



Response to  
**MODERNISING CONSUMER  
MARKETS**  
Consumer Green Paper



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## **NATIONAL CONSUMER FEDERATION**

The National Consumer Federation (NCF) represents the voice of UK consumers. We are an independent, not-for-profit charity, with over 50 years' experience of tackling issues that affect large numbers of consumers, and campaigning for positive change. We work to influence Government, regulators and businesses to ensure that the consumer voice is at the heart of decision-making.

We provide a platform for everyone interested in consumer protection – from individuals, to local groups and national consumer organisations - bringing them together to share their knowledge, skills and experience. We provide a safe environment for people with common interests to be heard, and feel supported, by others.

Our expertise adds value to the collective consumer voice, making it a more powerful force for change.

We consider issues that affect large numbers of consumers and we aim to make things better!

We are known for our:

- **Expertise** - we help volunteers to develop their skills and experience in areas of consumer interest
- **Thinking** - the NCF is a home for consumer experts to share common views and values and provide detailed analysis and solutions
- **Voice** - consumers need to be heard. We provide consumer volunteers with a platform for addressing issues that may not be well covered elsewhere.

Following the Consumer Congress in December 2017, NCF has set up an Enforcement Group drawing on a wide range of expertise to address enforcement issues. The views of this group are incorporated in this response.

## MODERNISING CONSUMER MARKETS Consumer Green Paper

### An Overview

Overall, NCF welcomes the Green Paper but with reservations that are recorded in responses to individual questions. On the whole the Green Paper asks the right questions, though there are several places where questions are not posed when they should have been.

NCF supports the three principles set out for responding to the challenges and opportunities of modern consumer markets:

- **competition should be central to our approach** and the government should always look to remove barriers to competition where they arise
- **consumers should benefit from new technology and new business models**, with competition and regulation working together in the consumer interest
- **consumers should be able to get redress when things go wrong** and consumer rights are effectively enforced.

However there exists a wider range of consumer problems that should not be overlooked. These are picked up at appropriate points in this response.

The NCF has long called for a greater focus on the rights and interests of consumers, and in that spirit, we welcome the government's green paper.

We welcome the focus on new technology and future challenges and the recognition of the importance of enforcement and effective mechanisms for redress.

However, we feel there is undue emphasis on incentives to switch traders and the use of data portability, without sufficient safeguards around vulnerable consumers, transparency and clarity of information and universal access to the internet. Nor is there a clear vision of the ultimate goal which is a better deal for *all* consumers. Switching is an indicator of market engagement, not of market outcomes. Consumers need to see the benefits of switching reflected in their outgoings. We return to this issue later in this overview.

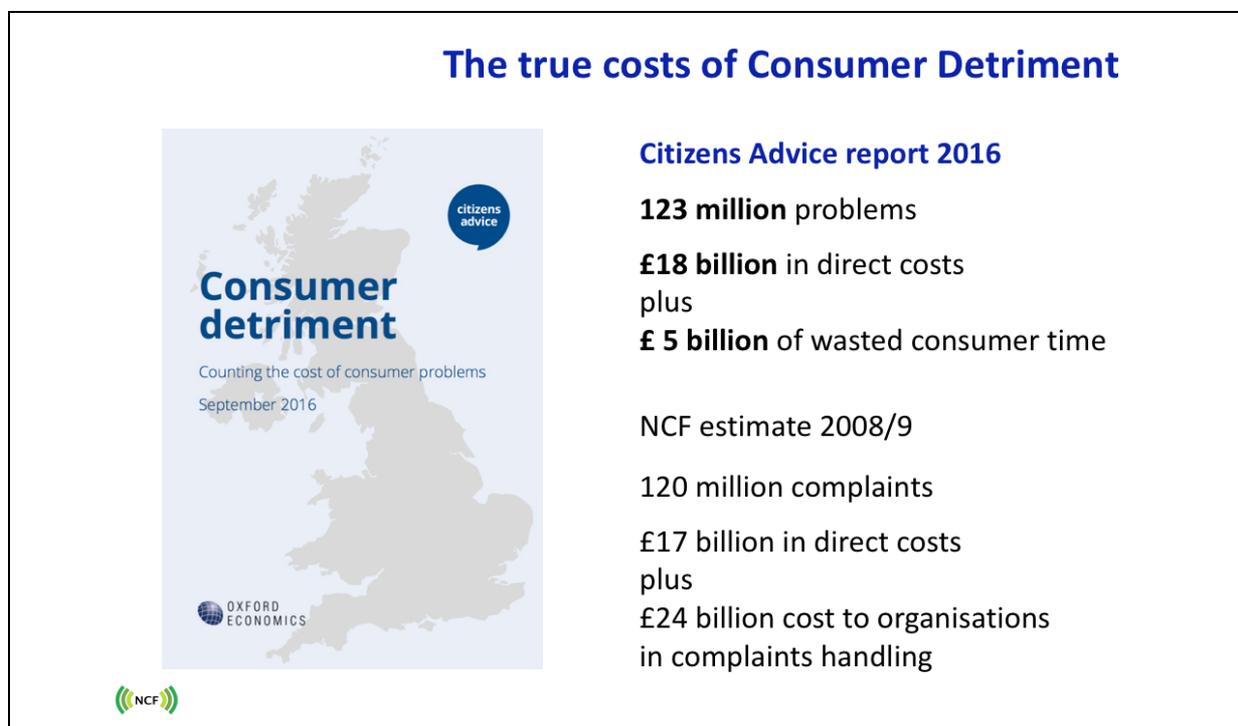
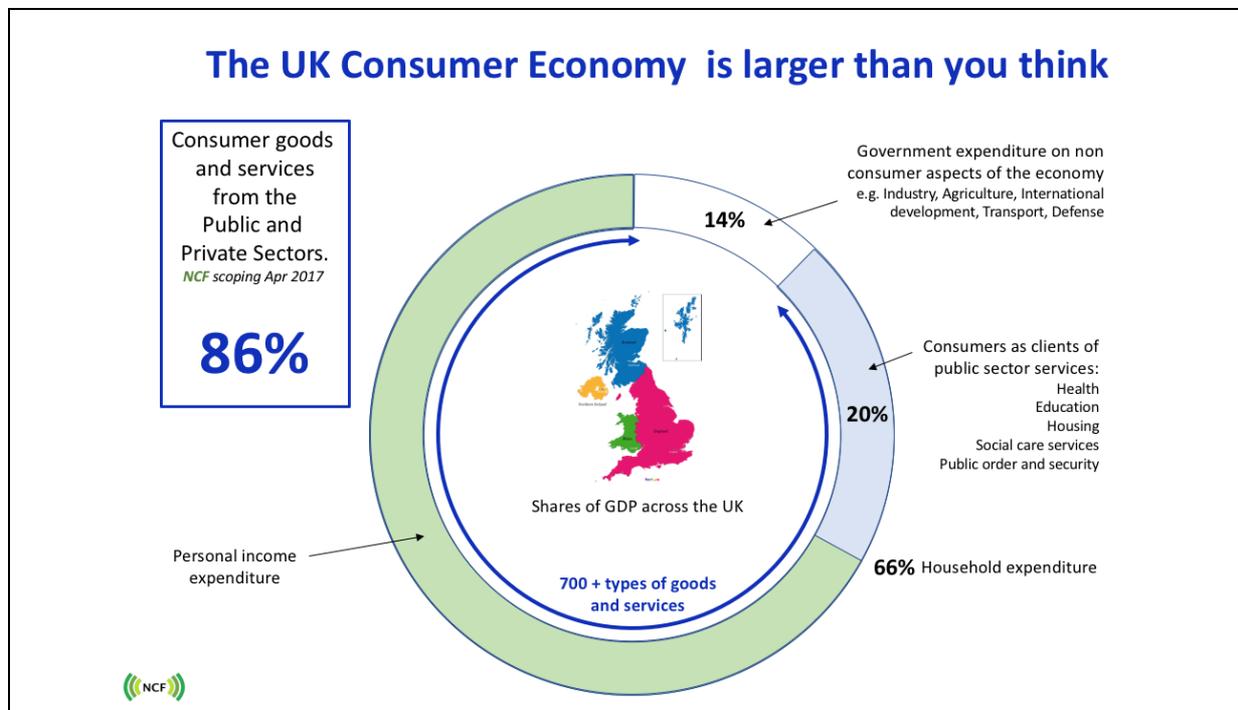
We would have liked to have seen a greater focus on consumer representation in groups where effective decision-making takes place - such as standards groups, those groups awarding contracts for things like transport services, enforcement groups etc.

