

Modernising Consumer Markets: a Response to the Consumer Green Paper

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Introduction

This is a response to the BEIS Green Paper *Modernising Consumer Markets* by Peter Cartwright, Sam Dunleavy and Richard Hyde who are Consumer Law and Policy specialists at the Centre for Commercial Law in the School of Law at the University of Nottingham. We have not provided answers to questions that relate primarily to competition law (questions 8 and 17-21) which are beyond our expertise.

We divided responsibility for the questions between us on the basis of our particular interests and expertise, but have each read the others' responses and believe that the responses have benefited from that.

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

Data portability has the most potential to improve consumer outcomes where competition exists, but consumers are unable properly to choose the optimal provider without possession of the data held by the provider. Therefore, consumer data portability is important in areas such as financial services (including banking, insurance and pensions) telecommunications and energy.

In insurance, data regarding consumers' insurance requirements and insurance history could be used to better-match consumers to insurance appropriate to their level of risk. For example, where a motor vehicle insurance consumer has a telematics-based policy, the data captured should be made available to all other insurers in order that they can offer premiums based on this data.

In telecommunications, details of consumers' usage (and, in particular, the balance of usage in landline, broadband and TV bundles) should be portable to enable consumers and providers to identify an appropriate package.

Data portability is unlikely to enhance outcomes in markets where there is no competition (such as water) or in transportation (where open availability of data about the services provided and price is important, but availability of data regarding consumer behaviour is less so).

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

A starting point for addressing this is to think about what we mean by vulnerability. Consumers may be vulnerable in different ways and for different reasons. Research has suggested that it is possible to create a taxonomy of vulnerability which can identify (a) what makes consumers particularly vulnerable; and (b) how policymakers might address

these elements of vulnerability.¹ It is argued that consumers may be particularly vulnerable (and it should be remembered that vulnerability is relative) in terms information, pressure, access to products, ability to pursue redress and the impact that they face from making sub-optimal choices. These should be considered when assessing the impact of legal or policy change on consumers.

The Green Paper rightly states that simply relying on engaging consumers by providing them with more information is not wholly effective. Although policy has seldom *only* provided information, there is general acknowledgement that too much faith has been placed in disclosure as a way of (a) ensuring that consumers make optimal choices; and (b) enabling consumers to discipline markets. Some consumers (whether we describe them as vulnerable, disadvantaged or less privileged) are particularly ill-served by policies that focus heavily on disclosure.

Despite its limitations, information (broadly understood) may provide benefits for more vulnerable consumers. Providing information in a simple and user-friendly way alongside consumer education initiatives has a role to play. Simple, user-friendly information can contribute in particular to raising awareness but should be used alongside consumer education campaigns. Any initiatives should draw on behavioural science research to ensure, for example, that information is appropriately framed and that any over-optimism is accounted for. As the Green Paper rightly says we “need to take account of real-world behaviours and preferences”.

However, to ensure there is appropriate engagement consumers need to have confidence to go alongside the awareness mentioned above. First, they need confidence that they will be treated fairly by those who have the data. There will be an understandable fear on the part of many consumers (and not just the particularly vulnerable) that their information will be used to maximise traders’ profits rather than save them money or improve the quality of the service they receive. As the Green Paper states: “too often this data works against consumers rather than for them”. Second, they need confidence that data will be secure. Recent high-profile breaches are likely to make many consumers feel vulnerable in this regard. Third, consumers need confidence about their own ability to make appropriate choices. The business model of the energy market is largely based around penalising consumers for inertia, and it is true that many consumers are aware of this. However, those consumers are not necessarily confident that switching will produce a better outcome. In 2017 over 5m energy customers were said to have switched supplier, and while this may indicate growing awareness and confidence it is still a relatively small minority of consumers.

Automatic switching services, which use algorithms to identify the best moment to switch consumers onto a cheaper deal are an interesting development, with Ofcom trialling a collective switching service to move some customers to better value tariffs. A clear distinction needs to be drawn between initiatives which give consumers information upon which they can make a decision (say, to switch) and initiatives under which consumers authorise switching to take place whenever the algorithm underpinning the service deems it to be appropriate. The Government’s Smart Data Review needs to investigate the options in detail in the light of technological developments. It is extremely important that the

¹ P Cartwright “Understanding and Protecting Vulnerable Financial Consumers” (2015) 38(2) *Journal of Consumer Policy* 119-138.

relevant regulator is robust in ensuring that firms take appropriate responsibility and treat their customers fairly.

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

There are two main points to consider. First, data should be available in a single format that is readable without specialised software. It is suggested that CSV would be appropriate. Second, where possible, metadata and database architecture should be standardised so that all entrants to the market can utilise the data.

