

BEIS - Modernising Consumer Markets: Green Paper

Consultation response from the
Centre for Competition Policy
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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content. We have indicated the respondent(s) to each consultation question at the beginning of their response to facilitate further discussion. Prof. Bruce Lyons from the CCP has submitted a separate response to BEIS following the structure of the Competition Law Review. We refer to that response in this document where relevant. The two responses can be considered as complements.

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CCP Response to BEIS's Consultation on Consumer Green Paper

CCP welcomes the opportunity to respond to BEIS's consultation on Modernising Consumer Markets: Green Paper. We respond to consultation questions 1-4, 6-11, and 17-20. A summary of key points by question is provided below and a reference list is provided at the end of this response.

Summary

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

- Markets are not effective at assuring that consumers will benefit equally from any innovation, including data portability. So if the benefits of data portability are to be delivered through markets, a variety of interventions is likely to be necessary to stimulate activity amongst different groups of consumers.

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

- Data portability rule affects consumer switching costs, but the direction of the impact depends on the strength of network effects and the types of data that are covered by the rule.

Question 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?

- It is important to enable firms to make truthful statements about their performance and make consumers aware that the firms have the option to make such statements.

Question 6. How can the government support consumers and businesses to fully realise the benefits of data portability across the digital economy?

- When considering data portability, one needs to be cautious about the type of data that is included in the data portability rule.
- The right to data portability could be undermined if organisations charge unreasonable fees.

Question 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?

- Privacy by design principles and data protection impact assessments should inform the planning stage of innovative projects.
- The privacy and ethics recommendations by the Centre for Data Ethics and Innovation should be binding on organisations making innovative uses of data.

Question 8. What challenges do digital markets pose for effective competition enforcement and what can be done to address them?

- The primary challenge posed by digital markets for enforcement is to increase our understanding of what might happen, including our understanding of what features of digital markets are really new and different and what are just old wine in new bottles.

Question 9. Is the legal framework that covers consumer-to-consumer transactions appropriate to promote consumer confidence?

- The current legal framework to protect consumers and consumer confidence is appropriate and does not require legal changes. There is no evidence that consumers are being harmed in platform-based consumer-to-consumer transactions. More evidence is required to show that consumers in consumer-to-consumer transactions suffer from information asymmetries or a lack of bargaining power that would justify expanding consumer protection rules to those transactions.

Question 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?

- Personalised pricing (price discrimination), search personalisation and pricing in insurance markets need to be thought about using different conceptual frameworks.
- Any decisions regarding when price discrimination is reasonable or unreasonable will involve distributional judgements and so should ultimately be taken by political decision makers.
- Policymakers should be cautious before limiting price discrimination as economic theory indicates it will increase total surplus if the quantity consumed increases.
- If policymakers focus on consumer surplus rather than total surplus, personalised pricing may present more issues as it represents the increased extraction of consumer surplus by firms.
- Distributional concerns arise from increased extraction of consumer surplus since:
 - (i) the distribution of shareholdings is uneven across households, and
 - (ii) most online platforms are foreign owned so profits flow out of the UK and are difficult to tax.
- Evidence regarding online price personalisation needs to be considered carefully and critically. Policymakers should always question whether behaviour observed in the online world is materially different to what is seen in the offline world.

Question 11. Should terms and conditions in some sectors be required to reach a given level of comprehension, such as measured by online testing?

- Terms and conditions should be simplified and tested against consumer understanding to reach a particular level of understanding.

Question 17. Do you agree with the initial areas of focus for the Consumer Forum?

- The ambiguity surrounding the general duties of sector regulators may impede the Green Paper's pursuit of competitive markets. There is now an opportunity for the Government to clarify these duties to the benefit of consumers.
- It is imperative that the new Consumer Forum prioritises procedural transparency in order to allay investors' suspicions of government influencing independent regulators.

Question 18. Have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers?

- The CMA has provided coordination benefits but reform of the structure of decision making remains incomplete. There should be a common approach to decision-making panels for all effects-based cases.
- This reform could be aligned with the CAT applying judicial review to all effects-based cases (including under CA98).

Question 19. Does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition?

- The main tools are currently in place but the selection of the appropriate tool for the relevant competition problem needs refining.
- The limited use of CA98 Ch.2 (abuse of dominance) and a lack of apparent coordination with the markets regime needs addressing with a full and focused review.
- The recent focus of market investigations on demand side issues is a world-leading approach and should be encouraged. It is important to recognise that demand side problems require demand side remedies and further advocacy is required to steer appropriate expectations of such investigations.

Question 20. Is the competition regime sufficiently equipped to manage emerging challenges, including the growth of fast-moving digital markets?

- The CMA's lack of experience in CA98 Ch.2 is a concern as it will be responsible for challenging potentially dominant global corporations (e.g. Intel, Google, Amazon, Qualcomm) once the UK has exited the EU.
- The CMA faces an important new role in scrutinizing state aid. This will be a substantial task and the CMA will need determinative powers if it is to maintain and develop its reputation as a strong and independent institution.

Response to consultation questions 1-4, 6-11, and 17-20

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

(Wynne Lam) We expect data portability to have greatest impact in markets where switching costs are high. However, one needs to be cautious when applying the data portability rule to digital markets, as there are not only switching costs but also network effects. An issue highlighted in Lam (2017)¹ is that devising a policy that aims at reducing switching costs (such as the data portability rule) may have an adverse impact on overall consumer welfare when network effects are strong (as in many Internet markets). The reason is that the benefit of receiving an early bargain due to switching costs and network effects may outweigh the deadweight losses associated with them. Moreover, we would keep in mind that changing the level of switching cost can have different impacts on different categories of consumers: for instance, while a lower switching cost benefits the switchers, it hurts the non-switchers.

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

(Catherine Waddams) While this question is asked in the context of data portability, the question of ensuring that the vulnerable and the disengaged benefit from markets is, as the consultation acknowledges, part of a much broader question. The conventional model of markets depends on consumer activity, both to convey consumer preferences to providers, and to reward suppliers for responding to them. The market mechanism rests on consumers

¹ Lam, W. M. W. (2017) 'Switching Costs in Two-sided Markets', *Journal of Industrial Economics*, 65(1), pp. 136-182.

having access to relevant offers, responding to them if their assessment of the benefits of doing so exceed the costs involved, and receiving consequent benefits. Much of the early regulatory effort focused on ensuring that the offers available from suppliers are beneficial, and relying on consumers to respond appropriately.

However as the Green Paper observes, in several markets consumers do not respond consistently in this way, even when the benefits seem large. It may be that consumers are vulnerable, either in the short or longer term, and so are unable to assess and respond to opportunities. This could be because they are distracted by life events or because of intrinsic difficulties in assessing the options, and the detriment may similarly be either temporary or more long-lasting. Such inability to engage with opportunities might be classified as ‘can’t participate’. Those who are disengaged more generally, rather than because of a temporary situation or long term barrier, might be considered to have very high costs of participation, and be classified as ‘won’t participate’. The Green Paper makes a strong commitment to continuing to support markets which are competitive (regulated where necessary), and this involves the choice to participate as a central tenet. Markets will be severely handicapped in delivering their overall benefits of innovation and responding to the wants of consumers if they are constrained in how products, services and benefits are delivered to different groups, rather than in ensuring that all can participate in the markets on ‘fair’ terms as an input. Markets are an effective way of driving innovation and greater aggregate consumer benefits, but a very poor way of allocating particular distributional outcomes. This was demonstrated by the non-discrimination clauses in energy in 2009, both in principle (Hviid and Waddams Price, 2012)² and in practice (Waddams Price and Zhu, 2016a)³.