We feel that in places the green paper places too much emphasis on doing things 'for' consumers, rather than creating a framework where consumers can feel more empowered and have a greater voice.

It is disappointing that the green paper makes mention of greater competitiveness following Brexit but is not able to give consumers the reassurance and security that their existing rights will not be diluted as a result.

## Consumers and the economy

Consumers' expenditure comprises 66 percent of GDP, 86 percent when government services are included.



As the Citizens Advice report says – the amount is staggering. Neither Citizens Advice nor the NCF feel they have covered everything – even so combining all the factors quantified so far brings us to about £50 billion pa.

## **The unrevealed detriment**

Consumer policies and enforcement need to look wider than the revealed detriment and address the unrevealed detriment identified by market studies that investigate business practices and take a broader look at the functioning of consumer markets.

Surveys designed to quantify consumer problems<sup>1</sup> at best only reveal that detriment of which consumers surveyed were aware. There is a sizeable gap between the proportions of adults with unprompted and prompted recall of problems, suggesting that consumers have come to accept that service can be poor.

It is telling that the FCA Financial lives survey report<sup>2</sup> suggests consumers are resigned to poor service.

A survey of PPI policy holders indicated that the majority were happy with the product they had purchased<sup>3</sup>, yet estimates of the excess margins earned by lenders and the subsequent compensation payments made showed that this confidence on the part of consumers was seriously misplaced.

Market studies conducted by the CMA and other regulators that can identify detriment in terms such as excess profits and how they are generated are an essential tool for investigating markets and suggesting remedies.

## **Private rented housing**

A notable absence from the Green Paper is any consideration of housing in general, and in particular the private rented sector, on which an increasing proportion of households rely. Surveys of consumer detriment identify substantial problems with home improvements in owner occupied housing but not problems of substandard accommodation in the social private rented sectors.

Shelter is a basic human need. By most definitions the UK has emerged with some of the most expensive mass market housing in the world. Average rents in Britain are almost 50% higher than in France, Germany and crowded Holland. Over recent years many things that people buy have become more affordable: food, clothing, communication, cars and televisions – and the cost of building a house has come down too. But the price people pay for housing has rocketed up and up.

The quality of rented housing has deteriorated to the extent that some 1 million homes now fail to meet basic standards - plagued by unsafe electrics, damp, inadequate heating and ventilation, and poor insulation. Short tenancy agreements combine with the ability of

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<sup>1</sup> Citizens' Advice 2016

<sup>2</sup> Eg, FCA [Financial lives survey 2017](#)

<sup>3</sup> OFT

landlords to evict without reason to discourage complaints. Few consumers complain and when they do little enforcement action is taken<sup>4</sup>. Private renting is essentially a local market with local enforcement of consumer rights by local TSDs.

### **Consumer engagement**

NCF welcomes the recognition in the Green Paper that 'simply relying on 'engaging' consumers by providing them with more and more information has been shown not to be a wholly effective approach.' Nevertheless, there is an undertone that BEIS (like its predecessor departments) is looking for engaged consumers to drive competition as opposed to 'making markets work well for consumers', the OFT's mantra. There is more to engagement than switching. In any event a higher switching rate does not necessarily represent a gain to consumers. Intermediaries have an incentive to encourage switching per se. It is their business model.

Switching comes at a cost for both consumers and traders. The widely publicised gains for consumers who switch energy providers refer to moving away from standard variable tariffs to tariffs fixed for one or two years. Many consumers when they look at their monthly direct debits over a period of years will be unable to attribute differences to underlying price changes driven by wholesale prices, Government imposed obligations such as smart meters or to changes in their consumption resulting from the weather or use of more efficient appliances.

Data portability is a key element in the Green Paper which envisages an emerging market in intermediaries to provide, for example, automated switching services designed to ensure that consumers always get the best deal. Experience with financial services suggests that regulators in other sectors will need to ensure that such intermediaries work in the interests of consumers. The focus must be on outcomes for consumers and not on intermediate indicators such as switching rates.

### **Enforcement and Redress**

There is a welcome recognition in the Green Paper that all is not well. Enforcement relies on seriously under-resourced local TSDs. The combined impacts of cuts to government grants to local authorities and pressures to maintain spending on other higher profile local services have resulted in a halving of expenditure on TSDs since 2010.

The accompanying report on ADR reveals that awareness and take up is low. The proposals in the Green paper, though welcome, do not go far enough in addressing the deficit. Effective redress is still for the few and in a limited range of products. That needs to change.

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<sup>4</sup> Councils fail to discipline bad landlords: The Times, 16 June 2018  
<https://www.thetimes.co.uk/article/councils-fail-to-discipline-bad-landlords-s0g8k3whz>

## Questions for consultation

References in [...] are to Green Paper paragraph numbers.

### Putting consumers in control [53 – 64]

1. In which regulated markets does consumer data portability have the most potential to improve consumer outcomes, and for what reasons?

The aim must be to give consumers access to better deals in terms of price, quality and customer service. Access to own data in a useable form is intended to assist consumer engagement, to improve consumer choices, ease the transition from one supplier to another, thereby removing one of the consumer barriers that hamper effective market operation. If a regulated market is working effectively then there should be a net migration to better traders who provide a superior price and service quality mix than worse traders.