4 (a) 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?

There may be different rationales for, and objectives of, publishing performance data. The performance of a firm is an element of the quality of the service provided by that firm. Service quality is frequently difficult for consumers to judge accurately, but is also a matter of significant importance to them. Performance data can be viewed through different lenses and can be seen to have a number of objectives including (but not limited to):

- (1) Helping consumers to make better-informed choices, particularly about quality;
- (2) Improving standards by incentivising firms to step up their performance;
- (3) Providing greater transparency for a range of stakeholders; and
- (4) In some cases, operating as a form of sanction (or as part of a sanction).²

The objectives that are particularly pertinent to the specific regime always be remembered when designing the operation of that scheme.

There are several ways to publish performance data and there will always be significant trade-offs with whatever arrangement is in place. This may be between simplicity and comprehensiveness, or between transparency and confidence (such as in parts of the financial sector). Because the data is intended to be acted upon, there is also a danger that it can to a disproportionate response in some cases and an inadequate one in others, for example because of the way that the information is disseminated and interpreted.

Where information can be conveyed simply it is generally desirable to do so. For example, one strength of the National Food Hygiene Ratings Scheme is that the consumer can immediately see a score (in that case out of 5) which reflects an assessment (by an enforcer) of the extent to which the particular food outlet is compliant with food hygiene requirements. However, visibility and accessibility of information are also important, and one disadvantage is that under that Scheme there is no requirement for firms (at least in England) to display the score prominently on the premises. Consumers who want to discover an outlet's core may have to search online, something that will be an obstacle for some consumers. Despite that, having the scores available should have some market-disciplining effect even if not all consumers have access to the data.

² For a general discussion see P Cartwright "Publicity Punishment and Protection: the Role(s) of Adverse Publicity in Consumer Policy" (2012) 32(2) *Legal Studies* 179-201.

It is also important that the data is as reliable as possible. Another example of a scheme that involves publishing performance data is that operated by the Financial Conduct Authority (FCA) on complaints about financial services firms. The FCA publishes data relating to complaints every 6 months. This is collected and published at an aggregate (market) and firm level. However, firm-specific data is only published for firms which report 500 or more complaints in a six month reporting period, or 1,000 or more in an annual reporting period. Those firms must also publish complaints data on their website.

The FCA recommends that this can be used alongside data from the Financial Ombudsman Service “as an indicator of the quality of a firm’s complaints handling.” This is a matter which may be very important to consumers and may be an indicator of whether they are likely to be treated fairly. The publication of the data should give firms a clear incentive to improve not only the quality of complaint-handling, but also the quality of the underlying service which gave rise to the complaint in the first place. It is unlikely that many individual consumers peruse these data in detail. It is more likely that they read about some of the headline figures in the media. While potentially helpful, this runs the risk of the data being misused and misunderstood, as noted above.

The Government has to determine which matters relating to performance are (a) likely to be important to consumers; (b) capable of being assessed fairly and accurately; and (c) capable of being communicated fairly and accurately. Although it is helpful if the information can be communicated accurately directly to consumers, as noted above, the information may still be valuable if respected third parties are able to analyse and disseminate it.

A final point to note is that to be fair to firms, it may sometimes be necessary to provide contextual data with the information disclosed. One firm may look as though it performs poorly compared with a rival, but if there are sound reasons why this is not a fair comparison it is important that such reasons are explained.

4 (b) Should firms also offer discounts or compensation for poor performance?

As a general principle it is right that consumers receive recompense where suppliers perform poorly. This should protect consumers’ expectation interest and exert competitive pressure on poorly performing suppliers which should help drive up standards. However, it is important for the concept of poor performance to be linked to some identifiable obligation owed to the consumer for the issue of the need for compensation to arise. Consumer rights to compensation already exist in the general law of contract and more specific consumer protection laws (such as Part 4A of the Consumer Protection from Unfair Trading Regulations 2008).

However, as the Green Paper acknowledges, low consumer engagement may weaken pressure on suppliers to perform even in markets where there are compensatory regimes in place to address poor performance, if these regimes rely on active consumer participation. Therefore, the trend towards reliance on automatic compensation schemes, which do not rely on active consumer engagement to create the incentive for suppliers to avoid poor performance, should be welcomed since they allow for competitive pressure to be exerted on suppliers without the need for consumers to complain first. This protects the interests of consumers who would not otherwise succeed in securing compensation for poor performance, which may be particularly beneficial to certain vulnerable groups.

