consumers and businesses, whilst retaining a degree of flexibility for regulators to address developments in this area.

This could be supported by the introduction of dark patterns into non-statutory guidance for business on consumer protection from unfair trading[26]. This would give greater clarity to businesses and emphasise the prohibitions in the CPRs. The CMA could also potentially be given the duty or conferred powers to issue a Code of Conduct or something of a similar nature, which would have greater legal force. A code could comprise high-level objectives supported by principles and guidance

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

Misleading actions are already banned by Part 2 Regulation 5 of the CPRs, therefore drip pricing and paid-for search results that are not labelled accordingly are already covered by the CPRs depending on interpretation. Drip-pricing in particular has been identified as 'hidden costs' in the dark pattern taxonomy[27]. However, as this does not appear to have been sufficient in enabling enforcement agencies to take action against companies engaging in these practices to mislead consumers, the government should consider providing greater clarity and specificity by addressing these practices in Schedule 1 of the CPRs (commercial practices which are in all circumstances considered to be unfair) or updating non-statutory guidance for businesses on consumer protection from unfair trading.

In addition to any action taken to address drip pricing and paid-for search results, the government should include a general definition of dark patterns in Schedule 1 as proposed in our answer to Q46, creating greater certainty surrounding other existing manipulative design practices likely to be breached under the CPRs. This would be aligned with the Digital Markets Task Force suggestion that the government consider reforms to the CPRs to address certain manipulative design practices[28].

Business burden

Q48. Are there examples of existing consumer law which could be simplified or where we could give greater clarity, reducing uncertainty (and cost of legal advice) for businesses/consumers?

The proposed reforms to the enforcement regime, including granting new administrative powers to the CMA and potentially other regulators, will provide businesses and consumers with much greater regulatory certainty. It will remove the ambiguity attached to CMA guidance which currently only communicates their interpretation of the law and is reliant on a court to make a final decision.

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[26] Business companion, Consumer protection from unfair trading
[27] Mathur et al 2019, Dark Patterns at Scale
[28] CMA, Digital Markets Task Force Advice

Improving consumer enforcement through improved ADR and collective redress will also make it much easier and more straightforward to resolve disputes. Although a consumer should always have the right to take a case to court, this is a relatively complicated, time consuming and expensive option for most individuals. Greater access should make it easier and more likely for consumers and businesses to settle claims and allow courts to focus on a smaller number of contentious cases.

Green Claims

With growing environmental awareness, many consumers are keen to reduce the impact of their consumption. Ensuring consumers have accurate and accessible information about the environmental impact of products and services enables them to make more informed choices and will be critical to achieving the government's commitments to sustainability, including the commitment to reach net zero by 2050**.**

To support greater clarity for consumers and businesses, the government should consider including specific definitions of commonly used sustainability terms in legislation to establish how companies should use the terminology in claims, the level of evidence that will be required to substantiate the use of such claims, and give consumers confidence that terms are being used consistently.[29]

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

The government has made a number of important environmental commitments including the commitment to reach net zero by 2050. In order to meet these commitments it is critical that consumer law creates an enabling framework for consumers and manufacturers and does not unintentionally encourage unsustainable practices and behaviours. In particular we are concerned that the current rules for warranties and guarantees do not incentivise companies to design products that last longer, and cause companies not to repair products when problems occur relatively early in that product's life.

We therefore encourage the government to consider whether changes should be made to the CRA to encourage product longevity, and in particular whether longer warranties and guarantees may encourage the design and manufacture of more durable goods.

In March this year Defra consulted on a new waste prevention programme for England that set out its priorities for managing resources and waste better. The consultation set out Defra's intention to develop proposals to better inform consumers on the durability, reparability and recyclability of the products they buy as well as considering the role of longer-term warranties in promoting design for durability.

[29] Which? Response to CMA environmental claims, July 2021, Which?

As it stands, consumers typically have three routes to redress for purchased products, goods or services that become faulty or defective; the CRA, manufacturer guarantees and extended warranties.

The CRA provides consumers with protections when buying products, services or digital content. Under the Act, all products must be of satisfactory quality, fit for purpose and as described, for up to six years from the date a consumer takes ownership of a product. The CRA places obligations on retailers (not manufacturers) for remedying defective products. This can either be in the form of a repair, replacement or refund or price reduction, depending on how long consumers have owned a product. A fault that is discovered within the first six months of ownership is presumed to have been pre existing unless the retailer can prove otherwise. If a fault develops after the first six months, the burden is on the consumer to prove that the product was faulty at the time they took ownership of it. In practice, this may require some form of expert report, opinion or evidence of similar problems across the product range. Section 30 of the Act also sets out how manufacturers and retailers must communicate guarantees to consumers but it is not prescriptive about how long they should last or what the terms must be.

There is the opportunity to strengthen consumer protections, and at the same time increase the lifespan of products, by making the following changes to the CRA.

- extending the initial 6 month burden of proof period to a period that is more aligned with how long products should typically last
- reducing the time and cost burden for consumers to prove products were faulty when they took ownership.
- bringing manufacturers into the scope of the Act (taking into account international supply chains) so that there is a stronger incentive to improve product durability.

There is also the opportunity to review Section 30 of the CRA which deals with Goods under Guarantee to provide more prescriptive measures on guarantees, such as how long they should be provided for and what minimum terms and conditions should be included so that consumers have greater clarity and are not caught out by restrictive terms and conditions or short term time frames for redress. Currently, guarantee periods can vary from 1 year through to 10 years for more high value products. Consumers often have to register guarantees within a set timeframe for them to be valid and terms and conditions might restrict the level of redress they can obtain.

Bringing consistency in this area and ensuring consumers are better protected will help to clarify protections and hopefully lead to longer lasting products as consumers can seek repair easier than having to buy a new product outright.

With the growth of smart products, there is also a need for greater clarity about update provisions and weather sections 40-43 of the CRA applies. Currently update provision can typically fall well below the 6 years of protection required under the Act, effectively shortening the lives of these products.

Q50. Are there any redundant or unnecessarily burdensome requirements to provide information or other reporting requirements, which burden businesses disproportionately compared to the benefits they bring to consumers?
We are not aware of any requirements for businesses to provide information or reporting that are redundant or unnecessarily burdensome.

Prepayments

Q51. Do you agree that these powers should be used to protect those using "savings" clubs that are not currently within scope of financial protection laws and regulators?

No response.

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

Prepayments in the travel sector
It is a fairly common practice in the travel industry to use customer prepayments for reasons other than funding the cost of the specific booking, for instance as a source of working capital. When this happens, businesses find themselves unable to refund payments to their customers in case of cancellation, as the money has already been spent. The recent pandemic and refund crisis has highlighted the risks inherent in the travel industry's reliance on customer prepayments to fund operations, an issue which has been exacerbated by a drop in new bookings, demonstrating the need to strengthen financial regulation and protection of customer monies.

Indeed, during the course of the pandemic, tens of thousands of refunds were not paid to consumers within the specified legal time frame with many consumers waiting weeks or months to receive their refund in clear breach of consumer protection laws. Throughout this period the CMA received a large number of complaints related to cancellations, with 47,000 on holiday providers and 13,000 on airlines[30]. To date, there are still millions to be paid, with several holiday providers in the sector unable to retrieve refunds from airlines for the flight element of package holiday bookings.

Recognising the need for better protection of customer monies and to strengthen the sector's financial resilience, the CAA is currently consulting on changes to ATOL holders financial requirements, including proposals to fully or partially segregate prepayments using escrow or trust accounts. In the CAA's view, these proposals have the dual objective of improving the industry's financial resilience and consumers' ability to receive refunds in accordance with the law.

[30] https://www.gov.uk/government/publications/update-on-work-of-the-cma-during-the-coronavirus-pandemic-15-march-2021/protecting-consumers-during-the-coronavirus-covid-19-pandemic-update-on-the-work-of-the-cma#complaints-analysis

Which? strongly supports the CAA's proposal to require ATOL holders to segregate customer payments from their operational cash accounts. Indeed, when we surveyed consumers on this topic, we found that 41% are under the impression that when booking an ATOL holiday, their payment will be protected and held in a deposit, and not spent by the holiday provider, until after the holiday takes place. It is crucial that the proposals to protect ATOL bookings prepayments are not looked at in isolation, with stronger payment protections implemented across the market and not just the flight-inclusive holiday segment. This is to establish a level playing field for businesses operating in this sector, ensure consumers continue to have sufficient protections in place when things go wrong and that the market can grow sustainably without over relying on government intervention.