The data in question relates to the consumer’s own use of a particular product. Hence data portability has the greatest potential to benefit the consumer when choice is affected by how and how much the product is used. Competing quotes are best compared on the basis of the individual’s recent consumption data rather than data for average consumer, comparisons that can be gamed by traders. Examples include energy, telecoms, current account banking and credit cards where being able to compare traders based on last year’s usage may influence choice.

For products often sold as bundles, the availability of portable data and the choice models that make use of it must cover all parts of the bundle. Portability protocols must ensure the switching bundles is not compromised by incompatible contract terms such as different termination dates and break clauses or the ownership of downloads.

Data portability action by the CMA should ensure that as many technical options are kept open as possible and that privacy is safeguarded.

2. How can we ensure that the vulnerable and disengaged benefit from data portability?

Market engagement tends to be skewed away from consumers made vulnerable by a range of circumstances. Any moves to improve engagement must address the reasons for that non-engagement and not just throw data at the problem. The aim is to improve the outcomes for consumers, not just to increase switching. There is a need to spell out what data portability is supposed to achieve. This applies not just to smart meters but to other products where the virtues of data portability are being discussed.

**Smart meters.** It is not self-evident that the benefits will extend beyond giving consumers and traders the more frequent meter readings that will prevent direct debit payments getting out of step with consumption and thus avoiding large (and for some unaffordable) adjustments in payments. See Q3.

A prerequisite for data portability is access to reliable broadband with speeds sufficient for services such as on line shopping or banking. Ofcom data on the use of the Internet and the devices that access it show the present take up across age and social groups. There will be a cohort effect that will likely result in higher take-up across age groups, so some at least of the problems of access may be resolved.

More generally, there is a need to understand what makes consumers vulnerable in particular circumstances and the causes of disengagement. As FCA research shows 'Vulnerable' is not homogeneous group<sup>5</sup>.

3. How can we ensure these new services develop in a way which encourages new entrants rather than advantaging incumbent traders?

The automated switching services referred to in the Paper [63] are in effect a platform that aims to give consumers continuous access to the best deals on offer. Axiomatically, these services will only deliver benefits for consumers if all the available traders are listed and if switching choices are unbiased by issues such as commissions paid by traders. There should be no barriers to listing and no exclusive deals.

Reports in the Sunday Times<sup>6</sup> headline the possibility that energy suppliers may refuse to cooperate with automated switching sites. The argument that sites disrupt suppliers' business models is clearly unsustainable: That is what switching is about.

The same article also reveals two business diverging models for automated switching sites, one as a subscription service and another funded by commissions, apparently from a limited range of suppliers. Intermediaries funded by commission have an inbuilt incentive to churn customers to generate income. Lessons on the status of intermediaries learned in consumer financial services markets are highly relevant here.

In addition, regulators need to address the strategies used by incumbents to tie-in their consumers and create barriers to new entry as a means of identifying and limiting anti-competitive behaviour.

Bundled services present a problem for existing price comparison sites and for automated sites. Consumers who cannot switch the whole of a bundle on the same date

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<sup>5</sup> FCA [Financial lives survey 2017](#)

<sup>6</sup> 1 July 2018, Money section; Energy firms block switching to rivals

and under similar terms may be locked out of automated services. Automated switching services will therefore need to be able to analyse and switch the bundles that are on offer and that consumers actually use

Examples from the telecoms sector contracts leading to higher switching costs include

- non-portable email addresses linked to ISPs
- different parts of a bundle having different contract dates or termination clauses
- downloaded content not transferable to a new device
- linked mobile contract<sup>7</sup>.

4. What is the best way to publish performance data so that it incentivises firms to improve and can be used by consumers when taking decisions? Should firms also offer discounts or compensation for poor performance? [65-70]

Regulators should measure and monitor consumer detriment for their sectors down to company level and then use that data either with companies pre-publishing to encourage better performance or with direct publication to the public to help consumer choice.

Such performance data has to address issues that are relevant to the decisions that consumers actually take. The key question should be 'What action do you expect consumers to take on the basis of this information?'. Service quality measures need to capture what matters to consumers, not what happens to be easily measured.

**Performance data on franchised rail services.**

Comparisons between operators may serve to check against key franchise targets and otherwise incentivise (or shame) operators to improve, but it has limited relevance to consumer decisions. Trends may be as useful as absolutes. Generally, consumers do not have a choice between operators in the short term at least, though in the longer-term information on the speed, price (particularly season tickets) and reliability of rail services could be affected where they live. There is anecdotal evidence that house prices in Brighton have been adversely affected by long running service disruptions.

By contrast, consumers of mobile and line telecoms or ISPs face real choices between operators. With the increase in virtual mobile operators, consumers need to be able to

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<sup>7</sup> Virgin Media land line with a different termination date to the associated phone+internet+TV contact with non-portable VM email accounts.

make choices based on identifying the performance of the network used as well as the operator with whom they are contracting. In the case of landlines (including ISPs) consumers need to be aware of differences in operator agreements with Openreach that might affect levels of service, eg, out of service target times.

**Getting incentives right**

Compensation should adequately reflect the loss to consumers, eg, for loss of service or for inferior service. Traders need to be incentivised to 'get it right first time', not leave quality control to consumers.

It should not be cheaper to pay compensation than to restore service. The same principle should apply to supply chain contracts, eg, between the retailer of the service and network operators.

Rail users should be compensated for time consuming diversions and replacement bus services (not covered as 'late running').

5. Is there a need to change the current consumer advocacy arrangements in the telecommunications sector? If so, what arrangements would be most effective in delivering consumer benefits, including for those who are most vulnerable?  
[71 - 74]

As argued in the NCF Consumer Charter for Regulators, all regulators need to improve the resourcing and engagement with responsible consumer representatives.

Compared to the energy sector, telecoms can be complex in that service received by end users relies on a wider range of providers interacting.

Telecoms consumers differ widely in their expertise in buying and using services, hardware and software. It is hardly surprising that the sector generates a higher proportion of consumer problems than other regulated businesses. That in itself is not sufficient reason to change the advocacy arrangements. What it might be expected to achieve **for consumers?**

Present consumer representation in telecoms comprises the Communications Consumer Panel and Consumer Forum for Communications (CFC)<sup>8</sup>. The Panel comprises independent experts with direct sectoral experience. Its stated aim is to ensure the citizen and consumer voice is represented in communications policy development and that the sector works for consumers, citizens and micro businesses - and in particular people who may be in a more vulnerable position in society. The CFC is an informal forum hosted by Ofcom, for consumer representatives to share information and views

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<sup>8</sup> <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/organisations-we-work-with/consumer-forum-for-communications> and <https://www.communicationsconsumerpanel.org.uk>

with each other, and with people who formulate and implement communications policies that affect consumers. CFC's goal is to help decision-makers to be as well-informed as possible about consumers' preferences and priorities.

Neither organisation has any direct contact with consumers or their day to day issues and complaints in the same way that Transport Focus does. Neither could be described as a 'consumer advocate'.

### Ensuring vulnerable consumers are treated fairly

There are no consultation questions arising out of this section [75 – 86]. Here are some issues.