There are already a number of automatic compensation schemes in operation and plans are in place to implement new schemes to cover broadband services and energy switching. It is submitted that new (mandatory) schemes could be considered for rail, flights and other transport services, as well as some areas of the banking sector (for example where internet banking services cannot be accessed for a period of time).

Schemes will be most effective when they adhere to three general criteria; simplicity, consistency and fairness.

In terms of simplicity, it is important for the obligation to pay compensation to be linked to easy to understand and objectively verifiable metrics. It must be clear what is meant by “poor performance” and when this is likely to have occurred; the triggers and levels of compensation associated with this must be readily quantifiable. This should allow customers to appreciate the aspect of poor performance which has given rise to any compensation payment and therefore to use that information when making future consumption choices. It will also allow firms, customers, and regulatory bodies to compare performance against the relevant standard. They will therefore know, on the basis of clear criteria, when performance has been poor and the implications of that in terms of the duty to compensate. If the payment of compensation is to have the effect of incentivising suppliers to perform better, the link between the level of performance and the obligation to pay compensation must be straightforward.

Consistency is also important. The competitive pressure generated by an automatic obligation to pay compensation will be strongest where all suppliers are required to meet the same standards of performance which customers can then expect and rely on. In this regard, whilst voluntary schemes may be seen as a positive step towards better outcomes for customers in many sectors, the need for a mandatory compensation scheme covering all suppliers may be necessary to avoid patchy coverage which protects some consumers but not others. There is a risk that the new voluntary broadband scheme could be problematic in this respect, particularly if consumers do not fully understand the benefits of the scheme and therefore do not factor this into their choice of broadband supplier. Similarly, an array of different compensatory schemes currently operates across the rail industry. As a result, some customers will receive automatic compensation on some trains depending on how they purchased their ticket and what ticket they purchased, but other customers may need to actively apply for compensation. Equally, the standards of performance which give rise to a specific right to compensation under a particular scheme differ. Whilst it can be recognised that these differences arise in part due to different franchise agreements, which mean that changes to service standards may happen piece meal over a period of time, it is submitted that the lack of consistency has the potential to seriously disrupt the development of clear and consistent consumer expectations with regards to performance standards and suitable remedial action. A more consistent approach could bring benefits in terms of more robust customer expectations which in turn should produce clear incentives for suppliers to improve performance.

Fairness is also an important consideration when designing automatic compensation schemes. The scheme should be fair both in terms of the obligation that it imposes on the supplier and the compensation that it awards to the consumer. With regard to suppliers, fairness can be achieved by designing schemes based on clearly defined standards of

performance over which the supplier has some control. Where performance is dependent in part on some other party, it should be possible for the supplier to secure compensation from that third party which corresponds to their obligation to the customer. However, it is important that this is passed on (there is some concern that rail operators do not always pass on the compensation that they receive from Network Rail, thereby granting them a windfall despite the poor performance experienced by customers).³

With regard to consumers, fairness concerns the relationship between the poor performance experienced and the level of compensation received. As a general principle, the amount of compensation received should reflect the seriousness of the poor performance experienced. Payments for continuing poor performance or failure to automatically compensate promptly are a common feature of schemes currently in place and reflect good practice. However, there does seem to be scope for increasing some of the required payments under existing schemes to reflect the additional harm caused by repeat poor performance and failure to automatically award compensation. This should be designed to deter avoidance of obligations which would otherwise increase competitive pressure.

One important point that should be considered when designing automatic compensation schemes is the effect that such schemes have on consumers' other legal rights. It is often the case that compensation schemes reflect rather than expand existing consumer rights to compensation under contract law and/or other consumer protection laws. Automatic compensation schemes do, however, provide consumers with a valuable alternative to litigation. This is important because litigation frequently does not provide a realistic solution for consumer grievance. It is likely that the majority of consumers who experience poor performance will accept an automatic payment of compensation in lieu of seeking to further enforce their rights as consumers. In light of this, the level of compensation must reflect the fact that, as a default sum, this will supplant compensation that might otherwise be received as a result of other enforcement action. In this regard, monetary compensation will often be more suitable than discounts connected to the poorly performing supplier. It should also be made clear to consumers when they receive a compensatory payment of this kind that it does not override their other legal rights, and that where they have suffered additional loss they should contact the supplier and may be able to seek help from a relevant ombudsman or other ADR provider.

Once effective automatic compensation schemes are in place, it is important for supplier compliance to be monitored. This cannot be left to consumers since they may not be aware of failures and given the expectation of automatic compensation may be unlikely to proactively seek recompense.