Prepayments in the form of gift cards

In recent years, several high profile retailers have gone into administration leaving consumers that have gift cards or orders with the company out of pocket. These consumers usually have to join a long list of creditors and are unlikely to get their money back[31]. If the company is bought out by another company and continues trading, the new owner may honour the previous company's commitments but this is at their discretion and can result in long delays.[32]

We note that the law commission advised against additional protection for gift cards. However, we would encourage the government to consider some relatively light touch approaches that could provide protection to consumers . This could help reassure consumers and provide a competitive advantage to retailers and gift card providers that take this approach.

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

Which? has been contacted by a number of consumers that have experienced problems because of a delay in the formation of a sales contract. These generally relate to consumers that have not received items they have bought from online retailers because the company has gone insolvent.

Q54. Does the practice of using terms and conditions to delay the formation of a sales contract cause, or have the potential to cause, detriment to consumers? If so, what is the nature of the detriment or likely detriment?

As noted in answer to Q53, a number of consumers have contacted Which? because a delay in the formation of a sales contract resulted in them not receiving items they had bought from online retailers because the company had gone insolvent. WIth the increase in online sales, particularly since Covid restrictions, similar examples are only likely to increase.

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[31] With the collapse of Thomas Cook even though holidays were protected, consumers with Thomas Cook gift cards were not. Thomas Cook collapse your questions answered, December 2019, Which?
[32] House of Fraser customers still without refunds, September 2018, Which?

In these cases it is clear that the consumers were not aware that they were not the owners of the product from the point at which they had made the payment, as such it is reasonable to say that the law is not meeting their reasonable expectations. These expectations reflect the legal position that delaying contract formation may be "unfair" under Part 2 of the CRA 2015.

Furthermore we agree with the Law Commission that delaying the formation of the contract may further impact on a consumer's rights to prompt delivery of a product as this only becomes relevant from the point at which the contract is formed. If the product is not delivered at all, the consumer may still be able to claim compensation, but it may be limited or more difficult as a result of the contract not having been formed. We therefore welcome the Law Commission's recommendations and support the government addressing this issue through a change to the law.

CONSUMER ENFORCEMENT

General comments

Which? welcomes the proposals to strengthen consumer enforcement through the granting of stronger powers to the CMA and improvements to ADR and collective redress. We have responded in detail in the relevant sections. In addition to these responses we would like to highlight the following issues that we would recommend the government consider alongside the points already covered in the consultation.

Consumer enforcement landscape

We strongly support the government's proposals to enhance the CMA's enforcement powers. This will have a significant impact on companies' compliance with consumer law by making CMA enforcement action more efficient and effective and creating a stronger deterrent against companies that may consider breaking the law in this area. The government should also grant the CAA administrative powers so that it can take more effective action against breaches of consumer law in the aviation sector.

Trading Standards: Local authority Trading Standards (LATSS), working with NTS and Trading Standards Scotland are a critically important part of the enforcement landscape and are responsible for the majority of consumer protection enforcement action in the UK. However the system lacks the structure, accountability and resources to effectively address consumer protection issues that arise at a local, national and international level. In order to address these issues the government should conduct a review to identify the reforms that are needed to ensure Trading Standards, working with other enforcement agencies, is better able to address the risks consumers face in a modern economy. To avoid delaying the legislation needed to implement the other reforms in this consultation, this review may need to be carried out separately. These issues are addressed in more detail in response to question 74.

Product Safety: We recognise that this consultation does not cover product safety however many of the issues discussed here in relation to enforcement are also relevant to product safety. Which? has called for the Office for Product Safety and Standards to be made an independent statutory agency at arms length from government, with a clear unambiguous focus on protecting consumers and the promotion of product safety.

Improving intelligence led enforcement: Consumer enforcement should be 'intelligence led' making extensive use of data about markets, consumer behaviour and harms.

Complaint data is particularly important in helping to identify emerging consumer harm and allocate resources. Several bodies collect data about complaints including Citizens Advice, Resolver, Ombudsmen and, most recently, the CMA added a tool that enabled consumers to report a business behaving unfairly during the Coronavirus (COVID-19) outbreak.

However several surveys suggest that consumers generally do not report incidents to public bodies and as a result current intelligence may be missing important evidence. A recent Which? survey indicates that more consumers are likely to leave a poor review or post a comment on social media than report to a public body. Although public reviews and comments can be monitored they are harder to collect and assess and may not contain information that it would be useful to collect.

There may be multiple reasons for the lack of reporting including consumers not being aware that it is possible to report an issue, not being able to report because they don't know where to report, the process is too difficult, or they do not feel it is worth reporting an issue because they don't think it will make any difference. The government should investigate what are the barriers that prevent consumers reporting complaints to public bodies and how it can be made easier for consumers to report issues through a single accessible portal that accepts communication by social media, email, telephone etc.

In order to support intelligence led enforcement, the CMA should have a clear remit to gather and co-ordinate intelligence. They should have the means to gather data through a range of sources and should be able to require companies to share information outside of a formal investigation.

Transparency around enforcement actions: Transparency about enforcement actions helps consumers to make informed decisions and acts as a deterrent against companies that might consider breaking consumer law. However there is considerable variation in the level of transparency that different enforcement agencies apply to their work. In November 2020 the CMA published an Updated Supplementary Note on Transparency in Consumer Enforcement Cases[33] which introduced a number of improvements. We would support this approach being adopted more widely across enforcement agencies that are responsible for consumer issues, so that (unless a set of narrowly defined circumstances require otherwise)

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33 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932474/Transparency_in_CEC__Updated_Supplementary_Note_-.pdf

information about sectors or businesses that are under investigation is publicly available at an early stage in the investigation.

The structure of Trading Standards makes it particularly difficult to access information about investigations that are taking place across different local authorities, except where National Trading Standards (or in the case of product safety the Office for Product Safety and Standards) is able to publish this information.

The government should also consider improving transparency about the relative performance of companies to increase compliance and accountability, building on the example of food hygiene ratings, Advertising Standards Authority adjudications, online sweeps of websites undertaken by regulators to identify unlawful practices or products.

International cooperation: The number of consumers that are purchasing products from other countries through e-commerce has grown significantly in recent years making international cooperation between UK enforcement agencies and international partners an important element of the enforcement landscape. We therefore encourage the UK government to support this cooperation through:

- Making the necessary changes to the Enterprise Act 2002 so that UK agencies can disclose information with international partners. This cooperation represents a win-win situation for the UK and should be progressed alongside other proposals in this consultation, and should not be withheld as a bargaining chip in international trade negotiations.
- Seeking a formal relationship with European Union enforcement networks as part of Trade and Cooperation Agreement negotiations so that information can be shared, actions co-ordinated and therefore the impact enhanced.
- Seeking a consumer chapter in wider trade agreements that recognises consumer rights and supports cooperation between enforcement bodies.
- Taking a leading role in international networks such as the OECD Consumer Policy Committee, the International Consumer Protection and Enforcement Network and the UN Conference for Trade and Development.

Administrative powers

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

Which? strongly supports the proposals to empower the CMA by granting the regulator administrative powers. The CMA has been hampered by very weak powers that have resulted in investigations and cases lasting for many months or even years. We would expect the proposed powers to significantly increase the efficiency and effectiveness of the CMA's enforcement actions, enabling it to conduct more cases for the same funding. The ability to be a more active regulator, and the stronger deterrent effect of administrative powers, should be significantly more effective in influencing business behaviour and supporting compliance. This will be beneficial for consumers and for responsible businesses

that will no longer have to compete with unscrupulous companies.

The CMA's current powers have created a situation where cases can last for several years, during which time a company continues to break consumer law potentially causing harm to consumers and other businesses operating in the same market.