How to help the vulnerable? For many household contracts, traders will only deal with the account or policy holder; that's the first question when you ring up. Using someone else's on line access details for some services is likely to be regarded as fraud. Opening accounts in joint names is not usually possible. The only exception appears to be joint banks and savings accounts. All of this makes problems for consumers in situations where applying for and registering a power of attorney might not be appropriate or proportionate. It should be easier for account holders to appoint a representative short of applying for a power of attorney.

Who is vulnerable and when? There is a welcome recognition that vulnerability depends on context. The FCA report cited provides some useful answers.

Exclusion from the best deals on offer can arise from **digital exclusion** (access to or ability to use the internet) or financial stress. Coping strategies for low and/or irregular income can reduce access to markets and deals. Consumers with low or irregular incomes may avoid direct debits (including the Internet) to retain control over the precise dates when payments are taken. Relying on pay as you go for energy (prepayment meters) or for phone access may exclude such consumers from the best deals and any benefits from data portability. Suggestions that the portable data of vulnerable groups might be made available to, say, automated switching sites need to be treated with caution.

There is reference to help provided through libraries but these are subject to precisely the same financial pressures as TSDs so may not be a realistic option.

Power of attorney arises frequently as an issue in consumer finance pages as a result of variations in how firms deal with them and lack of training for customer facing staff in applying whatever rules a supplier has set out.

Finally, nothing is said here about scams or fraud and their prevention. Indeed, the word 'scams' only appears in the title of the NOA report.

6. How can the government support consumers and businesses to fully realise the benefits of data portability across the digital economy? [87 - 97]

Consideration has to start from what are the benefits to consumers and traders of data portability. Portability implies standards in terms of both format and content. Getting it wrong could stifle innovation.

The NCF supports the goals set out in the 'world leading digital economy' section. But there will be an urgent need to focus on rapid implementation in order to boost competitiveness after Brexit. Likewise accelerating the rollout of high-speed broadband will be mandatory to ensure competitiveness too.

The GDPR, which the government has pledged to mirror in the Data Protection Bill gives consumers a good basic right to portability, even if, as the Green Paper acknowledge, it could be enlarged. But like any other right, to be effective it requires proper enforcement. The Bill will strengthen the Information Commissioner's powers to sanction but there remains as ever the issue of resources in tracking the behaviour of some of the world's largest multinationals and of a willingness to issue dissuasive fines. The study proposed will have to find the path to allow 'collaborative security' of Smart data and open portals/platforms

### **Data portability – market issues**

Data portability is aimed at making a transition from one supplier to another easier, thereby removing one of the consumer barriers that hamper effective market operation. The consumer issue is that these markets generate major shares of consumer detriment. So there are poor traders in the market place to start with. If a regulated market is working effectively then there should be a net migration to better traders who provide a better price and service quality mix than worse traders.

Although there are benefits to consumers if they switch from a standard variable tariff to a low fixed tariff, the NCF questions whether generally there are any real benefits to consumers from switching. NCF believes a study is needed to investigate whether some traders grow their business by being "better traders" with a resultant decrease in number of customers in worse traders, or whether switching away from a trader results in that trader improving their services to encourage customers to return. Anecdotally, switching does not appear to deliver real benefits to the vast majority of consumers. "They are all as bad as each other."

Data portability action by the CMA should ensure that as many technical options are kept open as possible. Furthermore, the study proposed in the Green Paper will have to

find a path which allows 'collaborative security' of Smart data and open portals/platforms.

7. As technology continues to develop, how do we maintain the right balance between supporting innovation in data use in consumer markets while also preserving strong privacy rights? [98 - 103]

There are a number of ways that data portability could be realised technically. For example:

- i. Transfer of data from one supplier to another ( the dominant form at the moment )
  - ii. Third party Data portability services where companies offer separate services to hold your data for transfer to another supplier on request
  - iii. Consumer products that allow consumers to hold their own data, keep it up to date and use it with different traders as they please.
8. What challenges do digital markets pose for effective competition enforcement and what can be done to address them? [104 - 113]

At its inception the Internet was seen by many as an unequivocal benefit for both traders and consumers. It did not take long to appreciate that all of the existing problems with markets imperfections could be replicated bigger and better in digital markets.

As the Green Paper says, traditional tools like abuse of dominance are difficult to use in any market but particularly so where consumers have 'free access'. Platforms sell businesses access to consumers mainly through advertising revenue which some would argue has benefits to consumers in terms of choice of other products. There is a risk identified in the Paper that consumer data available to traders may facilitate price discrimination. We support CMA work and the appointment of a new team to look in depth at these issues. CMA has also published reports and taken enforcement action on product search sites.

Platform dominance may lead to their becoming an 'essential facility' and hence a barrier to entry by new traders if access is restricted. Examples include Amazon and eBay.

Existing traders may use terms and conditions (Ts & Cs) that effectively lock-in their consumers. While the question refers to effective '*competition*' enforcement, recent CMA investigations and enforcement actions also involve the enforcement of 'consumer' legislation.

Digital markets involve complex issues, both of technology, and how it is used to the detriment of consumers. A primary concern is the resources available for investigations and enforcement. Complaints frequently relate to some of the largest multinational

companies. Cases may require extensive investigation and a high level of expertise. We therefore welcome the establishment by the CMA of a specialist group for this purpose<sup>9</sup>.

The increasing use of online advertising and search optimisation techniques, possibly exacerbated by the impact of the GDPR on direct mailing, may result in barriers to market entry or expansion for small players. New entrants are increasingly making use of platforms such as E-Bay and Amazon to reach new markets. It will be important to ensure that these platforms do not use their market power unfairly, by imposing unreasonable terms on small businesses, thus limiting the choice available to consumers.

Online markets can work to the benefit of consumers and traders.

**Second hand books** offered on the Internet enable buyers to shop around and compare price worldwide and enable traders to dramatically widen their market. But for some purchases consumers are often unable to check the reputation of an individual online supplier, whence the likelihood that consumers too will choose to purchase from sellers using an online platform, seen as a gauge of reliability. We believe consideration should be given to placing greater responsibilities on platform owners to remove traders with a record of persistently failing consumers and in cases of serious breaches of consumer legislation, to report them to the relevant authority.

*User Generated Content* gathered by Tripadvisor, Feefo and other consumer product/service reviews has a part to play in gathering intelligence about the problems that consumers face. However, these sources are susceptible to manipulation by traders. Platforms derive their income in the form of commissions from listed traders (sales generated from clicking through). Such content should be treated with caution.

9. Is the legal framework that covers consumer-to-consumer transactions appropriate to promote consumer confidence? [115 - 120]

Consumers need clarity establishing the status of the trader they are dealing with and how the application of consumer rights, the scope of enforcement and access to redress is affected.

Traders appearing to deal as consumers have always been a problem for TSDs. There are Internet equivalents of using small press advertisements to sell second hand cars as a means of avoiding consumer protection legislation. Platforms such as eBay cover a wide range of offers the status of which may not always be clear to consumers. TSDs used to prosecute traders trading as consumers. Probably enforcement is more difficult with digital platforms even if resources were available.