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

³ 'Train companies pocket millions in compensation while passengers endure cancellations' *The Telegraph* 26 February 2018
<https://www.telegraph.co.uk/politics/2018/02/26/exclusive-train-companies-pocket-millions-compensation-passengers/>

It is clear that performance in some areas of the communications sector could be significantly improved. It is submitted that consumer advocacy may play an important role in bringing about change. The Communications Panel works closely with Ofcom to ensure that the consumer perspective is considered and they have produced some good research concerning the interests of vulnerable groups in this sector in particular. However, given the scope of the communications sector and its importance for consumers, it may be desirable for the work of the Panel to be expanded. For example, sub-panels or groups might be set up to work specifically on areas such as the broadband market or the mobile market. This would require more in terms of resources and personnel but would be worth the extra investment if it produces more research focusing on consumer experiences in this sector. This could increase understanding of the types of problems that consumers face and therefore may help Ofcom tackle the issues that cause consumer satisfaction to be relatively low.

The role of other advocacy groups such as Citizens Advice and Which? must also be acknowledged. These groups have a strong public profile and may often have more ability than the Communications Panel to raise awareness of issues and therefore to generate pressure for change. In addition, these groups may have more scope to call for ambitious change to the status-quo since they are not restrained by the same practical considerations faced by Ofcom, and (because their close relationship with the regulator) the Panel. Supporting and engaging with these consumer advocacy groups is important and any steps that may be taken to strengthen the links between the Panel and such organisations should be considered (for example the power of the Secretary of State under the Communications Act 2003 to direct Ofcom to appoint an employee of Citizens Advice onto the Panel).

Whatever consumer advocacy arrangement is adopted, it will need to operate within a broader system of tough regulatory action informed by rigorous analysis of the market in light of understandings generated by behavioural economics. An effective consumer advocate should be able to draw on research in other sectors to inform regulation and policy in its own sector. Research such as the FCA's Financial Lives survey should be carefully considered in this regard. In addition, the Consumer Advocate should play a role in monitoring supplier performance and reporting on its findings. For example, the new automatic compensation scheme for broadband customers is a welcome step, but there is scope for it to be strengthened to include provision for poor performance where, for example, broadband speeds are consistently low. The Communications Panel could play an important role in monitoring the success of the new scheme and should make recommendations regarding how it should be developed in future. However, it must be noted again that a lack of capacity may limit the Panel's effectiveness in this regard.

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

The Government should provide platforms which enable businesses and consumers to access the data, and manipulate it to show the most appropriate products. This has the advantage of their only being one copy of the data (which is held securely on the platform) and reduces the need to build bespoke platforms for the reuse of data.

The Government should consider specifying data standards and API information, or should actively work with industry to define data standards and API information. The open

banking standards could form the basis for such standards in other sectors. The Government should consider whether standards should be defined on a sectoral basis or more generally.

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?

Compliance with the requirements of GDPR is necessary. In particular, providers should ensure that the consumer knows what data is being shared and for what purpose. Article 14(5) should not be used to prevent the service of notices under article 14. The use of a Databox (<http://www.databoxproject.uk/>) might be valuable – allowing consumers to choose what parts of their personal data that they share with the providers.

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

The current framework for consumer-consumer transactions is defective in two respects:

First, it is frequently not clear to consumers whether they are purchasing from a consumer or a business.⁴ The test whether an individual is a trader (and therefore whether the protections of the Consumer Rights Act 2015 apply) is based on information that may not (and indeed, in some cases, cannot) be known to the purchaser (and may not be known to a seller). This is particularly the case in online contexts (although it is perfectly possible that a consumer will be similarly confused in a face-to-face context such as a car boot sale). Whilst the protections provided by the repealed Business Advertisements (Disclosure) Order 1977 are broadly provided for by the Consumer Protection from Unfair Trading Regulations 1998, it is not clear that this broad protection is as efficient in ensuring that consumers are aware that a sale is made in the course of a business. Sellers may not be aware whether they are acting in the course of a business or not, and therefore cannot make an appropriate disclosure. In some cases platforms have put in place mechanisms to allow consumers to determine whether a seller is acting as a business or a consumer (for example eBay PowerSellers are likely to be businesses⁵), and this should be encouraged, but it is not always clear on all platforms, or in face-to-face interactions.

Second, while the common law applies to the C-to-C transaction (so, for example, an inaccurate description of a product could amount to misrepresentation) there are no protections provided to the buyer in a C-to-C transaction insofar as it relates to the quality and fitness for purpose of the product. Caveat emptor applies, and therefore the risk is on the buyer rather than the seller. Whilst this may be justifiable in circumstances where the buyer has an opportunity to examine the product before making a decision to purchase (such as at a car boot sale) it is inappropriate when the product is purchased at a distance, where the consumer does not have the opportunity to examine the product in advance. Therefore, in order that consumers can buy with confidence, knowing that there is a minimal level of protection afforded to them, it is suggested that the following minimal level of protection be afforded to the buyer in C-to-C transactions:

⁴ Compare *Blakemore v Bellamy* [1983] RTR 303 with *Stevenson v Rodgers* [1999] 2 1064 1064

⁵ A PowerSeller must have a minimum of sales volume of £1,000 per 12 months.