Analysis of all reported CMA (or its predecessor the Office for Fair Trading (OFT) cases from 2007 to date, shows that the average case length is 35.1 months where court action is taken by the CMA, and 19.7 months where court action is not required. When a case goes to court, the average time from commencement of proceedings to final judgment is 14.8 months. This suggest the requirement for the CMA to take court action results in an average delay of approximately 15 months.

Currently in order to bring a case against a company, the CMA must first undertake an investigation, however these investigations are often frustrated by the CMA's limited information gathering powers. Reaching an agreement or undertaking with a company may be the best way to resolve an issue but if the CMA needs to take enforcement action, it must take the case to court which causes an additional delay and will initially result in a court order or injunction. If a company fails to comply with the agreed remedies, the CMA is required to return to court before the company can be fined. This means that the CMA tends to heavily rely on issuing guidance and seeking undertakings from businesses. Whilst this may be appropriate in some cases, it creates opportunities for companies that are intentionally breaking consumer law to 'game the system', drawing out the process before reaching an agreement, but not facing any penalty for their non compliance.

The protracted nature of investigations and cases costs the CMA time and expense, limiting their ability to investigate other issues. Their current powers also have limited deterrent value as companies are aware they can 'game the system' by stringing out an investigation and then reaching agreement before the case comes to court. For example the CMA's enforcement case against Norton has taken nearly three years. It took approximately 28 months before any court proceedings were issued, following which Norton capitulated after just 3 months, subsequently providing various undertakings, on behalf of a number of its subsidiaries .Even if the case does go to court the company is unlikely to face a fine for their unlawful practices.

The limits of the CMA's powers were dramatically highlighted during the COVID 19 pandemic.

- Price gouging. Early in the pandemic there was clear evidence of price gouging in UK markets, however whilst authorities in Greece, Canada and Australia were able to issue fines and jail sentences, the CMA lacked the tools to effectively deter traders or take action.[34]

[34] Which? article on action taken on price gouging policies in other countries.

- Refunds: Despite clear guidance from the CMA, some companies in both the travel and wedding sectors were slow to offer customers refunds and were still unlawfully holding on to consumers' money months after the cancellation of services.[35]

Other regulators that were established after the CMA, such as the Financial Conduct Authority[36] have effectively used these powers to raise standards and challenge companies that fail to comply with the law. There are also a number of examples from other countries such as Canada, France and Italy where national bodies responsible for consumer protection are able to use administrative injunction powers and fining powers to uphold consumer law.

For example in the UK it took nearly six years, and the threat of legal action, for Viagogo, a well known secondary ticket selling company to finally change it's practices and follow CMA guidance on the information it gives consumers. During this time the company continued to mislead consumers but it neither paid a fine nor contributed to the CMA's costs.[37] Following the case, the CMA noted "While it is clear that concerns about the sector remain, there are limits to what the CMA and other enforcers can do with their current powers."[38] In contrast, in Canada, the Competition Bureau has access to administrative fines and secondary ticketing sites Ticketmaster and Stubhub faced immediate fines of CA$4m (and CA$.5m costs) and CA$1.3m for not complying with a previous warning about the information they provided consumers.[39]

It should be noted that in granting the CMA new administrative powers, it is important that they should still also be able to take the full range of civil or criminal court action if necessary, for example to obtain injunctions backed up with court sanctions or secure criminal convictions for deterrence purposes.

Q56. What would be the benefits and drawbacks of the CMA retaining the same or similar enforcement scope under an administrative model as it has under the court-based, civil enforcement process under Part 8 of the EA 02?

The purpose of the administrative system is to increase efficiency and predictability. These needs are relevant to all aspects of the CMA's enforcement remit. Reducing the scope of the new administrative powers would create imbalances that could negate some of the benefits of moving to an administrative system, requiring some cases to be pursued through the less effective and efficient system and introducing inefficiencies and some of the potential for 'game playing' that hampers the current system.

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[35] CMA updates on package holidays, weddings. To give a specific example; The CMA opened its investigation into COVID cancellations concerning package holidays in July 2020 and opened an investigation specifically into Teletext on 4 February 2021. Teletext agreed and signed undertakings on 26 May 2021, promising to pay back £7m. In September 2021 the CMA threatened court action against Teletext holidays for failing to provide refunds for outstanding claims.
[36] Fines issued by the FCA 2020
[37] Secondary ticketing websites, CMA
[38] CMA calls for stronger laws to tackle illegal ticket resale, August 2021, CMA.
[39] Annual Report of the Commissioner of Competition for the Year Ending March 31, 2020

Under the CRA the CMA also gained the powers to require non-compliant businesses to undertake enhanced consumer measures that deliver financial redress, ensure future compliance or disseminate information to consumers. These powers are critical to protecting consumers and ensuring they receive redress. Excluding them from the administrative powers would make it far less likely that they would be used and effectively exclude individual consumers from many of the benefits that this reform is intended to deliver.

Unfair Contract Terms are separate from Part 8 of the EA 02, but should be within scope under an enforcement model.

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

We support the principle that processes and procedures should result in fair and proportionate administrative decisions, both as a principle but also because this will be critical to ensuring support from all parties and the long term success and sustainability of the system. Processes and procedures should be sufficient to ensure all parties have confidence in the system, but also proportionate so that they do not undermine the efficiencies that the reforms are designed to achieve.

Whilst companies should always have the right of appeal, this will inevitably lead to additional costs and, if overused, will act as a disincentive for the CMA to take action and threaten to negate the benefits of the new system. Therefore the process itself should be designed in such a way to ensure transparency and accountability and ensure the system is not abused. In particular it is important that all stakeholders have an opportunity to submit evidence ahead of a decision and appropriate account is taken of this information.

We agree with the outline proposed in the consultation document and suggest that the government consider the processes that have been developed in other enforcement agencies that already have administrative powers including some of the sector regulators, the Information Commissioner's Office etc The CMA has recently made improvements to the transparency of it's enforcement actions. The same approach should be applied to these processes as it will not only improve awareness of the CMA's actions, but should also provide assurance that processes are being used properly and without favour or prejudice.

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

The same scope and powers of judicial scrutiny should apply in consumer enforcement investigations as in competition investigations. We therefore recommend that there should be a specialised consumer court (equivalent to the Competition Appeals Tribunal) reviewing the CMA's decisions on the merits, as is the case in Competition Act cases.

In order to make the process accessible to public interest bodies, there should either be a

cap or a maximum percentage of the costs that can be recovered when a public interest organisation brings a case.

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialised tribunal? What would be the main benefits of your preferred option?

Appeals of administrative CMA decisions should be heard by a specialised consumer tribunal system. However this system should (a) not be subsumed into the competition tribunals, and (b) be adequately funded and resourced.

This system would have the following advantages:

- Speed and efficiency. If the tribunal was capable of dealing with preliminary questions (e.g. concerning the scope of information gathering powers of the CMA) this would be particularly beneficial. With a specific case list, this ought to lead to quicker decision making than if the case were pushed into the High Court case lists and had to wait for a suitable qualified judge.

- Flexibility (in terms of procedure / process). Tribunals can apply specific rules to ensure appeals can be dealt with in an appropriate manner, rather than being tied to the Civil Procedure Rules.

- Expertise. A consumer tribunal system can develop a list of specialised judges with experience in engaging in the complex and various consumer laws, which would aid in the consistency of decision making. This has worked well in other tribunals, particularly in the employment context.