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<sup>9</sup> <https://www.gov.uk/government/news/cma-appoints-stefan-hunt-to-top-digital->

For effective enforcement there is a need for a clearer distinction as to when a consumer to consumer transaction becomes a business to consumer transaction. In general, where there is an on-going activity or an activity that is regularly repeated by a seller, this should be governed by the full consumer protection regimes. For the C2C transactions the number of customers per annum, transaction value and potential for harm should be taken into account for any light touch consumer protection law and regulation.

Platforms need to take responsibility for those who advertise. As with any intermediary, consumers need to be clear who they are dealing with.

Consider, for example, a regular Airbnb supplier that does not conform to bed and breakfast regulations, particularly on fire safety. An NCF member stayed in an Airbnb, five storey house in London with beds in every room, a total of approximately 20 single and double beds, one route of exit and no firebreaks between floors. Not only are there safety implications, but there are issues of fair competition that need to be addressed.

Similar issues arise with platforms such as Uber. The consumer needs clarity about precisely who s/he is dealing with.

Once again, this is an issue where online intermediaries could be required to identify and report so-called 'consumers' who are effectively trading regularly.

10. In what circumstances are personalised prices and search results being used? In which circumstances should it not be permitted? What evidence is there on harm to consumers? [121 - 126]

Personalised prices could mean

- i. A posted price with a declared discount that may or may not be personal to that particular consumer
- ii. A posted price that already incorporates an undeclared discount (or price rise) that is personal to that particular consumer
- iii. A posted price that varies according to level of demand, as in airline yield management.

As with other issues surrounding digital markets, none of the above is an entirely new feature. Previous conclusions about price discrimination should apply. Nevertheless, there is the suspicion that in digital markets the processes involved are made easier, even less transparent, institutionalised and that the impact is less benign.

In (i) the consumer knows that a discount has been applied though not necessarily what factors have may have given rise to it. In (ii) the consumer has no indication that the

price is in any way special. In (i) or (ii) the discount may rest to a perception that the consumer is a reluctant purchaser, based on a previous search (ss with the example in the Green Paper), But it could equally be generated by a prior knowledge of the consumer's profile built up from a variety of digital sources.

Examples of (iii) can be seen in the travel market where prices vary in order to fill capacity (yield management) and predate any use of personalised prices based on consumers' personal data. The former price discrimination has clear benefits but it can also offend consumer notions of 'fairness' and result in complicated pricing structures which in turn lead to calls for 'simplification', eg rail fares.

Personalised prices, on-line, reflect the supplier's assessment of the consumer's willingness/ability to pay, based perhaps on data from social media or a perceived reluctance to purchase based on previous searches (The case study in the green paper [121], describes a situation equivalent to a consumer bargaining strategy in a physical market where walking away may trigger a better offer but the opposite is often true.) Personalised prices can be seen in many internet sales and there is anecdotal evidence of higher prices being offered to specific potential customers with good credit levels. However, it is not clear that the algorithms used to generate personalise price always result consumers paying more. Those who are seen as shopping around may pay less. 'Naïve' online shopping, such as a failure to use comparison websites, might also result in higher prices being offered, sometimes to vulnerable consumers.

For competition to benefit consumers, it must lead to some combination of better price and/or better quality. Where transactional prices are transparent (trades are published), all consumers get the benefit of competition. Personalised prices reflect the supplier's assessment of the consumer's willingness to pay, based perhaps on data from social media or a perceived reluctance to purchase based on previous searches (The case study in the green paper [121]), describes a situation equivalent to a consumer bargaining strategy in a physical market where walking away may trigger a better offer.

Stress purchases provide a common basis for price discrimination. Some outlets are known destinations of last resort. Examples include credit for high risk customers recently reviewed by FCA. In the rent-to-buy market high risk consumers may pay more both in the posted price of the product and the linked credit. Other examples where consumers may find it difficult to shop around include funerals or emergencies such as burst pipes or punctured tyres or even running short of fuel on a motorway. Stress purchase are easily identified by the retailer.

Overall, we consider it to be a market failure if consumers are offered different prices and terms on the basis of their personal characteristics by religion level of wealth etc. We would suggest that a transparency requirement (a sufficiently prominent pop-up warning of personalised pricing in simple terms e.g. "our pricing practices mean other

consumers may be charged less than the price advertised to you") would be worth considering.

However, personal pricing discrimination does not mean that products cannot be designed taking into account the personal characteristics of individuals such as over the counter medicines, clothes by size, age, gender, wealth management in financial services, family holiday packages etc. Further promotional price changes available to all, or price increases due to reduced availability compared to demand (airline ticket pricing strategies) would be acceptable provide they did not contain pricing personal characteristic discrimination factors on top of any product pricing.

We believe research is urgently needed to better understand current practice, to quantify the detriment and to propose and test remedies. These are complex issues that call for more work by CMA in conjunction with the sectoral regulators.

11. Should terms and conditions in ***some sectors*** be required to reach a given level of comprehension, such as measured by online testing? [127–131]

Current good practice in safe product design for consumer goods and services is to identify

- the primary human users for the product,
- what the primary human user is intending to achieve through intended use,
- other human users involved in the use case, including other consumers (such as children), organizational users and malicious users,
- any intended human users having capability limitations,
- known consumer vulnerabilities and behaviours associated with the product.

Such good practice should be extended to the terms and conditions applicable to a product thereby better aligning the T's & C's with the consumers and their abilities. NCF is not clear why the scope of this question is limited to '***some sectors***' In principle, ***all*** contacts should be clear without reliance on extensive, unclear or unfair 'small print' that traders know consumer will neither read nor comprehend. The basic principle of dealing between traders and consumers should be 'no surprises'..

UTCCRs have been around since 1999. Yet knowledge of and compliance by business remains poor. CMA and previously OFT have tackled selected markets where there were onerous terms causing particularly detriment to consumers. It is timely that Ts & Cs were tackled far more extensively. It is not just a case of analysing for unfair terms that affect the balance of obligations as between traders and consumers. Sheer volume

is a problem in many cases. Many include restrictions on liability and run to 10s of pages. Digital markets provide extensive opportunities to limit liability as between different service providers, ISPs, hardware, software, APPs etc. Moreover, such issues as ownership of downloads and continuity of updates can expose consumers to unexpected and arbitrary decisions.

As suggested in the Green Paper, the approach used in consumer financial services could profitably be followed, whereby there are standards for clarity and where key features including any unusual or onerous terms have to be spelled out and drawn to the consumer's attention.

Traders should not be able to rely on tick boxes as evidence that the consumer understood the contract unless those terms comply with basic requirements. What would happen if tick boxes (I have read and understood) were to be banned as unfair? In addition, consumers should not be faced with what are in effect 'entire agreement clauses', that is where any sales representations outside the contract are excluded.