- a. That the goods be of satisfactory quality. This requirement would mirror the requirement in the Consumer Rights Act, but in most cases the reasonable expectation of quality by the buyer would be lower in cases where the seller is a consumer rather than a trader. For example, however, the goods would not be of satisfactory quality in circumstances where they are unsafe, as a reasonable buyer in a C-to-C transaction would be entitled to expect that the product would be safe. It may not be reasonable to provide the buyer with a right to repair or replacement in a C-to-C transaction, but a short term right to reject would be appropriate.
- b. That the goods be fit for purpose where the purpose has been explicitly communicated to the seller prior to the purchase and the seller has confirmed fitness for purpose. This would be narrower than the fitness for purpose requirement that applies in B-to-C sales under the Consumer Rights Act 2015.
- c. Where the C-to-C transaction is at a distance consideration should be given to the possibility of a right to cancel. This could be more limited than the right afforded to consumers by The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, for example in time.
- d. It should be a specific offence for a consumer knowingly to sell or offer for sale unsafe products. The definition of unsafe product should be the same as the definition in the General Product Safety Regulations 2005. However, in the C-to-C context the offence should not be committed on a strict liability basis.
- e. Consideration should be given to extending the protections of the Consumer Protection from Unfair Trading Regulations Part 4A. Whilst buyers in C-to-C transactions have the protection of common law doctrines such as misrepresentation, duress and undue influence, the difference between the protections and remedies depending on the identity of the seller might be thought to be problematic.

10 (a) In what circumstances are personalised prices and search results being used?

Personalised pricing is not a new phenomenon but the rapid development of data gathering and processing capabilities has significantly increased the potential opportunities for suppliers to adopt personalised pricing strategies as a means of exploiting information regarding consumers' willingness to pay. This issue arises predominately in relation to online interactions. However, it should be noted that data can be gathered and utilised in other ways, for example, through the use store cards or loyalty schemes which target consumers with products and discounts based on their observed shopping behaviours.

Despite some high profile anecdotal stories of suppliers using personalised pricing strategies, there is currently a significant lack of understanding regarding the extent to which personalised pricing is being used. It is clear that some suppliers have the technical capabilities to adopt complex personalised pricing practices, however detailed market study is required to investigate whether and how suppliers are using those capabilities. The OFT's attempt to gather information on this topic was significantly limited by the lack of response it received from suppliers. More rigorous investigation is needed to ensure

that policy makers and regulatory bodies are able to keep up with developments in markets.⁶ The CMA's plan to develop a Digital, Data and Technology team is to be welcomed in this regard (*CMA Annual Plan 2018/19*).⁷

10 (b) In which circumstances should it not be permitted? What evidence is there of harm to consumers?

Personalised pricing can be beneficial to consumers. It can allow suppliers to offer consumers more of what they want at prices which they are willing to accept. In this regard there is the potential for greater efficiency. However, personalised pricing practices also present certain risks particularly with regards to the increasing potential for very sophisticated profiling and targeting of consumers.

In some circumstances personalised pricing may lead to increased price complexity, rendering it difficult for consumers to know when they are being offered the best price. This may weaken competition if it reduces price comparison and therefore switching behaviour. It also poses significant risk to the trust that consumers have in online markets which was a particular concern of the OFT when they investigated this issue in 2013 (*OFT1489*).⁸

In addition, personalised pricing could be particularly problematic for those who are not able to manage their online profiles well which could lead to certain vulnerable groups paying higher prices than those able to manipulate the information suppliers can gather. Further problems include inaccurate profiling leading to irrational price offers and punitive (high) prices for those who choose not to share data with suppliers (this may be understood as a form of opt-out penalty) or for those who have little by way of online profile for suppliers to exploit. It may also be difficult for regulators to identify instances of unfairness associated with prices where each price is unique and offered temporarily to a consumer based on complex data profiling.

In light of the risks associated with personalised pricing the CMA's focus on this topic is to be welcomed⁹ as is the focus on consumer trust in the strategic steer. As this aspect of the consumer protection landscape develops it is hoped that more research and analysis will lead to a much more detailed understanding of personalised pricing, the risks associated with it, and the appropriate regulatory response.