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

We strongly encourage the government to grant the Civil Aviation Authority administrative powers to deal with breaches of consumer and passenger law. Based on Which?'s investigations and research, the travel sector is a clear example where a lack of administrative fining powers has undermined the ability of the regulator to enforce consumer law and caused confusion as to which regulator is responsible for enforcing consumer law in the aviation and package holiday space. The CAA has itself called for 'a more flexible enforcement toolkit', including the ability to impose fines directly on businesses, and for a more consistent approach to the powers granted to the regulator across passenger rights legislation.[40]

We are concerned that the inability of the CAA to effectively deter non-compliance and enforce consumer rights would exacerbate uncertainty around consumer redress in travel and perpetuate the existing fragmented nature of the regulatory framework in this sector. For example, the split of responsibilities between DfT and BEIS when it comes to air

[40] CAA review into airline refund practices during the Covid 19 pandemic, July 2020, CAA.

passenger and package holiday regulation can lead to a disjointed, patchy approach that risks creating gaps in consumer protections. It should be noted that the CAA prioritisation principles already require the CAA to consider whether or not another authority is better placed to address an issue.[41] If as a result of these proposals, the CMA has significantly enhanced powers to address abuses of consumer law, it is possible that more cases will be left for the CMA, placing an unrealistic burden on their resources, which could potentially lead to delays in addressing emerging issues in the market. In this regard, we believe the government must provide clarity on how it expects enforcement in the travel sector to work in the future and what steps it will take to ensure passengers and travellers alike have a regulator with a clear statutory duty to protect their rights.

Two recent examples demonstrate the impact of the CAA's weak enforcement powers on consumers:

- In the past 18 years, the CAA has only applied to the courts once for an enforcement order. The application was made against Ryanair in 2018, for its failure to compensate passengers after disruption to flights due to a strike by the airline pilots in that year. The regulator has been involved in this long running legal case since then, and despite the High Court ruling in favour of the CAA in April 2021, Ryanair is now appealing the decision. Ryanair has already lost similar cases brought by enforcement agencies in other European countries. Although all companies should have the right to appeal, the process that has been followed in this case is likely to result in passengers waiting at least four years to receive compensation for cancelled flights. If the CAA had had the ability to impose, or threaten to, a direct fine on the airline, this lengthy and costly court process could have been avoided.

- The recent refunds issues in the aviation sector have also illustrated the CAA's failure to enforce consumer law. As a result of COVID 19 restrictions many airlines cancelled flights during 2020 and 2021, however some airlines failed to give consumers a cash refund within 7 days as required under Regulation EC261/2004. Instead, consumers were given the option of rebooking flights or receiving a voucher; in some cases it was very difficult for consumers to even contact the airlines. During this period the CMA received more than 13,000 complaints relating to airlines' failure to offer refunds. In response, the CAA conducted a review of airlines' behaviour and identified several carriers that weren't paying refunds 'sufficiently quickly', but opted not to take enforcement action after receiving commitments from the airlines to improve their performance. Which? found that this action was largely ineffectual in changing airline practices. Indeed, we continued to hear how some airlines still failed to comply with the law, with passengers who were due to travel in March 2020 still waiting for a refund in the summer.[42] At the time, the CAA acknowledged how their "enforcement powers are not well suited to swift action" and how "this leads to a

[41] Prioritisation Principles for the CAA's Consumer Protection, Competition Law and Economic Regulation Work CAP 1233
[42] Which?, Airlines failing on commitments to regulator about time taken to process refunds, August 2020.

period of time when businesses are able to continue breaching the law without sanction".[43]

In response to reports from the public and Which? that airlines failed to refund passengers for flights they could not legally take due to lockdown, the CMA launched its own investigation at the end of 2020 and initiated legal action against British Airways and RyanAir in June 2021. The CMA's intervention is positive news for consumers, particularly given how well placed the regulator is given its Covid-19 Taskforce work on refunds and cancellations. However, it raises questions over the role of the CAA as the lead in consumer protection in the airline sector, while the amount of industry misconduct highlights the need for a stronger, more effective enforcer in this space.

Effectively addressing issues in the aviation sector is important for both consumers and for airlines and other businesses in the travel sector. Although there was evidence that passenger satisfaction levels were already declining before the pandemic, consumer trust fell dramatically during 2020 and 2021. Rebuilding this trust will be critically important if the sector is to build back after the pandemic and consumers are unlikely to return to their previous numbers until they can be certain their rights will be respected. This not only affects the current incumbents in the airline industry but the growth and development of the sector in the future.

We also encourage the government to consider the powers of other sector regulators, (including second tier regulators where appropriate) to ensure they have sufficient powers to address abuses of consumer law.

The government should take account of the powers that the regulator has to address consumer harms, evidence of consumer harm in that sector and the likelihood of the market continuing to generate consumer cases that place a significant burden on the regulator. In principle all regulators should have sufficient powers to effectively enforce consumer law. Failure to ensure that regulators have these powers threatens to create imbalances both within enforcement agencies and across the enforcement regime which could lead to discrepancies as to how companies are treated. Within enforcement agencies, staff will be aware that making progress on consumer issues may be more difficult and time consuming than addressing other issues where they have administrative enforcement powers, creating a disincentive to prioritise action in these areas. Across the enforcement regime, the granting of administrative powers to the CMA, coupled with the lack of effective powers amongst some sectoral regulators could place an additional burden on the CMA, as other regulators seek to rely on the CMA's new and more efficient and effective powers to enforce consumer law in their sectors.

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs, and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

[43] CAA review into airline refund practices during the pandemic.

The ability of the CMA to access information from companies, both as part of a formal investigation and outside of a formal investigation is critical to the efficiency of the system and the ability of the CMA to conduct investigations into companies' practices and make informed decisions about how they prioritise their work.

The recent decision by the CMA to take Norton to court for withholding information illustrates the need for these powers. In this case Norton was withholding research undertaken by the software firm on how customers responded to website information on auto-renewal and pricing.[44]

The ability to levy fines for non-compliance with an information request should incentivise compliance, however in particularly serious cases, for example if an individual is found to have provided false or misleading evidence or tampered or destroyed documents, the CMA should also have recourse to criminal penalties in line with its powers under the Competition Act 1998 and Enforcement Act 2002. The government should also consider whether to require a company director to make a personal declaration that the information provided is to the best of their knowledge full complete and correct and the company has carried out all reasonable checks to verify this.

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

Which? strongly supports the proposal that the CMA have administrative fining powers of up to 10% of a company's global turnover. In particular we support the level of fines being related to global turnover, recognising the number of multinational companies that operate in UK markets and the fact that turnover in one market may be relatively small in relation to their global operations.

Although we would expect the CMA to levy fines that are proportionate to the breach, the ability to levy a fine at this level if required will act as an effective deterrent against non compliance and encourage companies to be more attentive to ensuring their practices are in compliance with consumer law. As with any deterrent the hope is that it will be so effective that it is not used but it has to be available to achieve the effect.

The introduction of criminal liability for senior managers should also be considered in relation to consumer law cases. Where it can be shown that the infringement happened with the consent, connivance or as a result of the negligence of a director this should be grounds for director disqualification. The CMA can already apply to court to disqualify a person from holding a company directorship, if a company of which they are a director has breached competition law, and experience from the financial services regulatory regimes shows that (where appropriate) making senior managers personally liable for compliance does have a

[44] CMA takes Norton to court for withholding information, March 2021, CMA.

beneficial effect in addressing consumer detriment and makes it easier for regulators to carry out their statutory duties.

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

There are potential benefits in the CMA having the flexibility to agree to an undertaking that includes an admission of liability from the trader as this may be an efficient means of concluding an investigation and the admission of liability will provide a clear signal to other businesses as to the nature of the companies non compliance.

However there is a potential risk if the CMA is under pressure to reach an agreement, or the incentives that are in place to reach an agreement result in weaker measures being taken to protect consumers and responsible businesses operating in that market. In particular any agreement should not result in poorer outcomes for consumers than would have been achieved otherwise, for example whilst an agreement may include a reduction in the penalty it should not include a reduction in any enhanced consumer measures that the CMA deems relevant. To mitigate this risk the CMA should be able to make decisions on a case by case basis as to whether to accept such agreements.

Q64. What enforcement powers should be available if there is a breach of consumer protection undertakings that contain an admission of liability by the trader, to best incentivise compliance?

Companies that breach undertakings reached through an agreement should be required to pay any discount to the initial penalty that they received as a result of the agreement, plus an additional percentage. If the company's activities have resulted in consumer detriment, the company should also be responsible for refunds or compensation.

At the CMA's discretion the company could also be required to pay for a fixed term of periodical review of their practices by an independent third party to ensure they remain compliant with the law (as was applied in a previous CMA case involving secondary ticketing websites).