Other evidence from the energy market emphasises the heterogeneity of consumers (Waddams Price and Zhu, 2016b; Flores and Waddams Price, 2018)⁴, which comes as no surprise to marketing experts, but is more crudely accounted for in economic models, if at all. For example, Flores and Waddams Price (2018) found that within different characterisations of general consumption behaviour (shoppers, time-poor or loyal) different factors were associated with activity in the energy market, whether this was measured by looking around for better deals or changing suppliers/tariffs. So if the benefits of data portability are to be delivered through markets, a variety of interventions is likely to be necessary to stimulate activity amongst different groups of consumers. Similarly, surprisingly few of even those who had taken the time and trouble to enrol in a collective auction eventually accepted the consequent lower offers, and analysis again revealed a wide variety of reasons for such inaction (Deller et al., 2017).⁵

² Hviid, M. and Waddams Price, C. (2012) ‘Non-Discrimination Clauses in the Retail Energy Sector’, *The Economic Journal*, 122, F236-252, 2012.

³ Waddams Price, C. and Zhu, M. (2016) ‘Non-Discrimination Clauses: Their Effect on GB Retail Energy Prices 2005-2013’, *The Energy Journal*, 37, 2, pp.111-132.

⁴ Waddams Price, C. and Zhu, M. (2016) ‘Empirical Evidence of Consumer Response in Regulated Markets’, *Journal of Competition Law and Economics*, 12(1), pp.113-149; and Miguel Flores, M. and Waddams Price, C. (2018) ‘Consumer Behaviour in the British Retail Electricity Market’, *The Energy Journal*, 39, 4, 153-179.

⁵ Deller, D., M. Giulietti, G. Loomes, C. Waddams Price, A. Moniche Bermejo and J.Y. Jeon (2017) ‘Switching Energy Suppliers: It’s Not All About the Money’, CCP Working Paper 17-5, available at:

Lack of participation in one market is also associated with lower participation in others too. Such observations could result from inherent characteristics, which are displayed across markets and situations; but there is some evidence that lack of participation in one context is more likely to result in similar behaviour in other situations (Waddams Price and Zhu, 2016b).⁶ A remedy which protects consumers in one market and may discourage participation (perhaps by delivering the benefits independently of the consumers' actions) may have negative externalities elsewhere.

Markets are not effective at ensuring that consumers will benefit equally from any innovation, including data portability. Indeed there is a danger that in pursuing such equality, overall benefits will be lost, as they are all reduced to a lowest common denominator. Other mechanisms designed to ensure equal access are a crucial aspect of fairness; and mechanisms should be explored and introduced to help those who are unable to participate because of either short term or longer term vulnerability. These may include collective action on behalf of consumers, though these face the challenge of low participation rates from those who are disengaged in other aspects of the market (Deller et al., 2017a),⁷ and legal obstacles for opt-out schemes where active participation is not required (Deller et al., 2017b).⁸

As discussed in Question 4 below, once people have the option to port data, then they lose their anonymity because now choosing not to port data reveals information [as does whether or not you ask for your data]. Thus those who do not have a good story to port to a rival firm are likely to face worse offers than they would do before data was portable and hence be less able to generate the sort of offer which would make switching worthwhile. Thus while this policy is clearly able to set some people free, others are likely to be more strongly tied to their existing supplier and their existing supplier may be able to make use of that fact in the offers they make in the future. A related point arises from temporary vulnerability. If this leads the raw data to present an adverse story [for example if payments were missed or delayed] and if the consumer is not able to credibly demonstrate to rival firms that this data is not representative, then such a consumer will continue to suffer an adverse effect from even a temporary period of vulnerability.

<http://competitionpolicy.ac.uk/documents/8158338/17199160/CCP+WP+17-5+complete.pdf/fdaaed88-56e5-44f9-98db-6cf161bfb0d4>.

⁶ Waddams Price, C. and Zhu, M. (2016) 'Empirical Evidence of Consumer Response in Regulated Markets', *Journal of Competition Law and Economics*, 12(1), pp.113-149.

⁷ Deller, D., M. Giuliotti, G. Loomes, C. Waddams Price, A. Moniche Bermejo and J.Y. Jeon (2017) 'Switching Energy Suppliers: It's Not All About the Money', CCP Working Paper 17-5, available at: <http://competitionpolicy.ac.uk/documents/8158338/17199160/CCP+WP+17-5+complete.pdf/fdaaed88-56e5-44f9-98db-6cf161bfb0d4>.

⁸ Deller, D., Bernal, P., Hviid, M. and Waddams Price, C. (2017) 'Collective Switching and Possible Uses of a Disengaged Consumer Database', CCP Report, available at: <http://competitionpolicy.ac.uk/documents/8158338/19064125/Collective+Switching+Report++August+2017.pdf/127c78b6-faad-4496-b198-f56862230896>.

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

(Wynne Lam) Data portability is commonly thought to facilitate switching. However, one needs to be cautious about the type of data that is included in the data portability rule. For instance, the new General Data Protection Regulation (GDPR) only covers data ‘provided by’ the data subject but not data ‘inferred or derived’ by the data controller. In Lam and Liu (2018),⁹ we show that if data portability and data analytics are not mutually exclusive (as in the GDPR), data portability may generate long-run inefficiencies if the value of big data service is high enough. The reason is that data portability not only facilitates consumer switching given a fixed level of data provision, but it also weakens consumer lock-in, which increases consumer willingness to provide more data to the data controller, which in turn enhances the incumbency advantage and makes future entry difficult. This casts some doubt on the effectiveness of data portability, especially in markets where big data analytics are prevalent.

Question 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?

(Morten Hviid) Before considering how data is published, we should consider what data is (collected and) published. It is said that “what gets measured gets managed”, and by implication, what does not get measured might not get managed. In deciding what information is published, should policy makers focus on that which consumers say they care about or that which others think they should care about? Consumers may reasonably vary in which aspects of firm performance they care about. How can that be reflected in the choice of data to be collected? Collecting and disseminating information is typically costly. Who decides where to draw the line on how much data is collected? Where performance is multi-faceted, who determines the resolution of any trade-off between the different dimensions in which a firm can do well or badly? If we let this trade-off be determined by the impact on the firm’s bottom line, then the decision on what to prioritise becomes very utilitarian. Is that always appropriate? Finally, while the firm may be best at communication, it is likely to do it in a way which benefits it, wherever possible.

Secondly, it is important to be aware of the power of what is sometimes known as the ‘unravelling principle’. This can be illustrated using scores on doors combined with a policy, which makes it “voluntary” for restaurants to display their score. If no-one displayed their score, all would be viewed as average which would have a detrimental effect on those with 5*, who would hence reveal their identity by displaying their score. One effect of this is that silence, i.e. not displaying, now leads to a worse inference by consumers who certainly exclude the possibility of anyone with a top rating keeping quiet. But then those with 4* are harmed significantly by being lumped in with all those who are worse and hence display their result. Consumers are equally capable of working this out, meaning it is even

⁹ Lam, W. M. W. & Liu, X. (2018) ‘How does Data Portability affect Entry?’, Working Paper.

worthwhile for someone who has an average score of 3* to reveal this. Empirically there is support for the fact that consumers are able to make reliable inference from silence, or to borrow from Conan Doyle, from the dog who did not bark in the night. The good news is then that it may be enough to give firms the option to reveal information. The bad news is that once we have given the option, no one has the option to hide their true identity.¹⁰ Unravelling is, as explained in the answer to Question 2, equally important to consumers when data is portable.

For a general discussion of information-based demand-side remedies, see Fletcher (2016).¹¹

The actual question has three parts:

a. Publishing information to incentivise improvements by firms directly

Where the information is not used to impact consumer behaviour, this would solely be about firms adapting to best practices. There may be cases where firms do not know what an efficient outcome can look like and where there may be benefits in ensuring that such information is shared. However, this has to be done with some care since information sharing among firms can have both pro- and anti-competitive effects, see Kühn and Vives (1995).¹²

b. Publishing information for consumers to use in their decisions - incentivising firms indirectly

Where the information does affect consumer behaviour, such as information about restaurant hygiene, e.g. scores on the doors, this can incentivise firms. The literature, see e.g. Garrod et al (2009)¹³ and Fletcher (2016)¹⁴, suggests two things about the best way to implement this. First, firms are likely to be better than civil servants and regulators at communicating with consumers. This is driven by firms having both stronger [monetary] incentives and more extensive experience in doing so. Secondly, the most effective use of a public body may be as a guarantor that the information provided by firms to consumers is correct. In assessing the effect of using information, one should keep the ‘unravelling principle’ in mind (see above).