In the meantime, it is important for current laws which touch upon the issue of personalised pricing to be enforced. This includes the requirements of the GDPR which should allow consumers to understand how and why their data is being used, including use for applying personalised pricing. The prohibition of unfair commercial practices may also be relevant if suppliers pricing practices are misleading or aggressive.

However, there will be instances in which a personalised pricing practice falls into a grey area between these provisions and judicial interpretation may be needed before a clear

⁶ OFT, *Personalised Pricing* (May 2013, OFT1489)

http://webarchive.nationalarchives.gov.uk/20140402165101/http://oft.gov.uk/shared_of_t/markets-work/personalised-pricing/oft1489.pdf

⁷ CMA *Annual Plan 2018/19* (March 2018, CMA75)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704594/Annual_Plan-201819.pdf

⁸ Personalised Pricing (above)

⁹ CMA Annual Plan (above).

legal picture emerges. In addition, current transparency requirements may not be enough to bring instances of personalised pricing to the attention of consumers given the fact that privacy policies are rarely engaged with. One improvement that may be made to the current regime to respond specifically to the issue of personalised pricing would be a requirement for increased transparency whenever it is used. As a basic requirement suppliers could be made to disclose the fact that a price is a personalised price. This could be done by displaying a prominent icon or text in a way which responds to consumers' behavioural practices (recent research at the University of Nottingham has demonstrated the significance of consumer behavioural response to information located on web pages).¹⁰ Additionally, suppliers could be required to provide an explanation of the data variables relied on to inform that price. This would provide scope for personalised pricing practices to develop, but would also give consumers the ability to make a fully informed choice regarding whether to accept or reject a price offered in light of the logic underlying it. Consumers could then use that information to search for better prices or to adapt their online profile to allow them to get better prices in future. Whilst existing rules may provide this form of protection in some circumstances (depending on their legal interpretation) it is submitted that a clear and specific addition to these rules could offer a firmer footing on which to allow personalised practices to evolve.

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

A copy of a forthcoming article (Conklin, Hyde and Parente 2018) is attached. The findings are summarised below, but the reader is advised to consult the article in full. Further outputs from the project on reading behaviour of consumers are available from the authors of the study (kathy.conklin@nottingham.ac.uk or richard.hyde@nottingham.ac.uk).

This article argues that while reading scores may be a useful tool in determining whether a contractual document reaches an appropriate level of transparency, they cannot be the only tool used. Reading scores alone should not be relied upon by business, regulators or courts in determining that contracts are transparent and, particularly, determining that they can be understood by consumers. Whilst readability measures can alert the writer of a text as to its relative complexity, they cannot identify specific processing and comprehension bottleneck, and they cannot identify situations when the text is expressed in too simple language to properly convey the economic effects of the contract to the average consumer. They may be useful for simple self-diagnosis by drafters who wish to identify whether their contract is too complex; but they cannot identify whether an average consumer will be able understand the contractual clause and to reason on that basis. Further, such tools look at the entire contract; they do not identify particularly problematic clauses which may be found in generally readable contracts, or the transparent clauses that do not need amended in a complex, difficult to read, document.

¹⁰ Kathy Conklin, Richard Hyde, Fabio Parente and Kay Snowley, *Consumer behaviour and ICSS: Exploring how consumers respond to Information, Connection and Signposting Services* (January 2018) <https://psauthority.org.uk/-/media/Files/PSA/For-Businesses/Resources/Consumer-behaviour-and-ICSS-Exploring-how-consumers-respond-to-ICSS.ashx?la=en&hash=ACE521A3348ADED0F7346DA4459CD6FEBE38D316> See also Kathy Conklin, Richard Hyde and Fabio Parente, 'Assessing Plain and Intelligible Language in the Consumer Rights Act: A role for reading scores?' (2018) forthcoming *Legal Studies* (attached)

Online testing tools may be able to identify whether a contract is expressed in plain language, but they cannot necessarily assess its intelligibility. Assessing whether a contractual clause is expressed in plain and intelligible language requires the synergistic use of other methodologies that can more directly probe the processing and understanding of texts on the part of the reader. In this sense, a typical paradigm might involve the use of methods to evaluate the ways that consumers read texts, and comprehension questions to assess understanding and retention of information. Such an approach is unlikely to provide the simple, cheap, answers that reading scores might, but is more likely to gauge appropriately both the plainness and intelligibility of text by being able to consider both how the average consumer reads, and how a particular consumer reads. This is particularly important where a contract is either targeted at vulnerable consumers, or is likely particularly to affect vulnerable consumers. This is because the online tool is premised on determining the level of readability of a document; it does not consider whether the document would be able to be understood by a likely reader. This is a function that must be undertaken by a regulator, who needs to determine the appropriate standard that a contract should reach. Also, this should be context-specific rather than legislatively uniform for every contract in a particular sector.