If the CMA has powers to hold directors accountable for non compliance with consumer protection law, action could also be taken to hold individuals responsible for the failure of the company to comply with the agreement.

Alternative Dispute Resolution

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

Alternative Dispute Resolution (ADR) should provide an accessible and affordable means for all consumers to resolve a dispute with a company, regardless of income or education or

ability. However in a recent Which? survey only 28% of respondents said they were likely to approach an Ombudsman or ADR provider if they were unable to resolve a dispute with a company and only 14% had actually used an ADR service to resolve a dispute.[45]

There are likely to be a number of reasons for this low level of interest in using ADR services including ADR schemes not being available in the sectors where consumers have complaints and a lack of awareness about ADR. The Which? survey found that awareness of ADR is low amongst the population as a whole with around a quarter (23%) of consumers unaware of ADR and Ombudsman services and nearly half (46%) saying that whilst they are aware of these services they wouldn't know how to use them.

This suggests that it is not just vulnerable groups that face barriers to accessing ADR, however if availability and awareness was improved, vulnerable consumers would still face additional barriers which should be addressed. This may also have a positive impact on the ability of all consumers to also access ADR.

For example:

- Any costs involved in engaging with ADR, whether they are financial costs, costs in time, stress or anxiety are likely to create a more significant barrier for vulnerable groups. Therefore the ADR regulations and ADR providers themselves should seek to minimise these costs as much as possible.
- The terminology and language used in ADR should be reviewed as it can appear technical and legalistic to many people. One of the aims of ADR is to avoid the formality and complexity of the legal system, however Alternative Dispute Resolution, arbitration, conciliators etc are not words that are used in most people's day to day experience and can be off putting.
- ADR providers and companies that are a member of an ADR scheme should make it clear that the ADR scheme is able to handle complaints relating to a consumers' vulnerability, including consumers that haven't been able to access a service as a result of a disability.
- ADR schemes should seek opportunities to promote their services through organisations that vulnerable groups use and trust, for instance charities that represent people with disabilities or who may have English as a second language. These groups should also be asked to advise how ADR services can be made more accessible to the groups they work with.
- ADR schemes should be able to offer additional support to vulnerable consumers to help them engage with the process.

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

[45] All survey results used in answer to questions 65 -70 are from a survey conducted by Yonder, on behalf of Which? 2145 UK adults were surveyed online between 13th and 15th August 2021. Data were weighted to be representative of the UK population by age, gender, region, social grade, tenure and work status.

The 8 week rule that prevents a consumer bringing a case to ADR, unless they have received a deadlock letter, is too long and risks causing harm to consumers and discouraging them from seeking to resolve a complaint. With much greater use of digital communication it should now be possible for consumers and companies to understand each other's position and discuss possible solutions in a much shorter time.

A recent Which? survey found that 8 in 10 (81%) consumers think that a company should be given up to 4 weeks to handle a complaint before a consumer is allowed to take it to an ADR scheme. Within this group almost half (49%) would like to see the period to be 3 weeks or less. Very few (1%) feel the time period should be longer than 8 weeks which is the current rule.

The ADR regulations should also significantly reduce the time allowed for reaching a decision. Our survey found that nearly half (46%) of consumers think that less than 6 weeks is a reasonable length of time for the ADR scheme to reach a decision once they have received a complaint. A further one in three (34%) say 6-8 weeks is reasonable. This suggests that 8 in 10 support a timescale considerably shorter than the current 90 days allowed for resolving a case.

It is important that this period should also include the time taken by the ADR scheme to complete the case file. ADR providers currently have different policies on whether to include this period when they report, and this can give a misleading impression as to how long it takes to resolve a dispute. For example, figures from AviationADR suggest they take an average of 76 days to complete a case, however information provided in a review conducted on behalf of the CAA show that in 2019 it took an average of 50 days from a complaint being made to the full file being received. So from the point of view of the consumer the average time cases took was more like 126 days, rather than 76.[46]

ADR schemes and competent authorities should monitor this data as a delay in the completion of a case file could cause consumers additional detriment or cause them to give up on the case.

If companies require extra time for longer complaints this should be requested and agreed by the ADR scheme in advance and records kept to identify if businesses are abusing the system by repeatedly asking for extra time. Longer deadlines may be allowed for sectors if there is a valid reason, for example where an independent assessment of work is required in order to inform a decision.

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

An effective and active competent authority is critical to maintaining high standards as well

[46] *https://publicapps.caa.co.uk/modalapplication.aspx?appid=11&mode=detail&id=10219*

as reassuring consumers. Consumers are most likely to say that they would be reassured that a resolution scheme is unbiased, independent and can be held to account if the scheme had to meet national standards for consistency and fairness (64%) and if there was an independent body responsible for approving and reviewing each scheme (61%).

In regulated sectors the approval and oversight of ADR providers should sit with the sectoral regulatory bodies as now. Competent authorities for unregulated sectors should have the resources and powers to effectively oversee their schemes.

In addition the government should consider mandating a single authoritative body with responsibility for setting common performance standards for all ADR schemes and ensuring consistency across all sectors. The body should be adequately resourced, have consumer redress expertise, a clear consumer protection duty, sufficient legal powers and be independent of the competent bodies it oversees.

Strengthening ADR regulations will be important in enabling competent authorities to hold schemes to higher standards. Competent authorities should have the ability to introduce requirements in order to respond to emerging issues such as technological developments or market changes.

Competent authorities should be required to evaluate applications and give approval for new schemes. There should be measures to stop the proliferation of schemes that don't bring value as this can lead to companies gaming the system, a lack of consistency and a greater burden on authorities. Authorities should regularly review ADR schemes and publish reports and have the ability to investigate complaints and suspend or remove approval if serious complaints are upheld.

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

The case for having a single ADR provider in each sector

Where the government has introduced mandatory ADR it should either require that there is a single ADR provider for that sector or work towards that position, rather than allowing multiple providers to offer services. Due to the particular characteristics of ADR, we believe this is more likely to result in a service with high standards that works for both businesses and consumers.

The market for ADR is characterised by having providers on the supply side and firms on the demand side. Although consumers use ADR services when in dispute with a firm, they do not form part of the market. The demand for ADR can therefore be described as 'unilateral' in the sense that consumers have to use the provider chosen by the firm, and as such they do not form part of the demand for which suppliers will compete.[47]

[47] The ideas of unilateral and bilateral demand are explored in detail in Wagner (2013), Dispute resolution as a product: competition between Civil Justice Systems

Effective competition in any market has the potential to reduce costs and improve service. However, in the case of multiple ADR schemes with unilateral demand it is not clear that reduced costs or improved service for firms would translate into better outcomes for consumers. Indeed there is good reason to suggest that in a situation where the goals of the claimant and the firm are by their nature in opposition, competition which seeks to attract firms could lead to worse outcomes for consumers.

Firms' incentives with ADR provision are to minimise their costs. In the case of consumer disputes and ADR, these costs comprise two parts:

- The total amount of redress paid to consumers in settled disputes
- The handling cost per case

This is confirmed in some of the empirical research, which finds evidence of ADR schemes competing both on efficiency and bias.[48]

Impact on case decisions

With firms having freedom to choose which ADR provider they use, there is an incentive for them to choose to have disputes resolved by a provider that they perceive to be more sympathetic to their cause. There is evidence of this 'forum shopping' behaviour taking place in civil justice systems where one side of a legal case is able to choose the court in which it is heard.[49] While there appears to be little research on this phenomenon in consumer ADR systems, our analysis of the aviation industry, where there are two competing providers, suggests there may be cause for concern. For example, when easyJet moved from the Aviation Adjudication Scheme to AviationADR, the number of cases involving easyJet that were upheld fell from an average of 79% in the last six quarters it was a member of the Aviation Adjudication Scheme to 51% in the first six quarters it was a member of Aviation ADR.[50]

Impact on cost/efficiency

ADR schemes should be seeking to find a fair outcome for both the consumer and the firm, at a reasonable cost to both parties. The simplest way to avoid incentives that undermine these objectives is to have a single provider of ADR in an industry, appointed by a competitive process run by an authority representing both the consumer and business interest. Such a process could be run by sector regulators, the CMA or BEIS itself. By appointing a provider through a competitive process, there will also be incentives for the appointed provider to run an efficient service.[51]

A single provider would also deliver benefits in relation to:

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[48] Market for Private Dispute Resolution Services - An Empirical Re-Assessment of ICANN-UDRP Performance, Mich. Telecomm. & Tech. L. Rev. 285 (2005)
[49] Dispute resolution as a product: competition between Civil Justice Systems
[50] Airline Data, Civil Aviation Authority website, accessed Mar 2021.
[51] Such a system was also advocated by Citizens Advice, Queen Margaret University and University of Westminster in Confusion, gaps, and overlaps, 2017.