¹⁰ See, Garrod, L., Hviid, M., Loomes, G., & Price, C. W. (2009) Competition Remedies in Consumer Markets. *Loyola Consumer Law Review*, 21(4), 439-495, pp.450 (footnote 40) for examples of the unravelling principle in action.

¹¹ Fletcher, A. (2016) ‘The Role of Demand-Side Remedies in Driving Effective Competition’. Available at www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf.

¹² Kühn, K-U., & Vives, X. (1995) Information Exchanges Among Firms and their Impact on Competition, Office for Official Publications of the European Community, Luxemburg. Available at <http://blog.iese.edu/xvives/files/2011/09/Information-Exchanges-and-their-Impact-on-Competition.pdf>. See also Kühn (2001), Fighting Collusion by Regulating Communication between Firms, *Economic Policy*, 16 (32), pp.167-197.

¹³ Garrod, L., Hviid, M., Loomes, G., & Waddams Price, C. (2009) Competition Remedies in Consumer Markets. *Loyola Consumer Law Review*, 21(4), 439-495. See in particular pp.449.

¹⁴ Fletcher, A. (2016) ‘The Role of Demand-Side Remedies in Driving Effective Competition’. Available at www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf.

One would expect information remedies to be particularly effective where the message is simple, such as hygiene, so that processing the information correctly is relatively straightforward. It is less successful where the information is complex, such as the success rate of a surgeon. In the latter case, the problem is that the star surgeons are more likely to get the more difficult cases and hence have a higher mortality rate. The correct inference from a surgeon having a high mortality rate is hence difficult to make without further information and analysis. There is a danger that if the information is simplified too much, consumers may pay too much attention to this simplified information and look no further.¹⁵

c. Discounts and compensation for poor performance

A starting point should be whether people really care about compensation and discounts. Some research seems to suggest that people are more concerned with naming-and-shaming where poor performance arises.¹⁶ Does that reflect the attitude of a significant part of the population? Does the attitude differ across sectors? Unless the public reaction is very extreme [i.e. all claim refunds, all stop their interaction with the firm], this may be insufficient to ensure good performance - the problem with securing performance where demand is transitory is well known from the Franchise literature.¹⁷

Unless the compensation is significant, it may look as if firms are prepared to pay rather than clean up their act. This is sometimes referred to as efficient breach - e.g. it is cheaper to cancel a flight and pay compensation than fly if the number of passengers who have purchased a ticket is very low. Note that there are obviously cases where delivering on a promise is too costly not just for the firm but also relative to the benefits flowing from delivery. It may hence be challenging to set the right level of compensation. Consumers may have a variety of views about firms taking such a cost-benefit approach to a decision of whether or not to perform, even if the level of compensation is set to ensure that the firm only chooses to breach their promise to deliver when this is the better overall outcome.

There is a second reason why setting the “right” level of compensation may be difficult. If the required compensation is very high, then there has to be safeguards against fraud. Such safeguards increase the hassle of getting the compensation and may affect uptake, reducing the effectiveness of compensation to guide firm behaviour appropriately.

While it is evidently easy to have automatic compensation for a train being late and the measure in this case is obvious and relevant, this is not the case for all products and for all

¹⁵ Fletcher, A. (2016) ‘The Role of Demand-Side Remedies in Driving Effective Competition’, especially section 2. Available at www.staticwhich.co.uk/documents/pdf/the-role-of-demand-side-remedies-in-driving-effective-competition-456067.pdf

¹⁶ A Stephan, ‘Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain’ [2008] 5(1) Competition Law Review, pp. 123-145. [2007 data show less concern for compensation]. Stephan, Andreas, Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA (July 2015). CCP Working Paper 15-8. [in the 2014 data, Stephan found that in the UK about three-quarter of the sample thought that damages for price fixing was appropriate - but slightly more wanted to see public naming and shaming.]

¹⁷ e.g. Brickley, James A., and Frederick H. Dark, 1987, “The Choice of Organizational Form: The Case of Franchising.” *Journal of Financial Economics* 18:401-20 [discussing passing trade along freeways”].

cases of poor service. Where there are clear guidelines to the level of compensation, e.g. for a delayed flight, and where the firm has information about both the failure to perform and the details of the person harmed, payment should be automatic. Where the consumer has to claim and where the firm determines the ease with which such claim can be made, the firm will invariably benefit from well-known behavioural biases, including the low take-up of opt-in, lack of confidence, lack of information, lack of time, etc.

Question 6. How can the government support consumers and businesses to fully realise the benefits of data portability across the digital economy?

(Wynne Lam) Our response to Question 3 applies to Question 6 as well.

(Karen Mc Cullagh) The right to data portability could be undermined if organisations charge unreasonable fees. It remains to be seen what fees, if any, UK companies will charge, and if they do, what approach the ICO (the national supervisory authority) will take, as they have not (yet) issued guidance on the matter. In the first GDPR data portability complaint in Austria,¹⁸ where the applicant wanted to access all their banking transaction history and was charged by the bank for a fee of €30, the Austrian Data Protection Authority ruled that the applicant should be allowed to access all their banking transactions free of charge.

Question 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?

(Karen Mc Cullagh) If data protection and privacy by design principles are embedded in the development process, and reviewed by a non-technical expert ethics board, then the correct balance is likely to be maintained. This involves a change of mindset - privacy and data protection concerns must shift from being an afterthought to an integral part of the planning and design process. It will require technical experts and innovators to keep in mind the mantra: Just because it is technically possible, does not mean it is good for society. The Facebook-Cambridge Analytica experience serves as a pertinent example - if the ethics board had included people from a humanities background, they would have quickly spotted the ethical and privacy flaws in tracking and tailoring political advertising.

Relatedly, one way of ensuring that privacy and data protection considerations are embedded in the design and operation of innovative practices is by requiring the completion of data protection impact assessments. These should be used to record the factors considered and weighting of competing considerations. Also, organisations seeking to develop innovative practices should be obliged to consult and comply with recommendations in reports produced by expert advisory bodies e.g. the Centre for

¹⁸ https://noyb.eu/wp-content/uploads/2018/06/dsb_dsgvo_auskunft.pdf (document in German).

Data Ethics and Innovation,¹⁹ and ethical frameworks developed by expert bodies e.g. The Ada Lovelace Institute,²⁰ The Alan Turing Institute,²¹ the Royal Statistical Society,²² the Nuffield Council on Bioethics,²³ the Wellcome Trust,²⁴ the Royal Society,²⁵ the British Academy,²⁶ and the Omidyar Network's Governance & Citizen Engagement Initiative.²⁷ At present there is no legal obligation for these recommendations to be followed. That should be changed - in particular, recommendations by the Centre for Data Ethics and Innovation should be binding (and should inform data protection impact assessments).

Question 8. What challenges do digital markets pose for effective competition enforcement and what can be done to address them?

(Morten Hviid) The primary challenge is to increase our understanding of what might happen, including our understanding of what features of digital markets are really new and different and what are just old wine in new bottles. While research is starting to offer some suggested guidelines, much more needs to be done, and the comments below are to a large extent providing more questions rather than more answers.

The first and fundamental question is what effective competition in a digital market [or well-functioning digital markets] might look like. Many of the markets are two-sided with the attendant issues which such markets raise. Digital markets may be more prone to firms occupying (temporary) monopoly positions. First mover advantages in information gathering may make entry difficult, making any monopoly position less temporary. Is the threat of entry sufficient to prevent consumer exploitation? Is ex-ante regulation needed? Is it likely to be effective? Digital markets differ from our standard undergraduate model of the market because a firm subject to consumer reviews on the platform cares about who it trades with. Matching supplier and buyer has become much more important, at least in some markets.

Does the CMA and sector regulators need to ramp up their capabilities [including their computer science capabilities] to analyse and understand digital markets? Can the available information help competition enforcers? As an example, when it comes to detecting bid-rigging, it might be possible to use data on past bids as a training sample for a supervised machine learning approach to flag up suspicious bids as they are received by the procuring organisation.