Further, if reading scores are to be used, the tendency for different measures and different calculators to rely on various assumptions points to the need for an analytic approach that can at least partly offset these biases. Using only one indicator or calculator enables those who understand the calculation methodology to draft based on achieving a particular score, rather than with the aim of achieving transparency. The different mechanisms for syllabification in the various online calculators mean that there can be large variations in the scores achieved by the same contract for the same indicator depending on the different calculator used. The use of a Grand Weighted Mean, as used in the paper, or at least an online tool that is not based on a single reading score methodology, is to be encouraged.

12. How can we improve consumer awareness and take-up of alternative dispute resolution?

The first point to note is that there is no shortage of ADR Schemes. Research by Queen Margaret University and the University of Westminster for Citizens Advice identified 147 schemes across a wide range of sectors.¹¹ However, only 15% of consumers polled had heard of the term “alternative dispute resolution” and an assessment of the arrangements led the authors to conclude that “the consumer ADR landscape now appears more complex and confusing than ever”.¹²

As implied by the consultation question, a distinction should be drawn between awareness and take up. There needs to be a push to raise awareness of ADR through a number of initiatives.

First, there is a case for a consumer education campaign. Advertising has raised awareness of some consumer protection programmes such as the Financial Services Compensation Scheme.

¹¹ C Gill *et al* *Confusion, Gaps and Overlaps* (CAB, undated).

¹² *Ibid* p 30.

Second, traders could be obliged to do more to publicise ADR (although as will become apparent, this is problematic). The present system is highly unsatisfactory. The ADR Directive was implemented in the UK by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. The intention of the Directive was that for all disputes between the trader and the consumer there would be a low-cost, simple and fast dispute resolution mechanism, but this is not the case. In some sectors, participation in ADR is mandatory; in others, it is not. Where traders are obliged to be part of an ADR service by law (for example in financial services) or by the terms of trade association membership, they are required to indicate this on their website and in their standard terms and conditions. This is beneficial, even if consumers are not always aware of precisely the benefits that ADR brings. However, where traders are not obliged by law to use ADR significant difficulties arise. The trader is obliged to inform the consumer about the possibility of ADR when the dispute arises, but not to use it. There is a danger that informing the consumer of the existence of ADR in this is misleading given the possibility of traders (lawfully) refusing to adopt ADR or follow findings. As one Report on ombudsmen bluntly put it: "Currently firms are required to say what the approved ADR scheme is in their sector even if they will not work with it, thus giving false hope to consumers. This rule is a farce."¹³

In terms of take-up, it goes without saying that this is likely to be greatest where ADR is (a) advertised clearly; and (b) compulsory. Outside compulsion, it is necessary for firms voluntarily to commit to ADR in order for consumers to be able to take it up. Where ADR is not compulsory, there need to be better incentives for firms to commit to it. At present, it is not clear that there is much competitive advantage for firms to do that. Of course, greater awareness might lead to more consumers' choosing firms who commit to ADR. In time, therefore, it is possible that the market could lead firms to see competitive advantages in becoming involved. However, this does not seem particularly realistic. There have been sectors where consumers have regularly chosen firms which have committed voluntarily to schemes (such as those that were ABTA members) but that tends to have been where there was a very clear benefit to the consumer in doing so. A commitment to ADR does not seem to be in that category.

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

There is a significant body of literature on ADR and it is important for the Government to engage with that. This brief response cannot do justice to the wealth of material available. However, a few reflections are provided below.

To deliver the best experience for consumers, ADR (among other things) should be: highly visible (see q.12), comprehensive in terms of their coverage, respected by consumers and firms (and hopefully a little feared by the latter), cheap (and preferably free) to use, able to deliver decisions promptly, staffed by experts and able to deliver justice on the basis of what is fair and reasonable in all the circumstances.

A good example of ADR is the Financial Ombudsman Service (FOS). FOS emerged out of a number of self-regulatory ombudsman schemes (including the Banking Ombudsman and Insurance Ombudsman) which had already developed a reputation for being fair to consumers. FOS is very different from those earlier schemes. However, it has managed to

¹³ MoneySavingExpert *Sharper Teeth* (2017).

maintain a reputation of being consumer-friendly, accessible and authoritative. It is obligatory for (most) financial services firms to join.