More generally the Green Paper outlines action on unfair terms [132- 134] but this can be labour-intensive, often requires market specific expertise and only scratches the surface. There could well be a good application of AI (Artificial Intelligence) to train AI systems for each regulator to recognise unfair T's and C's in their sectors enabling automated scanning of online 'supply to consumer' contract conditions at low cost and much greater effectiveness.

Subscriptions services [135- 138] present particular problems but a more rigorous application to fairness criteria linked to continuous contracts might fix this.

CMA should ensure that its guidance on issues such as unfair contract terms is updated to cover emerging business practices.

## Chapter 4 - Improving enforcement of consumer rights

This chapter covers:

- Awareness of and experience of ADR
- Improving access to ADR
- Supporting local and national enforcers to work together to protect consumers
- Use of civil penalties on companies for breaches of consumer law.

The Overview to this chapter records that 84% of consumers think traders respect their rights and that 79% of traders think their competitors comply with consumer law. Yet the respective knowledge by consumers of their rights and by traders of their obligations suggests that this confidence may be misplaced and does not sit well with consumer expectations regarding poor service. There is no room for complacency.

### 12. How can we improve consumer awareness and take-up of alternative dispute resolution? [148 - 152]

Research accompanying the Green Paper refers to the limited knowledge on the part of consumers of ADR. Consumer satisfaction with ADR by those who use it is predictable. It's good if you win and the trader complies.

However, there is no discussion of what consumers really want. Good customer service surely starts with 'Get it right first time'. That means devoting more attention initially to quality control and identifying consumer needs. Consumers don't want to have to complain much less resort to ADR or the courts. For that reason, consumers may not consider redress at the time of making a purchase or even how easy or costly it might be to return the product or complain about a service.

If consumers are to make effective use of ADR in any dispute, then it is important that they retain any useful documentation at the time of purchase and subsequently.

### 13. What model of alternative dispute resolution provision would deliver the best experience for consumers?

Apart from regulated industries, ADR is fragmented. Consumers need a single portal that is easily accessible and provides some basic guidance on how to initiate a claim. Where consumers are offered a choice of ADR provider, there needs to be a basis for making choice that consumers can comprehend. As the research shows, the present range of choices is confusing.

14. How could we incentivise more businesses to participate in alternative dispute resolution?

As with consumer codes (of practice) there is a need to make access to ADR a 'must have', part of building and maintaining a business reputation. Businesses that publicised their adherence to codes of practice and/or ADR should derive a competitive advantage. Membership of approved ADR should be promoted by means an ADR Mark that can be publicised by government and consumer organisations. Where reputation appears not to matter such that substandard or even dishonest firms can prosper then an alternative approach may be needed. See Q 15.

15. Should there be an automatic right for consumers to access alternative dispute resolution in sectors with the highest levels of consumer harm?

Access to ADR needs to be seen from the consumer's viewpoint. The consumer has suffered detriment and it doesn't matter what sector is involved. The consumer needs a general ombudsman with appropriate sector specialists, not a string of sector-specific bodies with the inevitable gaps and procedural differences.

In the absence of a general consumer ombudsman scheme, consideration should be given to providing a compulsory ADR scheme in sectors generating high levels of detriment, particularly if individual instances are large in relation to the consumer's own resources. Sectors where ADR might need to be compulsory include used cars and car servicing.

16. What changes are needed to ensure that local and national enforcers work together within an effective framework for protecting consumers? [156 - 165]

NCF is pleased to see that this issue is being addressed. See particularly [160 - 162]. Effective consumer enforcement promotes consumer confidence, which is a fundamental factor in encouraging and delivering economic growth. We are, therefore, very pleased to see that the Consumer Green Paper recognises the considerable pressure that public enforcement is under. This has been of great concern to the NCF for a number of years. It was raised at the NCF Consumer Congress *The Best of Brexit for Consumers* held in Westminster on 6 April 2017<sup>10</sup> and was followed up by the NCF Consumer Congress *Brexit: Transposition of laws – What's the point if Enforcement is weak?* held in Westminster on 5 December 2017<sup>11</sup>. Following the Congress, the NCF has established a broad stakeholder Enforcement Group to assist in developing proposals for better enforcement of products and services legislation from the consumer perspective.

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<sup>10</sup> 6 April 2017 Consumer Congress Report <https://www.nationalconsumer.org.uk/consumer-congress-themes/>

<sup>11</sup> 5 December 2017 Consumer Congress report

The establishment of the Office of Product Safety and Standards is a recognition that the current framework for protecting consumers is not fit for purpose. We see four problems to ensuring that an effective new framework is achieved:

- i. Enforcement authorities need the appropriate resources to meet these responsibilities,
- ii. There needs to be a separation between advisory services to businesses and enforcement/policing,
- iii. Enforcement authorities need reorganisation to more effectively police at local and national levels,
- iv. Particular attention needs to be given to cross-border transactions. Arrangements after Brexit are critical to transactions involving the EEA.

We agree that it can be challenging for NTS/TSS to pursue more complex cases through the courts. The possibility that NTS and TSS might be given enforcement powers is worthy of serious consideration. Relying on local TSDs to take action is unrealistic, given pressures on local funding and the financial risks of proceeding against traders with extensive financial backing. Moreover, as stated elsewhere in this response, there are considerable concerns, shared with other consumer organisations, that local enforcement is seriously under-resourced.

One area where the lack of local enforcement can impact severely on consumers' health and wellbeing is private rented housing. Consumers are too often afraid to complain. The Times reported that of those complaints that are actually made, only 60 percent were followed up by inspections and only 4 percent of complaints resulted in enforcement action in the form of improvement notices.<sup>12</sup>

Effective consumer enforcement promotes consumer confidence, which is a fundamental factor in encouraging and delivering economic growth.

The establishment of the Office of Product Safety and Standards is a recognition that the current framework for protecting consumers is not fit for purpose. We see three problems to ensuring that an effective new framework is achieved:

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<sup>12</sup> Councils fail to discipline bad landlords: The Times June 16 2018  
<https://www.thetimes.co.uk/article/councils-fail-to-discipline-bad-landlords-s0g8k3whz>

- i. Enforcement authorities need the appropriate resources to meet these responsibilities
- ii. There needs to be a separation between advisory services to businesses and enforcement/policing.
- iii. Enforcement authorities need reorganisation to more effectively police local, national and cross-border transactions

### Resources

We fully understand the constraints on funding for enforcement purposes but believe that enforcement should be looked at as an investment in the economy rather than a cost. On-line and cross-border purchasing and global marketing significantly increase the complexity of the market and the need for more effective enforcement. Work NCF has carried out indicates that the current lack of effective enforcement and limited development of enforcement provision to meet the new challenges is a serious drag on the economy, creating waste and adversely affecting the UK's international competitive position. Get enforcement right and businesses should become more profitable resulting in greater tax revenues. However, we believe that further research is necessary to fully understand the costs and benefits of enforcement. There is a simple formula:

**The Impact of Enforcement**



**Behaviour = chances of being caught x size of penalty**



We need to find a way to reduce the costs of compliance for good economic performers and to get poor performers to either improve or leave the marketplace. Properly audited, approved, codes of practice play an important role in self-regulation and enforcement. However, these codes of practice cost those businesses participating, and being voluntary, mean that there are significant parts of the supply side that do not participate in well run codes of practice. There needs to be far greater scrutiny of the many codes of practice to ensure that they deliver the appropriate level of consumer

protection. For the enforcement authorities, greater resourcing should be provided to monitor and enforce those companies that are not members of properly approved codes.