A second challenge arises from the large platforms being global firms, mostly located elsewhere for tax purposes. In reality, what powers do UK regulators have, in particular

¹⁹ <https://www.gov.uk/government/consultations/consultation-on-the-centre-for-data-ethics-and-innovation/centre-for-data-ethics-and-innovation-consultation>.

²⁰ <https://www.adalovelaceinstitute.org>.

²¹ <https://www.turing.ac.uk>.

²² <https://www.rss.org.uk>.

²³ <http://nuffieldbioethics.org>

²⁴ <https://wellcome.ac.uk>

²⁵ <https://royalsociety.org>

²⁶ <https://www.britac.ac.uk>

²⁷ <https://www.omidyar.com/our-work/governance-citizen-engagement>

post-Brexit, to bring successful actions against these firms? There have been many cases of the large global platforms taking over start-up firms. Analysing such mergers is challenging, as would be the implementation of any identified remedies.

Better information about consumers ensures better profiling and hence better targeting. Big data and AI enable firms to personalise both product and pricing, at least to some extent. The appropriate competition law response to this is not clear. In the extreme, the firm is using its superior information to provide the consumer with what he or she most wants, but at a price which may not leave the consumer with much consumer surplus. If the focus is on consumer surplus, then this is a problem in comparison to a more “Fordian” outcome where all products are the same, sold at a price which in the long run is equal to average costs. If we take a more total surplus approach, then this is not a problem unless it is difficult to redistribute via taxation; for example, because the firms are global platforms with tax domicile somewhere else. A lot depends on whether there are incumbency advantages to profiling and at least some of this will depend on data portability, as discussed elsewhere.

Profiling may also have adverse effects on diversity of experience. Once the algorithm realises you like a particular thing, it might decide to present you with more of the same.

Better consumer information potentially creates more active consumers and hence makes introducing successful products more worthwhile. The CMA has recently put a lot of store in the use of platforms to empower consumers, in particular price comparison websites (PCWs). The CMA and some sector regulators have also highlighted the problems caused by inadequate consumer activism. Better information should enable consumers to take a more active role. Alternatively, consumers may be able to sign up to algorithms that can act as their “rational self” and do the purchasing for them. If consumers are more active, firms will respond, introducing new products and services. Mostly this is going to make markets work better for consumers. However, it is important to be aware that there can be incentives for firms to overinvest in features where competition becomes about getting traffic through your platform.

Better information about rivals may either spur competition, relax competition or even lead to collusive behaviour. There has recently been a lot written about algorithms and whether they are likely to lead to more collusion, in particular collusion which is either hard to detect or which is not actually illegal. Algorithm-driven collusion means that pricing bots are used to monitor and maintain supra-competitive prices charged by rival businesses. AI may eliminate some of the reasons why collusion is unsustainable (for example, machines could facilitate collusion among many firms, or could be trained to detect cheating) but at this stage a lot of the existing research is speculative in nature. More work is needed to understand if this is likely to lead to more collusion, and whether we need new policy instruments in response.

Question 9. Is the legal framework that covers consumer-to-consumer transactions appropriate to promote consumer confidence?

(Sebastian Peyer) We think that the current legal framework regarding both consumer protection and consumer confidence is appropriate and does not require changes. Attempts to regulate digital markets without evidence of potential negative effects on consumers may harm consumer confidence and stifle innovation. Further research is required to understand if and how platforms change consumers' awareness of their rights and obligations, and whether changes of the current legal framework would improve confidence in digital markets. The empirical evidence currently available does not indicate that consumers suffer harm and, thus, does not support changes to the legal framework to protect consumers in consumer-to-consumer transactions. Our response focuses on platforms through which consumers transact with other consumers such as eBay or Airbnb as this seems to be the focus of this question. We would like point out that peer-to-peer platforms differ considerably from one another and regulating a particular issue in one of those digital markets may risk regulating a particular business rather than the entire market.

Who is a consumer and who is a trader?

Peer-to-peer platforms have changed how consumers purchase products and services, and from whom they buy. Peer-to-peer platforms connect buyers and sellers both of whom are often consumers and do not sell as part of a 'trade'. This means that consumer protection laws do not normally apply to those transactions. The framework that applies to those consumer-to-consumer transactions - apart from the terms and conditions of the respective platform operator - is ordinary contract law.

We agree with the Government that there are potential areas in which it is not always clear whether a seller is a consumer or can be characterised as a trader (para 118 of the Green Paper). However, clarifications in that regard should not be imposed by regulation. Firstly, the uncertainty regarding the application of consumer protection rules is not primarily a legal issue. The uncertainty stems from the fact that we observe a number of borderline cases in which the issue is one of applying existing definitions of trader and consumer to the real world. Recent legislation, such as the Consumer Rights Act 2015, defined a trader in section 2(2) as “a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.”²⁸ The same Act refers to a consumer as “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession” (section 2(3)). One can think of a number of instances in which it is not clear whether a person occasionally letting a spare bedroom via Airbnb or selling second-hand furniture via eBay qualifies as a consumer or trader.²⁹ Changing the legal framework to define those terms to a more fine-grained and platform-specific level will be problematic as it reduces any flexibility courts may have in interpreting existing consumer protection

²⁸ See also Article 2 of Directive 2011/83/EU on Consumer Rights.

²⁹ eBay does not provide a definition of consumer or trader but the platform makes sure that business sellers are aware of consumer protection rules (<https://pages.ebay.co.uk/help/policies/selling-practices.html>, <https://pages.ebay.co.uk/help/sell/business/international-business-sellers.html>).

laws and adopting them to consumer-to-consumer transactions if a consumer protection gap was identified. Secondly, consumer confidence or the potential lack thereof may relate to the lack of knowledge of existing rules. Consumers have normally only a very basic understanding of the rules that apply to their transactions. Platforms enabling peer-to-peer transactions could be required to clearly warn sellers or buyers that certain rules may apply to them if they are about to conclude a transaction. But before imposing rules on platforms, we would need to establish that this is indeed an issue.

Lack of evidence regarding consumer harm and consumer confidence

The purpose of regulation is to prevent and correct market failures and to protect public interests. The Green Paper raises the question of whether consumer confidence requires (further) protection. We think that there is no compelling evidence that consumers' confidence is harmed or consumers require particular protection in consumer-to-consumer transactions that are concluded in digital markets. Any regulatory action aimed at changes in the legal framework would require evidence of market failure or harmed interests. The OECD concluded in its 2015 report that we do not possess such empirical evidence; although, it acknowledged that peer-to-peer platforms could have a number of potential negative effects on consumers.³⁰ Before considering an intervention in the market, the Government should gather empirical evidence that would prove that the market is failing or public interests (such as consumer confidence) are affected.³¹

If the Government considers other (non-contract law) interventions, it needs to judge whether those changes are likely to increase consumer confidence beyond the existing level. Platforms use user-based assessments to review performance and increase transparency. Reviews are ubiquitous and are either part of the platform or hosted by third-party platforms and webpages. While rules for reviews may change, customers do not appear to lack trust in digital markets. The Government's Green Paper quotes from an EU study demonstrating that consumers' trust in online-shopping is exceptionally high in the UK. This suggests that consumers do not lack the confidence to engage with platforms and digital markets.

Why protecting consumers in consumer-to-consumer transactions?

If the Government plans to expand the protection of consumers in consumer-to-consumer transactions, it may be useful to remind the Government that the purpose of consumer protection rules is to balance bargaining power and information asymmetries that usually exist between consumers and traders. Traders acting for the purpose of business are normally in a better bargaining position, i.e. consumers do not negotiate contract terms but accept terms and conditions imposed on them by the trader. Traders, compared to consumers, also have better information about the product or service they offer, thus

³⁰ OECD, Background Report on 'Protecting Consumers in Peer Platform Markets' (2015).