- **Gathering intelligence.** A single provider will be much better placed to gather data and insight on the whole sector and engage with stakeholders in order to improve standards.
- **Consumer awareness.** Awareness is a critical issue in relation to ADR with only about 20% of people aware of the term.[52] Increasing awareness of ADR will support the use of ADR and increase the value of ADR membership for companies, as membership will provide assurance and build trust for potential customers. It is much easier to promote a single brand, such as the Financial Ombudsman Service, than it is to promote multiple brands.

Improved signposting.

A recent W? survey found that awareness of ADR is low with around a quarter (23%) of consumers unaware of ADR and Ombudsman services and nearly half (46%) saying that whilst they are aware of these services they wouldn't know how to use them. In order to be of value to consumers and businesses, consumers need to be aware that ADR exists. The most effective way to raise consumer awareness is likely to be through companies themselves providing this information to consumers, as this information is likely to be provided at a time and a place which is most relevant to the consumer. In our survey half of consumers thought that companies should include information about ADR in all customer communications (51%), the same percentage said that companies should include information in all communication relating to a complaint (51%). A further half (50%) say that companies should provide information about ADR on their website in the section about complaints. The wording that companies provide about ADR, as well as when and where it is used should be stipulated and monitored by the competent authority as is already the case in some regulated sectors. Improved signposting should be supported by a single accessible online platform with consumer information about ADR and clear links to approved ADR schemes.

Enforcement of decisions.

Although reliable data is difficult to come by, there is some evidence that compliance with ADR decisions in both regulated and non-regulated sectors is patchy.[53] In non-regulated sectors the ultimate sanction available for non-compliance is to suspend the business from membership of the scheme. As an enforcement tool against businesses in sectors where ADR is not mandatory, or where there are multiple schemes, this allows a non-compliant business to move to another ADR provider (whether approved or not) or to simply withdraw from offering any ADR at all. Neither outcome results in the consumer receiving the compensation they are due. To resolve this issue it should be possible to enforce an ADR decision through court just as if it had been a decision from a small claims court.

Independence.

A consistent complaint from both businesses and consumers is that ADR bodies are in some

[52] Modernising consumer markets Citizens Advice formal consultation response, Citizens Advice, 2018.
[53] Resolving consumer disputes: Alternative Dispute Resolution and the courts system. Department for Business, Energy and Industrial Strategy, 2018.

way biased. Although there is little evidence of this, ADR bodies could do much more to demonstrate their independence by publishing more information about how their values and processes protect their independence. Independent boards or committees can also play a critical role. For example the Motor Ombudsman has recently established an Independent Compliance Assessment Panel with clear rules on the duties and composition of the panel. Detailed reports and biographies of panel members are easily available on their website. A requirement that schemes are run by fit and proper persons will also guard against the misuse of schemes. Ultimately the competent authority should be responsible for ensuring the independence of all providers.

Supporting business improvement.
ADR schemes have a large amount of rich data about performance and complaints that should be shared widely with businesses, enforcement bodies and consumer advocacy groups as a tool to drive improvements in business practice, raising standards for all consumers. The ADR Regulations currently set out the data and information that approved ADR bodies should collect, publish and share with their relevant Competent Authority, however this is very basic and not clearly defined so it is open to interpretation.

The ADR Regulations also lack any criteria that explicitly require bodies to proactively 'promote improvements' or focus on 'prevention and culture change'. Some schemes, such as the Energy Ombudsman, have gone beyond the requirements, and demonstrated what can be achieved in this area, by establishing a formal tripartite agreement between the Ombudsman, Citizens Advice and Ofgem which shares data and identifies market trends. The ADR regulations should have explicit requirements on the collection and publication of data as well as engagement with businesses and stakeholders.

Q69. Do you agree that the government should make business participation in ADR mandatory in the motor vehicles and home improvements sectors? If so, is the default position of requiring businesses to use ADR on a 'per case' basis rather than pay an ADR provider on a subscription basis the best way to manage the cost on business?

We strongly support the government's proposal to make ADR mandatory in these sectors. Evidence shows that these sectors involve significant transactions and have a high number of complaints. Consumers also lack confidence in the ability of companies in these sectors to resolve complaints. In a recent Which? survey only 52% said they were confident that used car sales and car servicing companies would resolve a complaint successfully and only 50% were confident that companies in the home improvement sector would resolve a complaint successfully.

We do not have a specific view on the payment mechanism, however it should be sufficient to support a high quality ombudsman service that can resolve individual disputes and use the intelligence gained from dispute handling to support companies in improving practices. This is likely to require some predictability in funding to support core costs. We recognise that these sectors include a lot of small businesses and therefore to meet this need, larger

companies or trade associations could be required to make a regular contribution to supplement the income from payments made on a 'per case' basis.

We recognise that there are also concerns about how decisions will be enforced if companies fail to engage with ADR or fail to comply with decisions. These issues could be addressed by expelling companies from the scheme and maintaining a publicly available list of the companies that have been expelled. This approach is an effective deterrent in the context of a mandatory scheme where all other companies in the sector should be part of the scheme. Should individuals involved in an expelled company seek to trade under another name then it will become the responsibility of Trading Standards to enforce decisions, however traders that engage in these tactics may well have been the target of Trading Standards actions regardless of the introduction of ADR.

The government should also make ADR mandatory in the aviation and holiday sectors with the establishment of a statutory-backed ombudsman, and address gaps and issues with ADR provision in other sectors such as the property market. Consumer confidence in airlines and holiday operators resolving a dispute was only 37% (the lowest sector in our survey of eleven sectors).

Aviation is the only regulated sector where membership of an ADR scheme is not mandatory, leaving millions without access to ADR when things go wrong. The CAA does provide its own Passenger Advice and Complaints Team (PACT) to fill gaps in ADR provision, however it cannot make binding decisions about disputes with consumers having to go to courts to have PACT's decisions enforced. The impact of voluntary membership was starkly illustrated when Ryanair withdrew from AviationADR after the scheme made decisions the airline did not like, leaving thousands of passengers facing a struggle to get compensation they were due for flight cancellations. Ryanair's decision to re-join an ADR scheme in 2021 has only come after the CAA has made changes to the ADR scheme rules that risk weakening the ADR system for travellers – just as unprecedented travel disruption during the pandemic has shown us how much these protections are needed. During this time, Ryanair passengers wanting to escalate a complaint could only use the CAA's PACT, while those who originally sought help from AviationADR for the crew strikes cancellations are to this day still waiting for compensation. This demonstrates why ADR should be mandatory in aviation so airlines can't influence the terms of their participation.

Similarly, we urge the government to review dispute resolution in the package holiday sector. A holiday represents an expensive purchase for most people and the involvement of different providers can lead to complex disputes. However, the sector is only partially covered with ADR only available to customers of ABTA members through ABTA's arbitration service with claimants having to pay substantial fees to register a dispute. At present, a large number of travellers have no access to ADR while those who do might be deterred given the cost of making a claim.

In all sectors where ADR is made mandatory, the government should require ADR to be provided by a single ombudsman scheme as explained in our response to question 68.

However even with these changes many consumers will still not have access to ADR because the company they are in dispute with is not a member of an ADR scheme. In these cases the consumer has to incur the financial cost and time challenges of taking the case to a small claims court in order to resolve their complaint and many will either be unwilling or unable to do this. Therefore we encourage the government to develop initiatives that encourage businesses in other sectors to establish an ADR scheme and for businesses in those sectors to become members, with the aim of making ADR readily available to consumers across the economy. If these initiatives are not successful, the government should consider more interventionist steps to ensure justice is more readily available for consumers.

