



UK Department for Business, Innovation and Skills: Empowering & Protecting Consumers

Consultation response from the ESRC Centre for Competition Policy

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The response to each question in this consultation response has been drafted by a named academic member of the Centre, who retains responsibility for that section. The document has been edited by Professor Waddams following discussions held in the Centre and it has the broad agreement of the group of contributors.

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● The ESRC Centre for Competition Policy (CCP)

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CCP welcomes the consultation on Empowering and Protecting Consumers, particularly given its previous research in this area cited by the consultation document¹ and our findings that while UK consumer protection was among the best in the world, it suffered from overly complex law and inconsistent enforcement. We respond below only to the questions for which we have some basis from CCP's research programme.

We are surprised that in consulting on institutional remedies, the BIS consultation pays little direct attention to consumers or what we know about their behaviour. In particular we would have liked to see more discussion of how consumer protection should be related to the needs of particular groups of consumers (for example, should the average or the vulnerable consumer be the object of such protection?). There is a danger that in trying to protect vulnerable consumers, and particularly in trying to address various issues of cognitive hazard, authorities may generate worse outcomes for consumers in aggregate. Vulnerable consumers may benefit especially from consumer advocacy, which we should have liked to see discussed further in the consultation document.

In response to individual questions:

QUESTION 1. How do you think the provision of consumer information to consumers can be improved upon?

(Michael Harker)

Consumer law is clearly complex and difficult to comprehend, especially for those with limited cognitive abilities. The provision of consumer information in a readily accessible format and by trusted groups (such as Which? and Citizens' Advice) is welcomed. It should not be assumed, however, that online provision can completely remove the need for personalised information and advice (as was the case with Consumer Direct).

QUESTION 2. Do you agree that the OFT's consumer information role should be transferred to the Citizens Advice service?

No (see below)

QUESTION 3. Do you agree that the Extra Help Unit should be transferred to the Citizens Advice service?

No (see below)

¹ University of East Anglia (2008), Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries
www.bis.gov.uk/files/file50027.pdf

QUESTION 4. Do you agree that the OFT's consumer education roles should be transferred to the Citizens Advice service? What are your views about the types of consumer education activity that are most valuable and how they should be managed and coordinated?

(Catherine Waddams)

Questions 2-4 all ask whether we agree about transferring various roles from the OFT to the Citizens Advice service. We disagree that this transfer should take place, both because we believe that such functions should be closely related to competition enforcement, and because we do not think that the Citizens Advice service is sufficiently well resourced to undertake adequately the required roles. Because it is funded from local government services, it has already experienced serious cut backs in financial resource; and the service does not have sufficient experience in dealing with the complexity of consumer decision making. Both our own research² and Ofgem's work show that consumers often make errors, particularly if they are approached by sales people, and Ofgem's recent work suggests that despite their remedies to help consumers make better choices, an increasing proportion of consumers are becoming disengaged from the market³. Moreover competition authorities are increasingly using consumer remedies to help markets work better, even when the basic problem is not necessarily rooted in consumer behaviour⁴. It is therefore important to keep the consumer information and competition rôles closely related, rather than treating consumer information as a separable remedial function.

QUESTION 5. Do you agree that the proposed Trading Standards Policy Board and the TSI should coordinate and support business-facing educational activities?

(Daithí Mac Síthigh)

No, we believe that these functions should be retained within the competition authority and that the appropriate national body to co-ordinate such functions should be the CMA which should be constituted to include consumer functions. However if this is not the outcome, it is better that there should be some body overseeing such functions, rather than not doing it at all.

² Do Consumers Switch to the Best Supplier? by Chris M. Wilson and Catherine Waddams Price, Oxford Economic Papers, 62: 647-668, 2010

³ Retail Market Review, Ofgem, 2011

⁴ [Assessing the Effectiveness of Potential Remedies in Consumer Markets](#), a report for the Office of Fair Trading by Luke Garrod, Morten Hviid, Graham Loomes and Catherine Waddams, 2008

QUESTION 12. Do you consider that, subject to decisions by individual Departments, the vision of combining as many sectoral advocacy functions as possible in the Citizens Advice service is the correct one?

(Henry Allen)

In principle it seems like a reasonable idea given the circumstance. However, this is predicated on the ability of those previously employed in Consumer Focus being able to still carry out the vital work that they do. It is fundamental that there is an advocacy body specifically dedicated to working alongside regulators, policy makers and business to ensure that consumers are represented in non-market scenarios. The concern would be that the focus of Citizens Advice as an information service for consumers and citizens *within markets* might detract from identifying common issues across markets. This would tilt the balance of power away from consumer advocacy and towards producers. So this change would only be the correct decision if the sectoral advocacy functions are kept intact and able to function even more effectively as lobbyists in cross-market scenarios. Therefore merging sectoral advocacy functions should only be undertaken if there is a clear common concern. Individuals and teams with specialist sector specific knowledge should be retained, as in-depth knowledge on developments is crucial to successful advocacy on consumers' behalf, and ultimately to making the markets work in the consumer interest.