³¹ Some digital markets may require attention but not for reasons the Government has outlined in its Green Paper (consumer protection and consumer confidence). Short-term rental of accommodation via platforms such as Airbnb or HomeAway has allegedly led to housing issues and breaches of local laws in some urban areas. See, for example, Roberta A. Kaplan; Michael L. Nadler, 'Airbnb: A Case Study in Occupancy Regulation and Taxation' 82 (2015-16) U. Chi. L. Rev. Dialogue 103 and Jake Wegmann; Junfeng Jiao, 'Taming Airbnb: Toward Guiding Principles for Local Regulation of Urban Vacation Rentals Based on Empirical Results from Five US Cities' 69 (2017) Land Use Policy 494.

justifying the imposition of rules protecting consumers. Extending the use of consumer protection rules to consumer-to-consumer transactions would require evidence that consumer-sellers or consumer-buyers have greater bargaining power than the other side or that considerable information asymmetries exist that are not already addressed by contract law. Some platforms already oblige consumer-sellers to, for example, offer and accept returns when goods are not as described (chiefly reflecting the terms implied by sections 13 and 14 of the Sale of Goods Act 1979), thus accounting for potentially existing information asymmetries.³² More importantly, in the absence of any particular platform framework to handle complaints or goods of unsatisfactory quality, consumers will be able to fall back on standard contract law rules. If, for example, a consumer is induced to enter into a contract by a false statement of fact made by the consumer-seller, the buyer can seek a remedy for misrepresentation. In the absence of unequal bargaining power or significant information asymmetries between contracting parties, digital markets do not pose challenges for consumers that need to be addressed applying consumer protection rules to consumer-to-consumer transactions.

Question 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?

(David Deller) Here we provide a framework to consider these issues rather than evidence on personalised prices and search results. Policymakers should be cautious regarding limiting price discrimination and should view restrictions as fundamentally being a political question because the case for imposing restrictions will depend heavily on judgements regarding distributional concerns. The role of distributional objectives in the two examples (paragraph 124) given of the EU restricting price discrimination is clear. The first case involves gender equality and the second, regarding the EU's ban on geo-blocking, is motivated by the desire for European integration.

Personalised pricing, personalised search and insurance markets

When thinking about personalised pricing and personalised search, in each instance it is important to adopt the correct theoretical framework and consider the precise empirical details of the particular market/platform being considered. In particular, personalised pricing in insurance markets requires a separate theoretical framework to other situations.

The majority of concern appears to relate to online information allowing a greater degree of price discrimination than in the offline world. Where price discrimination is the main concern, any case for limiting price discrimination is likely to link to distributional objectives, hence, a decision to limit price discrimination is more appropriate for political decision makers than unelected regulators.³³ The appropriate role for regulators is to

³² See, for example, eBay's Money Back Guarantee scheme when buyers claim that items are not 'as described' (<https://pages.ebay.co.uk/help/sell/return-policy.html>).

³³ That the default tariff cap in the domestic energy market is being introduced through primary legislation rather than a regulatory rule making appears appropriate in this light.

provide evidence on the size of price differentials, who receives the ‘high’ vs ‘low’ prices and the likely consequences of restricting price discrimination.

Concerns around the negative consequences of search personalisation can appear similar to price discrimination in that a key concern is platforms choosing to direct consumers to a particular product delivering a lower consumer surplus (the product is higher priced and/or lower quality) because the platform receives a higher commission from doing so. However, there is an important difference between the two issues: while basic economic theory indicates that price discrimination increases total welfare³⁴ as long as the total quantity purchased increases, the welfare impact of search personalisation is more complex to assess, not least because there are three actors: consumers, suppliers and the platform itself. If a platform finds it is more profitable to deliver less effective matching between consumers and suppliers (i.e. the search engine matches consumer A to supplier A and this match delivers lower consumer surplus and/or supplier profits than a match between consumer A and supplier B), it is possible for search personalisation to reduce total welfare. However, at least when there is competition between platforms, the likelihood of total welfare being reduced by search personalisation appears low as consumers and suppliers seem likely to be drawn to the search engine offering the most effective matching. Nevertheless, we agree more research in this area would be valuable. Dinerstein et al³⁵ is an interesting recent paper highlighting the trade-offs a platform may face when deciding how to present search results and, in particular, the trade-off between providing relevant search results and search results maximising price competition between suppliers.

Insurance markets require a different framework because of the information asymmetries involved and concern about groups being uninsured against certain risks. Insurance markets can be characterised as having two types of equilibrium: ‘pooling’ or ‘separating’. In a pooling equilibrium, individuals are charged a common price, all individuals receive insurance and the higher costs of higher-risk individuals are spread across all consumers. In a separating equilibrium, different groups are charged different insurance premiums according to their risk of making an insurance claim. There are two issues with separating equilibria: first, in competitive insurance markets there is likely to be a tendency towards separating equilibria as firms can win business by offering a lower price to lower risk clients; and, second, in separating equilibria some high-risk individuals may face such high prices they can no longer purchase insurance and go uninsured. Firms may still apply price discrimination and search personalisation to insurance products. Evaluating the merits of different outcomes is likely to be very challenging.

The increasing quantity of online information may provide additional ways for insurers to identify groups with different risks and warranting different priced insurance. This increased potential for separating equilibria and people going uninsured is likely to vary across markets. Ultimately, where concern about the uninsured is sufficient, as in Europe regarding

³⁴ Where total welfare is the sum of profits received by firms and consumer’s surplus.

³⁵ Dinerstein, Einav, Levin, and Sundaresan (forthcoming), ‘Consumer Price Search and Platform Design in Internet Commerce’, *American Economic Review*.

healthcare, a pooling equilibrium may be enforced by making insurance compulsory and tight regulation of insurance prices.

The comments below relate specifically to personalised pricing, i.e. price discrimination in general markets.

Total surplus vs consumer surplus

The textbook economics view that price discrimination is generally positive is based on an assessment of total surplus; in particular, price discrimination potentially allows consumers with a low valuation (low ability to pay) for a product to be charged a lower price and purchase the product for the first time. That high valuation consumers pay a higher price under price discrimination is not seen as a problem since the higher price simply transfers surplus from high valuation consumers to firms. Ultimately, the higher profits from price discrimination will be distributed to shareholders who are still citizens in society, and there remains the possibility to tax profits to fund policies to alter the distribution of resources across society. While the presumption in favour of price discrimination is reasonable, it is valuable to highlight some significant implications for government decision making and understanding the political pressures around price discrimination.

First, if different consumers face different prices for the same product there is the question of whether citizens consider this to be intrinsically unfair. Considering a specific market, it seems natural the group paying the high price will be opposed to price discrimination, while those paying the low price are likely to welcome price discrimination. As a result general survey evidence concerning how much consumers dislike price discrimination needs to be considered carefully. For a survey referring to a specific market, one might expect the proportion reporting a dislike of price discrimination to be related to the proportion paying the 'high' price as a result of price discrimination.

If surveys report a general dislike of online price discrimination, the first question is whether people asked about offline price discrimination would provide materially different answers? Indeed, one may question whether consumers fully appreciate the multitude of price discrimination they experience in their offline lives. Another question is, if a majority of households report a dislike of personalised prices, how should this be interpreted? Does it indicate: (a) that summing across all the markets they face, the sampled consumers think price discrimination makes them financially worse off, (b) there is a form of loss aversion so households afford greater weight to situations where they are disadvantaged by price discrimination, or (c) consumers have an inherent preference for fairness, such that they would be willing to accept a higher price in order for all consumers to pay the same price?

Second, the political pressures related to price discrimination are likely to be closely associated with whether groups who benefit or suffer from price discrimination have the greater political voice. Where the question is about limiting price discrimination, it is perhaps naïve to think political pressures around price discrimination will disappear once limits are imposed. Prior to price discrimination being restricted those paying the 'high' price may make representations to politicians; once price discrimination is restricted those

consumers experiencing an increase in price (those previously on a low price) may make political representations that price discrimination should be unlimited.

Third, in general it is not possible to use the difference between the 'low' and 'high' price to calculate the 'gain' to consumers from ending price discrimination. After restrictions on price discrimination are imposed, the market will reach a new equilibrium. One might think the new equilibrium price will lie somewhere between the low and high prices; however, depending on the detailed competitive structure of a market it is possible for *all* consumers to experience a price increase after price discrimination ends. For example, Hviid and Waddams Price (2012)³⁶ discuss the negative competitive consequences of imposing regional non-discrimination clauses in the domestic energy market. Also, if monetary savings³⁷, i.e. price differentials, are the key motivation for engagement and switching in a market one would expect a drop in engagement and switching following limitations on price discrimination, which in turn may reduce competition and raise prices for all consumers.