Q70. How would a 'nominal fee' to access ADR and a lower limit on the value of claims in these sectors affect consumer take-up of ADR and trader attitudes to the mandatory requirement?

There is no evidence of consumers making frivolous claims so a charge cannot be justified on these grounds. In fact there is a strong business argument for encouraging consumers to engage with ADR processes as the alternatives may be more damaging and costly for the company in the long term. Our survey suggests that consumers are currently unlikely to escalate a complaint and are more likely to stop using the company (47%) voice their dissatisfaction to friends and family (40%), give negative feedback in a customer care survey (38%) or leave a bad review on social media (34%). None of these responses is in the interests of the company.

Our survey also suggests that even a nominal fee would discourage a significant number of consumers from bringing a case to ADR. Almost a quarter (24%) say that they would not pay a fee in any circumstances and significant numbers would not pay a fee if the transaction was less than £200.

Whilst setting a lower limit for the value of claims is reasonable, this should not be set too high as the impact of a failed purchase can vary significantly according to the circumstances, and consumers shouldn't be denied the opportunity to resolve the issue to the satisfaction of both sides.

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

Consumer trust and confidence is good for business. As noted above our survey shows that there is a lack of trust in the ability of companies in some sectors to resolve complaints satisfactorily. Membership of an ADR scheme will provide a mechanism for companies in these sectors to resolve complaints and, through the engagement of the ADR provider with companies, will support them in improving their own complaint handling procedures.

ADR is not currently well known or understood amongst consumers, however with improved

consumer awareness, membership of an ADR scheme has the potential to be seen as a signal to consumers that these companies are trustworthy and can be relied upon to resolve an issue if something goes wrong. As such it has the potential to create additional business for these companies.

Businesses can also benefit directly from a proactive ADR scheme that engages with them to explain issues arising from consumer complaints either on an individual basis or across a sector. With government advice services often stretched by limited resources, this is a potentially valuable source of intelligence for large and small enterprises. It also has the potential to lessen the burden on enforcement agencies by preventing issues arising in the first place.

Collective redress

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

The current routes to collective consumer redress in the UK are still relatively limited and as a result consumers are often unable to access redress in consumer cases. Which? believes that representative procedures with the appropriate safeguards should be enabled for all consumer claims.

It is welcome that the CRA extended options for bringing group claims in competition cases, however these rely on showing an underlying breach of competition law such as anti-competitive agreements or an abuse of a dominant position.

In a consumer law case, the various litigation mechanisms such as Group Litigation Orders or 'representative actions' under the Civil Procedure Rules are complicated and it is challenging for consumers or their advisers to make arrangements for funding and managing risks in order to take such cases.

Whilst regulators can sometimes take enforcement action that would benefit a large number of consumers, the risks and costs of litigation may also be a serious deterrent and proceedings could take a long time before individual consumers can benefit, for example in the recent action by the CAA against Ryanair regarding compensation for cancelled flights.

Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and (b) businesses?

For consumers, it is clear that in areas of systemic breaches of consumer law, such as on secondary ticketing websites, it would be easier to address widespread consumer detriment via collective cases than relying on each individual affected to take legal action. It would also often be a more efficient use of the court system, and avoid placing further burdens on

County Court small claims processes. Even in sectors where ADR procedures are available, it is currently sometimes difficult for consumers to obtain compensation and enforce awards. For example, despite being a mandatory jurisdiction, in Financial Ombudsman cases, if a business loses a complaint but still fails to pay the compensation ordered, the affected consumer must nevertheless apply to the County Court for a judgment to obtain the money owed.

The availability of collective redress options for consumer organisations would also encourage settlement of meritorious claims. It has been shown to work well in other countries without resulting in a 'flood' of litigation. Some European countries have long standing provisions for collective redress and recent changes are increasing access in other countries. Recent cases include the German consumer organisation, vzbv, reaching a settlement to compensate the owners of VW cars affected by the fraudulent emissions device. As a result of the settlement, approximately 260,000 consumers in Germany who joined vzbv's case can receive between 1,350 and 6,257 euros, depending on the car model and age. The Dutch consumer organisation, Consumentenbond is bringing a collective action against TikTok that has been illegally collecting private information from children for years, including dates of birth, telephone numbers and email addresses, as well as more sensitive information including religious beliefs and even biometric data. Consumentenbond is asking that TikTok stop its unlawful acts, delete illegally collected personal data and pay compensation.

For businesses, there would undoubtedly be a deterrent effect in having wider availability of collective redress claims, particularly on an opt-out basis. The forthcoming implementation of the EU Collective Redress Directive is already having a positive impact in ensuring that businesses re-examine and improve their consumer complaints handling processes. There are obvious benefits in this for consumers, however it will also benefit responsible businesses as they are less likely to have to compete with unscrupulous competitors.

It should also be noted that there are also significant advantages for businesses in dealing with a collective redress claim through appropriate procedures, as they may be able to rely more effectively on the outcomes, whether achieved through court adjudication or settlement, in order to help protect them against subsequent individual claims.

In considering the introduction of collective redress mechanisms for consumer law, the government should consider the following points:

- **Opt out.** A representative body, including consumer associations, should be able to launch a collective action on behalf of all identified, identifiable and non-identifiable victims, without the requirement of an official mandate from each one of them. This is much more effective in ensuring all affected consumers have access to justice.
- **Scope**. Compensatory collective redress should cover all areas of consumer law.
- **Funding**. Third party funding should be allowed in order to cover costs.
- **Damages**. Consumers should be able to claim for both material and other damages.

- **Risk**. Costs should be capped or limited to a set percentage of the total costs. Without this clause most public interest organisations are not able to bear the risk and will be unlikely to bring a case to court.

In addition to the changes above we also urge the government to give detailed consideration to activating the provisions in the CRA to extend the powers available to Which?, as a private enforcer of consumer law. Which? is the only designated private enforcer for the purposes of Part 8 EA 2002 and has the power to apply for an enforcement order to stop infringing behaviour of traders and to include also in the application a demand that the trader issue a corrective statement. We can also accept undertakings to this effect.

Which? has made limited use of these powers due to the expense and the risk of adverse costs from taking formal Part 8 action and has not yet issued full proceedings against any traders, however we have secured positive changes for consumers by raising issues at pre-action correspondence stage. For example, as part of our work challenging unfair practices by train operating companies and the Rail Delivery Group we helped secure clarifications to national rail terms and conditions in 2018.

However, Which? does not currently have the formal powers to include enhanced consumer measures in orders or undertakings. This would clearly increase the effectiveness of actions when dealing with traders who have potentially breached consumer laws, by raising the option of developing more creative solutions for the benefit of consumers.

Trading Standards

Q74. How can national enforcement agencies NTS and TSS best work alongside local enforcement to tackle the largest national cases of criminal breaches of consumer law?

Local authority Trading Standards Services (LATSS) are a critically important part of the consumer enforcement regime and shoulder responsibility for enforcing most consumer cases on a day to day basis. However the service that consumers can expect is dependent on local authority resources and priorities, and this leads to a fragmented system, with limited transparency and accountability for how budgets are used.

In England and Wales, NTS coordinate LATSS teams to support national and cross regional work, however NTS lack statutory powers and therefore rely on individual LATSS to undertake cross regional investigations and prosecutions. While the CMA can intervene in situations where there are market-wide or precedent setting issues, the current split of responsibilities still creates the unrealistic expectation that a local authority should be able to take a large national or multinational company to court in order to tackle consumer detriment. Although some local authorities have taken on large investigations, many do not have the necessary capacity and expertise and are not able to make the long term budget commitments to handle these cases.

Local authorities are also asked to bid for the opportunity to host national teams that lead work on issues such as online scams and estate agencies. In Scotland, local authority TSS are supported by Trading Standards Scotland. In Northern Ireland trading standards work is delivered by a single body Northern Ireland Trading Standards Service.