### **Advice and Policing**

The NCF opposed proposals to introduce the advisory role for the Primary Authority Principle and have no reason to change that view, based on our understanding of its implementation since adoption. We supported the Home Authority Principle as this was logical to ensure that companies were dealt with efficiently by a single Trading Standards Department. We support the need for advice for businesses but we still do not believe it is effective for the advisor to also be the policeman. Both activities are important but there needs to be separation between them. The lack of resources or desire to take enforcement action can result in advice being given, maybe multiple times to avoid more confrontational, and costly, but necessary enforcement action. It is essential that there is a clear separation.

### **Enforcement at local, national and cross border levels**

Trading Standards Departments were established when trade was mainly local and, in the past (as detailed in the Hampton enquiry into cutting red tape), they were very successful in minimising the levels of rogue traders and poor performing businesses. However, cuts to their services and the globalisation of trade have severely reduced their ability to maintain good business behaviour through enforcement activities. Significant resources are needed to take a multinational company to court and this cannot be left to local enforcement. Local authorities, even with significantly more resources, are subject to local political control and priorities which makes them ill-suited for such a role. Hence, we believe NTS and TSS need enforcement powers but perhaps more importantly we need to develop a more efficient central mechanism to enforce against large/international companies. This has serious budgetary implications. We would suggest that the government examines the models that currently apply to medicines, food, credit, motor vehicles and health and safety, in addition to the newly created OPSS, all of which have a central enforcement element, in order to identify what might work best for consumers generally.

UK enforcers will need to continue to cooperate with other jurisdictions.

We also welcome proposals to extend civil enforcement powers. The NCF is strongly of the belief that there has been a regrettable reluctance to pursue the senior management of companies that have badly failed consumers, especially in cases of unsafe products causing death or serious injury. Heavy fines, prison sentences and more should be options available in addition to pressure to just 'leave the market'.

In times of constrained resources, intelligence-driven prioritisation and burden-sharing are particularly important. After the UK withdraws from the European Union, it may lose its current access to the RAPEX and RASSF databases which alert Member State authorities to risks deriving from unsafe consumer products and food found elsewhere on the market. Information derived from the systems constitutes a valuable source of intelligence for NTS and TSS and obviates the need to carry out further inspections and

testing. One option would be for the UK government to seek continued access to these networks as part of its future relationship with the EU (although access at present is limited to EU and EEA Member States) or to agree some other form of mutual exchange of information. More broadly, the UK will no longer benefit from the informal sharing of knowledge and know-how between enforcement bodies which occurs in the advisory committees created by European safety and product regulations. The UK will therefore need to maximise its participation in other relevant fora whether under the auspices of international organisations such as the OECD or by enhanced bilateral cooperation.

Similarly, the UK will no longer participate in the CCP, a body which brings together national authorities with the responsibility for enforcing consumer protection legislation and in which the CMA (previously the OFT) has played an active role. The underpinning legislation enables British consumer authorities to refer a breach of consumer rights to the Member State in which the business in question operates, so that appropriate enforcement action can be taken there. Unless similar reciprocal arrangements can be put in place by agreement, British consumers will lose the benefit of these arrangements.

17. Do you agree with the initial areas of focus for the Consumer Forum? [172 - 180]

The proposed Consumer Forum will have a particular focus on vulnerability and acting on the NAO recommendations. Other areas of focus will be:

- the principles to determine whether government or regulator should act in dealing with a particular problem
- how to maximise the potential for consumers from open, portable data

The NCF welcomes the proposed Consumer Forum but believes strongly that it should be widened to include all consumer markets without an official regulator, particularly those that generate significant levels of detriment e.g. 2<sup>nd</sup> hand cars; computer supplies; travel. In addition, the Forum must include representatives of consumers and independent experts, not simply Government, regulators and related departments. It is only by having a wide consensus of views, including those on the demand side of the economy, that the forum will be fully effective. Although the Green Paper does not make it clear, we assume that the Consumer Forum would bring together representatives from throughout the UK. In our view the Forum could effectively model itself on a parliamentary select committee: setting its agenda of topics for report, hearing evidence and where appropriate, commissioning research.

We believe there is a need for a much higher profile for the Minister for Consumer Affairs and consider the Forum to be a step in the right direction.

We accept that the Consumer Forum should have a particular focus on vulnerability and act on the NAO recommendations. We agree that other areas of focus should be in determining whether government or regulator should act in dealing with a particular problem and in looking at the regulatory challenges and opportunities which will arise after the UK leaves the European Union. We would commend the NCF Consumer Charter for Regulators (ANNEX 1) to the Forum as a benchmark against which the impact and effectiveness of individual regulators could be judged.

<sup>i</sup>The main priorities for the Forum should be the main areas of detriment and the main causes of that detriment: housing both letting and purchasing; cars & emissions; utilities; travel. It is not obvious to us what is intended in the consultation document by a focus on "how to maximise the potential for consumers from open, portable data".

The Forum should better understand consumer switching behaviour. We believe this requires a more in-depth study (or at least a review of the already extensive academic research) It is not simply a question of nudging people into switching. Our preliminary view is that consumers are switching due to poor service and, sometimes, overcharging. Their switching criterion is price and only price, aimed at punishing the company they are leaving. We believe this is because most consumers believe that in many regulated sectors, all the companies are as bad as each other. Hence, switching does not encourage better behaviour by companies and results in them only making offers of unsustainably low prices to switching consumers, with 'loyal' customers often charged more than a switcher. Companies cannot offer a price that will hold, and rely on those that have better things to do than switch. Citizens Advice gives an example that it only takes "as long as watching your favourite Soap on TV to switch", but we are convinced that most people would prefer to continue watching the soap!

The European Council of Energy Regulators claims that the only mechanism for delivering a fair market for energy is by customers switching. We question this statement and believe further research is needed to find a more effective way of ensuring consumers in these markets are treated fairly.

## **Further comments**

Standardisation is a widely accepted way of ensuring products are safe and efficient whilst allowing producers sufficient freedom to innovate and improve. European standards bodies (CEN and CENELEC) have ensured that consumers are represented in

their working groups and technical committees through the medium of ANEC (the European Association for the Coordination of Consumer Representation in Standardisation). British consumer representatives are one of the largest contingents supported by ANEC, which is entirely funded by the European Commission and EFTA. If British consumer representatives are to continue to be active in European standardisation bodies after Brexit, another source of funding will be needed to support them. The document in ANNEX 2 sets out this important issue in more detail.