Fourth, paragraph 122 correctly identifies our online behaviour provides new sources of information to segment consumers and fine-tune price discrimination so that firms' online pricing moves closer to the concept of first degree price discrimination where each consumer is charged a different price *and* a consumer is charged a different price for each unit they consume. Under first degree price discrimination all consumer surplus is extracted by a firm such that consumers are indifferent between purchasing and not purchasing a product. Increasingly accurate price personalisation therefore shifts surplus (the gains from trade) from consumers to firms. At a procedural level, this may be significant as decision rules that seek to maximise consumer surplus may be affected by this decrease in consumer surplus.

More fundamentally, there is the question of whether there should be policy concern about this shift in surplus from consumers to firms. Again at the crux of the issue are distributional concerns. In a simplistic representative agent model of a closed economy, the distributional concerns are limited: each agent is both a consumer and a shareholder, so increases in profits are returned to citizens/consumers. That profits are ultimately distributed to shareholders who are real-world citizens (either as dividends or capital gains) should not be forgotten; however, even though a large proportion of households are shareholders (at least indirectly through pension funds), distributional concerns around increased consumer surplus extraction do not disappear. In particular, shareholdings are unevenly distributed

³⁶ Hviid, M. and Waddams Price C. (2012) 'Non-Discrimination Clauses in the Retail Energy Sector', *Economic Journal*, 122(August), pp. F236-F252.

³⁷ CCP research consistently finds monetary savings to be a key driver of switching in the domestic energy market, see: (i) Deller, D., M. Giulietti, G. Loomes, C. Waddams Price, A. Moniche Bermejo and J.Y. Jeon (2017) 'Switching Energy Suppliers: It's Not All About the Money', CCP Working Paper 17-5, available at: <http://competitionpolicy.ac.uk/documents/8158338/17199160/CCP+WP+17-5+complete.pdf/fdaaed88-56e5-44f9-98db-6cf161bfb0d4>; (ii) Waddams Price, C. and M. Zhu (2016b), 'Empirical Evidence of Consumer Response in Regulated Markets', *Journal of Competition Law and Economics*, 12(1), pp. 113-149; and (iii) Miguel Flores, M. and C. Waddams Price (2013), 'Consumer Behaviour in the British Retail Electricity Market', CCP Working Paper 13-10, available at: <http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-10.pdf/2ee68805-470a-4fea-b5f7-7678f52b9971>.

across society and it is commonly stated that the wealth distribution is less equal than the income distribution and the income distribution is less equal than the expenditure distribution. This relationship between distributions in the aggregate suggests increased consumer surplus extraction is likely to shift surplus towards more well-off members of society, i.e. it is likely to be regressive. Nevertheless, accurately assessing the complete distributional impact of price discrimination is likely to be difficult due to the need to know: (a) the distribution of shareholdings and how these vary by market, and (b) the consumer surplus gain price discrimination still offers for consumers with a low willingness/ability to pay.

While increased extraction of consumer surplus is potentially regressive, in a closed economy there is an obvious mechanism to deal with the issue: corporate taxation or the taxation of dividends/capital gains. This taxation would allow surplus (profits) to be re-distributed back to consumers, while still allowing price discrimination to maximise the quantity of goods traded. In this setting taxation is an alternative to restricting price discrimination.

However, the online world is not a closed economy, it is a global world where most of the large platforms (e.g. Amazon, Google, Apple, etc.) have their profits taxed in jurisdictions other than the UK. This means increased price discrimination may see consumer surplus being transferred from UK consumers to citizens in other jurisdictions, and the UK taxation system may not be able to redistribute profits, as suggested above, in a meaningful way. Yet, even if the UK government decides to restrict price discrimination on distributional grounds, it may not always be feasible when dealing with foreign domiciled firms. Limiting price discrimination will reduce the profitability of operating in the UK and some firms may threaten to close their UK facing operations in which case the UK government will have to determine the credibility of such threats when setting policy.

Fifth, over the past thirty years the de-regulation process and various public sector reforms have increased the role of markets and choice. This has been viewed as a mechanism for enabling competition, leading to lower prices, higher quality products/services, and allowing consumers to access products/services more closely matching their needs. However, for such a framework to be effective for consumers, consumers need to be able and willing to engage. As the retail energy market shows, price discrimination can occur according to engagement level (or other behavioural biases), e.g. the 'disengaged' are charged a higher price as they do not leave their current firm when their price is increased. If engagement/behavioural biases have an association with characteristics such as education and/or income, price discrimination according to engagement potentially represents an uncomfortable distributional issue.³⁸ Rather than a consumer facing high prices in some markets and low prices in other markets (according to their varying preferences), it potentially suggests some consumers are likely to experience high prices across a range of markets. If it is more 'vulnerable' or lower income consumers who end up with the higher prices across a range of markets, there may be political/policy concern.

³⁸ Especially if it occurs where retail markets have been created by policymakers, e.g. energy.

Awareness, verifiability and limits on firms' ability to price discrimination

Paragraph 123 highlights that some consumers are unaware they are experiencing price discrimination online. Again, it is worth considering whether this is different to knowledge about the offline world?

If consumers truly dislike price discrimination (i.e. they dislike it even when they receive the low price), one might expect companies to actively promote cases where they follow uniform pricing as this should attract additional customers. If such marketing is relatively rare, it potentially suggests the profitability gains from an increased volume of transactions do not outweigh the reduced opportunities for consumer surplus extraction when uniform pricing is followed. In turn, this may be evidence that consumers' true preferences around price discrimination are different to their stated preferences.

Even if consumers do value uniform pricing, there is the question of how a consumer, or a policymaker, could verify that price discrimination is not occurring? An inability by firms to credibly signal uniform pricing to consumers, could deter uniform pricing strategies as if marketing statements are not believed, a firm will not experience an uplift in sales from pursuing them. Equally, if a policymaker receives a commitment that a firm will not price discriminate, how does it know that the commitment is being upheld? Is the policymaker dependent on whistleblowers? Or is the policymaker reliant on the vigilance of consumers and/or a large effort to monitor prices directly? Also, are there ways a firm can technically comply with a uniform pricing policy/requirement while still increasing the extraction of consumer surplus? For example, while supermarkets may adhere to a national pricing policy, i.e. a single product is priced the same throughout the UK, they can still alter the products they stock in each store e.g. higher profit margin/higher priced coffees are stocked in wealthier areas.

Equally, if a policymaker is concerned about price discrimination according to specific customer characteristics, e.g. their online search behaviour, there may be a difference between evidence consistent with/suggestive of such price discrimination and *proof* of price discrimination according to the specified characteristics. For example, considering the case studies on pg40 of the Green Paper, suppose a consumer sees one price on a website, then deletes their browsing history and receives a different price from the same website a few minutes later. Such an experience is certainly suggestive of price discrimination based on one's browsing history, but it is not definitive proof: in the time between the first and second website visit, other 'environmental' factors could have changed that are the actual triggers for the price change, e.g. prices could be set by time of day, in response to searches performed by other consumers or changes in stock levels, etc. Proof of price discrimination according to particular characteristics may require access to a firm's internal documents/computer systems.

Last, if there is concern about price discrimination, it is worth considering the conditions required for price discrimination and whether altering these conditions offers a way

forward. There are two main conditions for price discrimination³⁹: (i) market power, and (ii) the no arbitrage condition⁴⁰. In terms of physical goods, the online world potentially has characteristics undermining both of these conditions: compared to the offline world consumers gain access to a wider variety of sellers in a range of geographic locations, and services such as eBay offer the opportunity for consumers to resell their purchases. A potential limitation of this argument is if a consumer accesses the wide range of sellers through a monopolistic platform and the platform collects information to enable price discrimination by the underlying suppliers or steers consumers to particular sellers. For services, price discrimination is likely to be easier for firms/harder to address because: (a) it is difficult to re-sell services, and (b) the characteristics of services tend to be less well-defined so search engine results identifying the cheapest/best product may be less effective at combating market power. Finally, even if market power is tackled from the supply side (i.e. there are more suppliers), if there is a natural incumbent and consumers remain disengaged the incumbent will retain unilateral market power.