QUESTION 13. Do you agree with the design principles for the regulated industries unit as set out in paragraph 4.34?

(Henry Allen)

By and large, yes. The conditions set out seem to be actively concerned that consumers are given adequate representation in regulated sectors, as well as ensuring that the relevant bodies have the powers necessary to hold companies to account. The levy on businesses to fund the body is a sensible way to proceed as it will keep the body independent from government. Ensuring the capability to research emerging concerns is fundamental to the sound operation of a worthwhile advocacy group. If it were *merely* reactive then it would only be doing half its job.

QUESTION 14. In the light of all these considerations, do you agree that Consumer Focus should be abolished and its sectoral and some of its general advocacy functions be transferred to the Citizens Advice service? What are your views on alternative approaches?

(Henry Allen)

Abolishing Consumer Focus outright seems to be going too far. Putting Consumer Focus under the umbrella of Citizens Advice would be a more reasonable approach as it would keep what is a necessary advocacy organisation intact with the relevant experience and expertise gained over the years, whilst consolidating some of the bureaucracy. As stated in answer to Q.12 & Q.13 it is imperative to consumer representation to have dedicated proactive advocates both researching and lobbying, on both in-market and cross-market

scenarios. Consumer advocacy needs to be proactive as merely reactive appeals put power in the hands of producers, as there is a clear collective action problem for consumers.

QUESTION 16. What are your views on these options for the transfer of information gathering powers? Which is preferable and why? Are there any other options for information- gathering powers?

(Daithí Mac Síthigh)

It is fundamental to the necessary functioning of consumer advocacy that the successor to Consumer Focus has the powers to gather the required information from regulators, businesses and any person that supplies goods or services in the course of a business. A toothless advocacy body would be a waste of resources and merely a nod to an effective regulated market. In this respect option a) would be preferable as it will ensure that the adequate powers are directly transferred to Citizens Advice without considerable compromise.

Moreover if information-gathering powers are transferred to Citizens Advice, there needs to be a mechanism by which CA is accountable to a public body (and ideally subject to judicial review in respect of this function) for its use of those powers. The most appropriate method of conferring information-gathering powers for this purpose would be by way of primary legislation specifying the extent of the powers as well as the name of the relevant body, rather than an enabling provision that would allow any number of bodies to be designated at any future time by a Minister.

QUESTION 17. What are your views on whether redress schemes such as those established in electronic communications, financial services, energy and postal services should be extended to other sectors?

(Morten Hviid)

The document provides no evidence on (a) how successful the redress schemes have been in the sectors where it is used and (b) on the scale of the problem in the water and transport sectors. It is hence not possible to offer any comment on the costs and benefits of the scheme. However if a scheme is to be introduced it would, as is pointed out in both 4.57 and 4.58, be essential that “dispute resolution by the independent ombudsman is separated from sectoral advocacy.”

QUESTION 20. Which option for reform of enforcement powers and responsibilities do you prefer, if any, and why?

Option 1 – Transfer of all OFT/CMA powers to Trading Standards

As the Government observe, this will result in duplication, inconsistency of approach and, without a complex enforcement system in place at the “supra-local level”, will lead to under-enforcement of national cases.

Option 2 – All enforcement (other than at local level) is undertaken by the CMA
This is perhaps the most efficient model, reduces duplication and would ensure that the CMA has a full complement of powers with respect to consumer detriment.

Option 3 – Transfer of majority of OFT consumer enforcement powers to TSs

(Michael Harker)

If some powers are to be transferred, then it is welcomed that the CMA retains remedies with respect to markets displaying structural problems.

If this option is pursued, then there needs to be substantial cooperation and coordination between local trading standards. The TSPB would need to play an important role here and be appropriately resourced. This does beg the question as to whether this is a more efficient system than option 1.

QUESTIONS 20-24 - Division of labour between CMA and Trading Standards.

(Morten Hviid)

BIS is correct that the choice is between option 3 and some minor tweaks to existing divisions. In both cases there will be some overlap and hence a need for coordination. Since this is all a matter of degree, it would be a surprise if a cost-benefit analysis did not come down on the side of the minor tweaking of the existing system. It would then be possible to engage in an ongoing assessment of how the new system works, especially if a single CMA is created. In particular, it is not easy to predict how much would be lost in terms of competition enforcement by moving all or some of the current OFT powers to trading standards. The current insight from the academic literature⁵ is that consumers play an important role in making markets work so that the OFT’s current motto of making markets work well for consumers might plausibly be extended to “making consumers make markets work well for consumers”. Arguably this is what empowerment is all about. A gradual approach, tweaking the existing division, appears the better approach unless demonstrable and significant benefits from option 3 can be identified.

⁵ See literature summarised in Luke Garrod, Morten Hviid, Graham Loomes and Catherine Waddams, 2009, “Competition Remedies in Consumer Markets”, *Loyola Consumer Law Review* 21(4); 101-158, which builds on a previous OFT discussion paper, OFT994.