In a modern economy where businesses are increasingly operating online or across local boundaries, this system is no longer fit for purpose and doesn't provide a sustainable solution to the problems facing consumer markets. Covid has also exacerbated this situation with Trading Standards, which have a broad remit besides consumer enforcement, having to take on wider responsibilities too.

This structure has been put under additional strain by the budget cuts that have affected LATSS in recent years. The impact of these cuts on capacity and expertise is well documented in CTSI Workforce Surveys. Whilst it is important that LATSS are properly financed, structural reform is also necessary to ensure national and local service delivery is as effective and efficient as possible - and that issues are dealt with at the most appropriate level.

In order to address this situation the government should review the work of Trading Standards, including how responsibilities, powers and resources are allocated across the enforcement landscape, reflecting the types of risks - and therefore skills needed - to tackle the problems consumers face in today's, and potentially future, markets. Although the government may be able to make some changes in the short term, we recognise that the review may need to be carried out separately from legislation adopted as a result of this consultation so as not to delay progress on the important reforms that the government has already proposed.

- **A strategic approach.** The work of Trading Standards should be guided by a national strategy with flexibility for local priorities. The CMA would be best placed to develop and lead this strategy working with National Trading Standards and with input from sector regulators.

- **Powers.** The CMA should have the ability to intervene in national cases beyond the constraints of its current remit that formally restricts it to 'market wide or precedent setting' issues. These reforms would ensure that national work is supported with the management and expertise required. Any change should recognise the advantages that NTS already offers including that NTS is already well established within TS networks.

- **Resources.** Local Authority TSS currently account for the majority of the UK budget for consumer enforcement, however the budget is not ring fenced and following several years of significant funding cuts, local budgets for consumer protection have been greatly reduced. Local TSS in the UK have lost 56% of full time equivalent staff

since 2009 and twenty services have reduced funding by over 60% since 2011.[54] 44% of local authorities that responded to a survey by the Chartered Trading Standards Institute said they lacked the expertise to enforce the legislation they are responsible for.[55] As part of this reform, funding should be held centrally and there should be greater accountability to ensure that funding allocated for local trading standards is used for consumer protection work.

- **Structure.** In 2010 the NAO estimated that 70% of consumer detriment arose out of activity that crossed local authority boundaries, yet Trading Standards work is split across more than 150 separate local authorities.[56] With the growth of more large businesses and online businesses in the modern economy this structure should be reviewed as part of a review of the overall enforcement regime, so that resources are appropriately allocated locally, regionally and nationally.

Business advice

Q75. Does the business guidance currently provided by advisory bodies and public enforcers meet the needs of businesses? What improvements could be made to increase awareness of consumer protection law and facilitate business compliance?

Business advice has an important role in ensuring good consumer protection practices. Measures to support companies' compliance with their legal responsibilities prevent consumer harms occuring, and reduce the need for reactive interventions. Guidance documents should be developed with input from experts identified by, or from within, local trading standards and CMA to ensure a consistent approach and high quality materials.

Which? has some concerns about the operation of Primary Authority Partnerships (PAPs) which are an increasingly important mechanism for delivering advice to companies. For example Hertfordshire County Council has 70 Primary Authority Agreements with companies including Amazon, Tesco, PC World, Nestle Cereal Partners, Hilton hotels and the Federation of Master Builders.[57]

However creating a partnership between a local authority and a business, particularly a large national or multinational business, can create a number of challenges including a lack of resources and expertise to effectively review a companies' practices and a reluctance to effectively challenge the company if that becomes necessary. This was highlighted by the safety issues that emerged with Whirlpool tumble dryers where the local authority that was responsible for advising Whirlpool failed to take a sufficiently strong position on the actions Whirlpool needed to take. Which? had to initiate judicial review proceedings in order to

[54] Protecting consumers from scams, unfair trading and unsafe goods, National Audit Office (NAO), December 2016.
[55] Workforce Survey, Chartered Trading Standards Institute (CTSI), 2019
[56] Protecting consumers from scams, unfair trading and unsafe goods, NAO, 2016.
[57] Primary Authority Register Hertfordshire County Council

ensure consumers received appropriate advice about the fire risk associated with the affected dryers and the action they needed to take.

In particular we are concerned that:

- Local authorities can have a conflict of interest if they have to take action against a company that they have a PAP agreement with. In these circumstances the Local Authority may have been advising the company for some years, they may have built good relations with the company and that agreement will also have been a source of income for the local authority. As a result of cuts in local authority budgets, trading standards teams are under pressure to agree PAPs with companies to support the service.
- Local authorities may lack the capacity to provide advice to national and international companies with complex systems and turnovers that are many times the budget of their local authority. This is particularly true if there is a disagreement with the company and the company uses its resources to employ technical or legal experts to defend its position.

To address these issues the government should consider:

- PAPs with companies over a certain turnover or with complex operations should be managed by a central organisation with the necessary skills and expertise to provide advice and monitor compliance.
- Establishing a mechanism to provide independent oversight of PAPs to ensure that companies are receiving good quality advice and any potential compliance issues are being properly investigated and effectively addressed.

Annex A

Recent Which? Investigations into online scams

- Scams rocket by 33% during pandemic (July 2021)
- Online dating fraud up 40% through the pandemic (June 2021)
- Coalition of organisations urges government to use Online Safety Bill to protect people from an avalanche of online scams (May 2021)
- Why scams must be included in the Online Safety Bill (May 2021)
- Two in five victims of online scam adverts don't report to host platforms (April 2021)
- Investment scammers run riot on search engines, while victims pay the price (March 2021)
- Devastating emotional impact of online scams must force government action (March 2021)
- Nearly one in ten scammed by adverts on social media or search engines (November 2020)
- Which? calls for urgent government action to protect people against online scams (October 2020)
- How scammers use Google to lure victims (September 2020)
- Google fails to stop scam ad targeting Revolut users for a third time (September 2020)
- Fake ads; real problems: how easy is it to post scam adverts on Facebook and Google? (July 2020)
- Your life for sale: stolen bank details and fake passports advertised on social media (April 2020)

Annex B

Recent Which? research and investigations into fake reviews

- Best-selling Amazon products show signs of fake and incentivised review practice (June 2021)
- Fake Google reviews boosting UK businesses (March 2021)
- How a thriving fake review industry is gaming Amazon marketplace (February 2021)
- How to avoid fake reviews on Amazon in the sales (November 2020)
- Facebook failing to stop the trading of fake reviews (August 2020)
- Did travel companies pay their way to better ratings on Trustpilot? (July 2020)
- Fake reviews make consumers more than twice as likely to choose poor-quality products (May 2020)
- How eBay's review system is promoting fake, counterfeit and even dangerous products (March 2020)
- Amazon 'betraying trust' of millions of consumers with flawed Amazon's Choice endorsement (February 2020)
- Fake TripAdvisor reviews push 'world's best' hotels up the rankings (Sept 2019)

Annex C

Recent Which? investigations into online marketplaces and product safety

- Don't buy teeth whitening products from online marketplaces, May 2021.
- Online marketplaces fail to remove banned products – even after consumers report them, Which? finds, December 2020.
- Which? safety tests uncover dangerous baby sleeping bags, September 2020.
- Two-thirds of the 250 products tested from Amazon Marketplace, AliExpress, eBay and Wish fail safety tests, February 2020.
- Which? testing finds almost half of Christmas tree lights from online marketplaces are dangerous, December 2019.
- Amazon and eBay safety issues spark Which? call for stronger regulation of marketplaces, November 2019.
- eBay potentially putting lives at risk with killer alarm listings, October 2019.
- Power failure: Online marketplaces flooded with unsafe electrical appliances, September 2019.
- Revealed: the terrifying smoke alarms that will fail when you need them, May 2019
- Cheap and deadly – Which? warning on the 'Killer car seats' still on sale, Feb 2019.
- Worries over unsafe toy slime grow ahead of Christmas, December 2018.
- Which? reveals the children's Halloween costumes that fail fire safety tests, October 2018.

Which?
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Justin Macmullan, Principal Policy Advisor (Consumer Rights), Which?, 2 Marylebone Road, London, NW1 4DF, justin.macmullan@which.co.uk