Question 11. Should terms and conditions in some sectors be required to reach a given level of comprehension, such as measured by online testing?

(Sebastian Peyer) Yes, terms and conditions should be simplified and tested against consumer understanding to reach a particular level of understanding for the reasons that were put forward in the Green Paper and are supported by a growing body of academic literature.⁴¹ Ayres and Schwartz have argued that terms and conditions of online contracts could be further improved by testing them against consumer expectations, warning consumers when their expectation of more favourable terms is not matched by the actual terms and conditions.⁴²

Question 17. Do you agree with the initial areas of focus for the Consumer Forum?

(David Reader and Michael Harker) In addition to proposing the creation of a government-regulator Consumer Forum, Chapter 5 of the Green Paper identifies a number of themes related to the Government's vision for utilising competition to deliver consumer benefits and for facilitating stronger interactions between government and regulators. These are key themes involved in CCP's ongoing research into the statutory and institutional context of energy markets,⁴³ as part of its wider UKERC-funded project on 'Equity and Justice in Energy Markets'. As a case study, the regulation of retail energy markets has the potential to provide valuable insights into several of the issues

³⁹ Taking the presence of consumers with different demand elasticities as a given.

⁴⁰ This condition requires those consumers purchasing a product at a low price to be unable to re-sell their purchases to consumers being charged the higher price.

⁴¹ See, for example, Oren Bar-Gill, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* (Oxford University Press 2012).

⁴² Ian Ayres; Alan Schwartz, 'The No-reading Problem in Consumer Contract Law' 66 (2014) Stanford Law Review 545.

⁴³ CCP's UKERC-funded project on 'Equity and Justice in Energy Markets', Research Package 1: Statutory and Institutional Context.

Details available at <http://competitionpolicy.ac.uk/research/research-projects/equity-and-justice-in-energy-markets/rp1>.

raised in Chapter 5, and we draw on some of the emerging findings from the project’s elite interviews and archival research to respond to Question 17.

It is important to note that previous Parliamentary Committees and Government reviews have emphasised the importance of regulators being (i) assigned a clear statutory remit, (ii) issued a clear steer on how their duties should be prioritised, and (iii) protected from having to decide on political policy issues (i.e. ensuring there is a clear dividing line between government and regulator responsibility).⁴⁴ A case in point is the BIS *Principles for Economic Regulation* which, in 2011, saw the Conservative-Liberal Democrat Coalition commit to taking the opportunity to clarify regulators’ duties where appropriate (and as and when frameworks are reviewed), and resisting the temptation to add new duties to a regulator’s remit without first considering the knock-on impact to the legislative framework as a whole.⁴⁵ The underlying concern here is that a large number of duties increases the potential need for regulators to trade-off conflicting duties in their decision-making, including the duty to promote competition. This proved to be a key line of enquiry in the CMA’s Energy Market Investigation (EMI), which considered whether the perceived ‘downrating’ of Ofgem’s duty to promote competition under the Energy Act 2010 had the effect of producing decision-making that affords less emphasis to effects on competition. This perceived downrating can be observed in *Figure 1*, below, along with an illustration of how DGGS/Ofgem’s general duties with regards to gas have proliferated since privatisation.

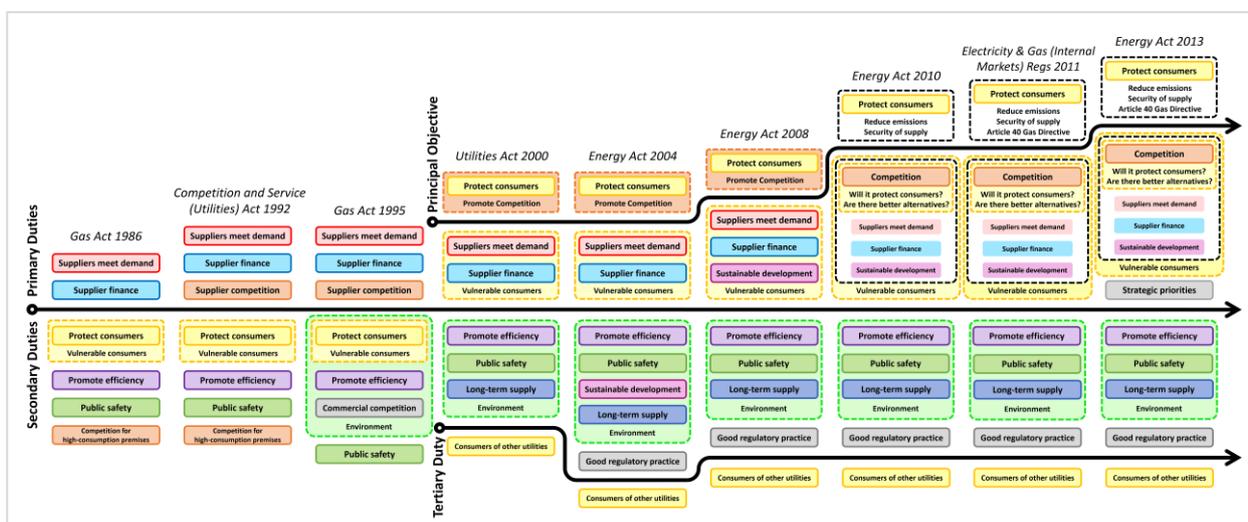


Figure 1. Evolution of the UK energy regulator’s general duties in respect of gas. [Source: Harker and Reader (forthcoming) from CCP’s UKERC-funded project on ‘Equity and Justice in Energy Markets’].

The broad list of Ofgem’s general duties affords it a wide discretion over how to interpret its legislative remit, meaning there is confusion surrounding the precise extent to which

⁴⁴ Regulators Committee, *UK Economic Regulators* (HL 2006-07, 189-I) para 3.13; Department for Business, Enterprise & Regulatory Reform, *Government response to UK Economic Regulators report* (BERR, 31 January 2008) para 1.1; Department of Business, Innovation & Skills, *Principles for Economic Regulation* (BIS, 12 April 2011) para 11.

⁴⁵ BIS (n 44) para 11.

Ofgem can intervene in pursuit of certain duties. For example, Ofgem has repeatedly taken the view that interventions which stand to ‘have significant distributional effects’ are a matter for Parliament and not the regulator,⁴⁶ while – in contrast – the Government has previously suggested that Ofgem possessed the requisite powers to implement a wide-ranging price cap for certain types of default tariff, and that Ofgem should exercise these powers to the benefit of consumers.⁴⁷ This is indicative of the uncertainty surrounding the legislative remit of UK regulators with an extensive list of general duties and, when one factors in the very real threat of judicial review, there are clear incentives for regulators to adopt a cautious – potentially, an overly cautious – approach to distributional issues. Only when a regulator has clarity on its statutory remit can it confidently interpret how far it can go in the pursuit of outcomes that benefit specific groups of vulnerable consumers. Therefore, to elaborate on paragraph 178 of the Green Paper, regulators must not only be ‘willing and able to take action to prevent harm’ but also *aware* that they have a legitimate basis on which to take action. In turn, we agree with the Green Paper’s proposal to assign the Consumer Forum a focus of developing ‘the principles to determine whether government or regulator should act in dealing with a particular problem’,⁴⁸ in the anticipation that – over time – these principles would “sharpen up” the respective roles of each institution and ensure that consumers do not suffer as a result of neither institution intervening to correct a market failure.