QUESTION 25. Do you agree that the CMA should retain a consumer enforcement role in those cases where a potential breach of consumer law may be connected to a structural market problem?

(Catherine Waddams)

Yes, we agree that it is crucial for the CMA to retain a consumer enforcement role where a potential breach of consumer law may be connected to a structural market problem. The recent cases which Ofgem has had to bring for mis-selling in residential energy, at precisely the time when it is trying to empower consumers to be more active and make better choices in the market, while exploring whether there are structural issues in the market, illustrate well the importance of having a single enforcement body. Such cases are by their nature complex, and any attempt for two enforcement bodies to deal with them independently would substantially weaken the competition regime and enable more abuses. Indeed we argue that the CMA should have far-reaching responsibility for enforcement of consumer law, as outlined in our responses to questions above.

Questions 26 and 27 are interrelated – if the CMA has substantial discretion, then these should be subject to procedural limitations

QUESTION 26. In an Option 3-based model, should this enforcement role be subject to procedural limitations?

QUESTION 27. Do you agree that the CMA should enjoy significant discretion over when a market has structural problems, such as to give rise to its consumer enforcement powers?

(Michael Harker)

This should be pursuant to a full market investigation, especially given the extensive remedial powers currently enjoyed by the CC. In any case, recent case law has demonstrated that any substantial market intervention will need to be proportional to the detriment concerned, and underpinned by a rigorous cost benefit analysis.

QUESTION 28. Do you agree that the CMA should retain responsibility for mixed market studies where there may be competition and consumer issues (supply and demand side market failures) present on the relevant market?

(Michael Harker)

Yes. Recent market investigations by the CC into final consumer markets – such as extended warranties, home credit and PPI – demonstrate that market remedies will need to be multi-faceted, for example, increasing competition through the provision of clearer information to consumers.

QUESTION 29. Do you agree that in an Option 3-based model, the Citizens Advice service should in future be responsible for pure consumer detriment analysis and that the CMA should not perform pure consumer market studies? In such a case, do you agree that the CMA should stop performing market studies once it identifies that there is no structural problem in such markets and do you think there should be a duty on the Trading Standards Policy Board to prioritise cases referred by the CMA?

(Catherine Waddams and Michael Harker)

It is very difficult to separate out a structural problem with a market; the current market investigation regime can be used to address consumer behaviour which results in detriment. To draw artificial boundaries between cases, especially where these need to be done before a full investigation has been carried out, would not be conducive to finding a remedy which is best placed to deal with the detriment. However it would be advantageous for the CMA to be able to summarily dismiss cases which turn out to have little merit, rather than the current arrangement where the Competition Commission must fully investigate all references which fall within its jurisdiction, even if they discover early evidence which indicates that a full inquiry is not merited..

QUESTION 33. Do you agree the TSI would be the appropriate home for the OFT's professional guidance and training functions in the event of creation of a new single Competition and Markets Agency?

(Daithí Mac Síthigh)

At the moment, as the document makes clear, the OFT publishes guidance on consumer law. As we argue above, the CMA is the most appropriate body to handle these duties. If the CMA is not going to deal with this area, then it is appropriate that these important functions be transferred rather than abandoned. However it is hard to judge, from the consultation document, the capacity of the TSI (which is at present a charity) to undertake these functions. Furthermore the impact of any transfer on the legitimacy and (non-binding) authority of guidance needs further consideration, i.e. whether a statement of the law would be received differently depending on whether the ultimate author was the OFT as opposed to a private organisation.

QUESTION 34. Do you agree that the TSI is the most appropriate home for the OFT's international liaison and general policy functions in the event that the CMA has only a limited consumer enforcement role?

(Daithí Mac Síthigh)

International liaison should be linked to the responsible public authority, which is much better placed to speak legitimately and accountably for the UK than a body not answerable to Government or Parliament.

QUESTION 37. Do you agree that the current supercomplaints system to the OFT should be retained in respect of the CMA if the proposed changes go ahead?

QUESTION 38. Do you think that the supercomplaints process should be extended to require the Trading Standards Policy Board to issue a reasoned response if the subject matter of the complaint relates to consumer enforcement?

(Morten Hviid)

The supercomplaint system should be carefully assessed, as should the selection of bodies given such powers. Ten years worth of cases have seen 13 supercomplaints submitted to the OFT. Not all of these have given rise to OFT investigations. Of the 13 cases, more than half have been made in sectors where there are pre-existing regulators who either had or should have had the powers to deal with the issues raised in the complaint (the FSA and Postcomm). It is hence not immediately obvious that this system presents good value for money as it is. We would recommend a careful analysis of the impact of the system before extending it.

QUESTION 40. Do you agree that the proposed changes to the consumer enforcement landscape should go ahead if the creation of the CMA is delayed? If not, why not?

(Catherine Waddams)

Since we disagree with the proposed separation between competition authorities and consumer law enforcement, we would not like this change to proceed, whether or not the establishment of a joint CMA is delayed.