## Competition [181 – 196] [181 – 196]

18. Have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers?
19. Does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition?
20. Is the competition regime sufficiently equipped to manage emerging challenges, including the growth of fast-moving digital markets?

The 2014 reforms have certainly helped, CMA competition investigations appear now to be more orientated towards consumers. The role of consumer behaviour in making markets work is better integrated. There is less trust in information remedies. However, these impacts may be as much a result of a changed attitude than as a consequence of wider powers.

Regulators need to understand how markets work, the business models employed, how 'free to consumers' markets make profits and hence what behaviours might be anti-competitive. This may include linking competition with unfair contract terms, unfair business practices etc which may confer market power. It is for those involved in investigations to flag any issues where lack of powers limit their ability to investigate or impose appropriate solutions.

## Strategic Steer to the Competition and Markets Authority

21. Do you agree with the approach set out in the draft Strategic Steer to the CMA? Are there any other areas you think should be included? [197 - 200, Annex A]

In summary the Strategic Steer to CMA is to

- Support the aims of the Industrial Strategy
- Champion consumers
- Make the most of the challenges and opportunities of the digital economy.

## NCF reply to the Consumer Green Paper - "Modernising Consumer Markets"

NCF's main concern is that:

- these elements are given equal weight,
- that consumer issues are not subordinated to either the industrial strategy or to developing the digital economy.

It would be easy to encourage the expansion of digital markets in ways which exploited rather than benefitted consumers, issues that are identified elsewhere in the Green Paper.

## ANNEX 1 – NCF CONSUMER CHARTER FOR REGULATORS

### A CONSUMER CHARTER FOR REGULATORS

The main purpose of regulation is to promote and protect the interests of consumers in sectors where market forces alone would not deliver the best outcome. An effective regulator will...

**Put consumer interests at the heart of what regulators do through...**

- A **legal framework** that includes a primary purpose to pursue the interests of current (and future) consumers
- A **vision and strategy** backed by project management and other organisational processes in which the consumer interest is embedded;
- A **Board** with a lay Chair and a lay majority including consumer expertise;
- **Culture and values** that ensure consumer interests run through their behaviour and everyday ways of working.

**Understand what a good outcome looks like for all consumers and deliver it including...**

- **Access for all** including disabled people and consumers in vulnerable positions
- **Clear, simple, accurate and understandable information** about products and services
- Fair **marketing** practices, where necessary curbing pressure selling and misleading advertising
- **Effective choice** for consumers between providers competing to offer better products and services at a better price, with the ability to switch easily
- **Fair pricing and contracts** with no hidden twists and tricks and no unfair cross subsidy
- The consumer interest taken into account when deciding issues affecting **infrastructure investment**
- **Quality** delivered to agreed or contracted standards and good quality outcomes which are responsive to consumer needs
- **Protection from harm** so that products and services which cannot be used safely cannot be sold

- Resolution of individual **complaints** quickly and fairly by regulated firms, and access for consumers to an Ombudsman or other independent mechanism for resolving disputes which is free to the consumer

**Be an alert watchdog and act swiftly on behalf of consumers by...**

- **Identifying risks**, scanning the horizon using consumer insight and intervening early to prevent problems emerging and to spot when things are going wrong
- **Creating the right incentives** for the market to work well for consumers
- **Ensuring that data is published** to allow consumers to compare performance of providers, for example on complaints
- **Working closely with other regulators** to maximise consistency of approach and share best practice including on enforcement
- **Involving consumers and their representatives**, including consumer bodies through regular dialogue and research to understand consumer views and behaviour in the development of policy and in delivery
- **Ensuring compliance with licence conditions and other rules** through investigations and effective enforcement backed by legal powers, imposing **penalties** on firms where rules have been breached and securing **redress** for consumers who have been adversely affected including compensation where appropriate

**Be transparent and accountable to consumers through...**

- **Working openly**, consulting and reporting regularly on their performance in achieving consumer outcomes
- Providing a readily accessible **channel for feedback** and complaints about the regulator
- Using **language** that ordinary people can understand



## ANNEX 2

### UNITED KINGDOM CONSUMER PARTICIPATION IN ANEC<sup>13</sup> POST BREXIT

#### ISSUE

1. ANEC, the European Consumer Voice in Standardisation, is funded 95% by the European Commission and 5% by EFTA. United Kingdom consumers make considerable contributions to European Standardisation through membership of ANEC. When the United Kingdom has left the European Union in 2019 it is likely that UK consumers and consumer organisations will be excluded from membership of ANEC, unless special arrangements are made for continuation.

#### RECOMMENDATION

2. That arrangements are made with the EU (27) and EFTA for UK membership of ANEC to continue to allow participation in policy and technical standardisation work post Brexit.

#### TIMING

3. The arrangements to be in place by the time the UK leaves the EU.

#### BACKGROUND

4. ANEC participates in the standardisation activities of the three European Standardisation Organisations CEN, CENELEC and ETSI and has some influence on related EU legislation with the EU Commission and Parliament. Strategies are developed and adopted by the ANEC General Assembly (current strategy 2014-2020) which comprises one member from each eligible European Country representing all national consumer organisations in that country. Currently Arnold Pindar, Chairman, NCF, is the UK General Assembly member of ANEC. He is in his fourth term as President of ANEC (elected by General Assembly members every two years).
5. UK consumers have been in a leading role in ANEC since it was established in 1995. ANEC presently focuses its activities on eight areas of consumer interest:
  - Child safety
  - Design for all
  - Domestic appliances
  - Information society
  - Innovation
  - Services
  - Sustainability (including environment)
  - Traffic

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<sup>13</sup> ANEC : The European Consumer Voice in Standards [www.anec.eu](http://www.anec.eu)

UK consumers are active in all areas. The UK has 37 active consumer experts, the largest number of any country after Germany.

6. Work through ANEC complements the work of the British Standards Institution's Consumer and Public Interest Network, having direct influence with consumer representatives from other member and EFTA states and a route into EU legislation related to standardisation.

## **ARGUMENT**

7. On leaving the European Union it is recognised by all stakeholders that European and international standardisation will be of increased importance to cross-border trade and the health and safety of communities. All stakeholders accept that we need to maintain and where possible increase UK influence to ensure standards meet our needs.
8. The European Commission and EFTA do not normally support the activities of third countries in organisations such as ANEC, unless e.g. the third country has applied to join the EU. Hence, in order for UK consumers to continue to work in ANEC it appears that a deal is needed to facilitate participation. This may require the United Kingdom to fund UK consumer activities in ANEC post Brexit.
9. From the beginning (1995) the UK has had a leadership role in ANEC that has contributed significantly to the success of European Standardisation for the protection of consumers. If the United Kingdom is excluded from membership of ANEC our influence on European Standards (and to some extent European legislation) will be significantly diminished. We shall have no other route for consumers to work with their opposite numbers in European countries to influence European standards.

**ARNOLD PINDAR**  
Chairman, NCF

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