In specific reference to the regulators’ duty to promote competition, the way in which the Green Paper phrases this duty (i.e. ‘to protect consumers which includes promoting competition as far as possible’⁴⁹) touches upon an issue we have encountered regarding the possible misinterpretation of the competition duty in practice. The precise wording of Ofgem’s competition duty introduced by the Utilities Act 2000 (namely, to protect consumers ‘wherever appropriate by promoting effective competition’) would seem to place less emphasis on promoting competition than an ‘as far as possible’ wording. Indeed, one of our elite interviewees (with experience of working within Ofgem) noted instances of senior members ‘misremembering’ their competition duty as being ‘to promote the interests of consumers wherever possible through the promotion of competition’ which, in the interviewee’s opinion, tipped decision-making more in the direction of promoting competition than the legislation stipulated.⁵⁰

But while a misreading or misremembering of the competition duty may see regulators afford it more emphasis than legislation prescribes, the CMA has found that changes to the arrangement of Ofgem’s duties in 2010 may have seen competition afforded too little emphasis on certain occasions. The Final report of the CMA EMI concludes that the arrangement of Ofgem’s duties after the Energy Act 2010’s so-called ‘Paragraph 1(C)’ amendments (which removed competition from Ofgem’s principal objective and also

⁴⁶ See e.g. oral evidence delivered by Ofgem Chief Executive Dermot Nolan to the BEIS Committee; Business, Energy and Industrial Strategy Committee, *Oral evidence: Energy price caps* (HC 2017-19, 470-1) Q74.

⁴⁷ See statement by Greg Clark MP; HC Deb 27 June 2017, vol 626, col 452.

⁴⁸ BEIS Consumer Green Paper, para 180.

⁴⁹ *ibid* para 173.

⁵⁰ CCP, *Equity and Justice RP1 Interviews*, Interview I-8, lines 201-210.

requires Ofgem to consider whether promoting competition will protect consumer interests and whether there are better alternatives available) was ‘likely to constrain Ofgem’s ability to promote competition or lead to confusion as to its role in promoting competition’.⁵¹ Yet, despite the CMA’s recommendation that the role of competition within Ofgem’s duties be clarified⁵² (namely, by deleting the Paragraph 1(C) amendments⁵³), it is notable that this is the only CMA remedy that the Government chose to reject outright,⁵⁴ despite a previous commitment by David Cameron’s Conservative government to amend the duties while drawing on the CMA’s findings.⁵⁵

Our research findings cast serious doubt on whether the current general duties of the UK sector regulators (in particular, the wording of the competition duty and its potential conflict with other duties) will permit the regulators to encourage the competitive markets that the Green Paper envisions. Therefore, to ensure that the Government’s ‘refreshed approach to regulatory policy and the use of competition’ is truly transformative, there is a rational basis for the Government to draw on the 2007 Lords report and the 2011 BIS Principles and to revisit the prospect of undertaking a wide-ranging ‘simplification’ of regulators’ duties. This could produce numerous benefits, including: (a) reducing potential conflicts between duties and thereby alleviating the need for potentially arbitrary value judgements when trading-off duties; (b) greater consistency and predictability in the decision-making process to the benefit of market participants and potential investors; (c) reducing the risk of regulatory effectiveness being diluted by the pursuit of “too many” duties;⁵⁶ (d) renewing and reinforcing the status of competition as a driver of consumer benefits (with clear principles for protecting the interests of vulnerable consumers); (e) greater uniformity between regulatory assessments, allowing for more effective cooperation between regulators in different sectors, and (f) an opportunity to recast the duties so they are more representative of the modern day challenges faced by consumers and markets.

Short of a wide-ranging simplification (which would require legislative realignment), the introduction of a Consumer Forum could, in theory, go some way towards addressing the confusion surrounding the respective roles of government and regulators when it comes to deciding on redistributive issues. This proved to be one of the most pressing issues that our interviewees felt the Government should address, and it is commendable that BEIS has included this as a stated aim in the first sentence of Chapter 5. We agree with the Green Paper’s suggestion that government has an important role to play in markets that exhibit traits of significant public policy concern (paragraph 173). Indeed, many of our interviewees considered it inevitable that government will have a role to

⁵¹ Competition and Markets Authority, *Energy Market Investigation - Final report* (CMA, 24 June 2016) para 18.23.

⁵² *ibid* para 18.28.

⁵³ *ibid* para 19.278.

⁵⁴ Department for Business, Energy & Industrial Strategy, *Government Response to the CMA Energy Market Investigation* (Policy paper, 26 February 2018) 3 and 7.

⁵⁵ HM Treasury, *Budget 2016* (HC 2015-16, 901-I) para 2.349.

⁵⁶ This was a prevailing view among interviewees, who suggested that the proliferation of regulatory objectives had made it more difficult to pursue any one of them successfully.

play in independently regulated sectors that attract a high degree of political and media salience.

The Government is, however, right to allude to the fact that a more coordinated relationship between government and the regulators may have ramifications for perceptions of independence by prospective investors. Uncertainties posed by Brexit and reforms to the UK's foreign investment regime means prospective investors are likely to need more convincing than was once the case,⁵⁷ so they must be confident that the Consumer Forum does not possess a de facto decision-making role, where government departments seek to influence the decisions of regulators on an ad hoc basis. Procedural transparency should therefore be a key element of the Forum's initial focus if it is to allay suspicions of encroaching on regulatory independence.⁵⁸

Question 18. Have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers?⁵⁹

(See footnote 51)

Question 19: Does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition?⁶⁰

(See footnote 52)

Question 20. Is the competition regime sufficiently equipped to manage emerging challenges, including the growth of fast-moving digital markets?

(Peter Ormosi) Ensuring that merger control does not hinder businesses' innovation efforts should be a key objective of competition authorities. Commentators argue that DG COMP has taken a new Innovation Theory of Harm (ITOH) approach in some of their recent merger decisions. The ITOH means that mergers in concentrated markets with low entry barriers are assumed to reduce innovation, and the burden of proof falls on the merging parties to demonstrate the opposite. There is limited evidence on how specific merger decisions affected innovation in the past. In a recent paper, Bennato et

⁵⁷ David Reader, 'Extending 'National Security' in Merger Control and Investment: A Good Deal for the UK?' (2018) 14(1) IBA Competition Law International 35.

⁵⁸ The majority of our interviewees favoured 'more transparent discussions' between regulators and government; although, some reported the effectiveness of a designated "go-between" (a senior member of the regulator who would maintain a dialogue with the sponsoring government department).

⁵⁹ This question is responded by Bruce Lyons from the Centre for Competition Policy in a separate submission to BEIS following the structure of Competition Law Review, available at <http://competitionpolicy.ac.uk/documents/8158338/24754029/Lyons+BEIS+competition+law+review+and+consumer+green+paper.pdf/edc9574b-b929-3ade-8971-60693a4356e8>.

⁶⁰ This question is responded by Bruce Lyons from the Centre for Competition Policy in a separate submission to BEIS following the structure of Competition Law Review, available at <http://competitionpolicy.ac.uk/documents/8158338/24754029/Lyons+BEIS+competition+law+review+and+consumer+green+paper.pdf/edc9574b-b929-3ade-8971-60693a4356e8>.

al (2018)⁶¹ offers evidence that the 5-to-3 consolidation of the HDD market did not lead to a reduction of innovation activity in the HDD market - possibly because of the increasing competitive pressure from a neighbouring technology (SSD). Our paper demonstrates that even in a very concentrated market, where entry was deemed unlikely at the time of the merger decision, technological development can completely change market dynamics. For this reason, we believe it is crucial that competition regimes abstain from introducing an innovation theory of harm and review each merger on a case-by-case basis.⁶²

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⁶¹ Bennato, Davies, Mariuzzo, Ormosi (2018) The Effect of Market Consolidation on Innovation in the HDD market, CCP Working Paper 18-4, available at: <http://competitionpolicy.ac.uk/documents/8158338/24898393/CCP+WP+18-4+complete.pdf/bc24240e-1410-c62e-a93d-e242b7be95cf>.

⁶² This question is also responded by Bruce Lyons from the Centre for Competition Policy in a separate submission to BEIS following the structure of Competition Law Review, available at <http://competitionpolicy.ac.uk/documents/8158338/24754029/Lyons+BEIS+competition+law+review+and+consumer+green+paper.pdf/edc9574b-b929-3ade-8971-60693a4356e8>.

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