In February 2017 MoneySavingExpert.com was asked by the Chair of the All-Party Parliamentary Group (APPG) on Consumer Protection to produce a report for the Group on the effectiveness of ombudsmen. The final report was presented to the APPG in November 2017.¹⁴ The Report focuses on ombudsmen rather than ADR more generally and it is not clear to what extent the conclusions are more generally applicable to ADR. The Report was highly critical of Ombudsmen and this is in contrast to some other recent reports on ADR. For example, it found that 53% of people who had used an ombudsman said they were put off using one ombudsman again. By contrast, a report by ICF Consulting for BEIS (*Resolving Consumer Disputes*) found that 69% of consumers were likely to use ADR again if they experienced a similar problem in future.¹⁵

Sharper Teeth made a number of recommendations which are worthy of consideration:

First, it recommended that all ombudsmen should have a statutory basis to ensure that “firms are cooperative with processes and compliant with decisions that have real legal teeth.” It is true that some ADR Schemes do lack teeth, and there is some dispute in the literature about the extent to which, once a recommendation or decision has been made, a firm might ignore it. Where there are close workings between ombudsman and regulator (for example between FOS and the FCA) it may be that the latter is able to deploy the considerable enforcement powers at its disposal.

Second, it suggested that oversight of ombudsmen should be boosted to address matter such as: the ease of complaining; the speed of processing complaints; and the perception of fairness. The issue of “perception of fairness” is particularly challenging. There is a sharp contrast in the views that consumers hold of some schemes and also a striking relationship between satisfaction, perception of fairness and outcome. *Resolving Consumer Disputes* found that in cases where the ADR provider decided in favour of the consumer 83% of consumers perceived the process to be fair. By contrast, where the decision was either for the trader or a compromise this figure was 17%.¹⁶ According to the data in *Resolving Consumer Disputes*, 60% of ADR cases are settled in favour of the consumer 11% in favour of the trader and 10% involve compromise.¹⁷

Third, it was suggested that the 8-week rule (the common requirement that unless a consumer receives a deadlock letter s/he needs to wait 8 weeks before using the ombudsman should be shortened to between 2-4 weeks (with for those in crisis). It is not just the delay in being able to bring a case to an Ombudsman that is of concern, but the delay (whether the case is one of an ombudsman or other forms of ADR) in bringing the dispute to a conclusion. *Resolving Consumer Disputes* found that relatively large shares of respondents said that the process took longer than they anticipated and criticised the lack

¹⁴ Ibid.

¹⁵ *Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System Final Report* (BEIS, April 2018).

¹⁶ Ibid.

¹⁷ Ibid.

of communication and information they received. Most people spent between three and nine months in the ADR process.¹⁸

Sharper Teeth also contained an aspiration: that “all companies in consumer sectors would be members of an ombudsman”. The need for compulsion is noted at various points in this response.

Sharper Teeth recognises that the rather bleak picture it paints results in part from the fact that its respondents self-selected to take part and that people who have a complaint to make were more likely to participate). This can be contrasted, for example, with the *Confusion, Gaps and Overlaps* which sought the views of 2,109 members of the general public, just 34 of whom had actually used ADR. A brief note of some of that Report’s conclusions also reveals a case for change.

First it identified significant gaps despite the proliferation of ADR schemes. Second it identified overlaps, observing that where there are multiple and overlapping schemes consumer confusion is likely to result. This led the authors to describe the ADR landscape as “more complex and confusing than ever before.” Like *Sharper Teeth*, *Confusion Gaps and Overlaps* points to ways in which ADR is not consumer-focused. As already noted, a major problem is lack of compulsion. It cites Causton where he says: “everyday, ADR providers receive hundreds of enquiries from consumers eager to engage in ADR, only to be disappointed because businesses are not engaging, particularly in the retail sector.”¹⁹. If the trader indicates willingness to use ADR, the consumer can then choose whether to use it, and this is beneficial. But trader engagement is undoubtedly very low. To take the Consumer Ombudsman as an example: as of January 2018 it had just 30 participating companies and it only resolves complaints about companies which participate in the scheme. RetailADR (formerly the Retail Ombudsman) has fewer than 50.

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

It would be best if firms were obliged to belong to authorised ADR schemes. *Confusion, Gaps and Overlaps* concluded that: “The government should adopt the principle that participation in ADR should be mandatory across all consumer sectors, regardless of the sector involved or the value of the claims consumers are making.” This would, at a stroke, address the issue of participation by businesses.

Short of compulsion, there are ways in which firms might be incentivised to join ADR Schemes, some of which have been touched on above. One is to do more to advertise those who *have* signed up, and to draw attention to those who have not. Organisations such as Which? consumer journalists and others might legitimately ask major firms why they have not subscribed to an ADR Scheme. As noted above, where there is greater consumer awareness there is a better opportunity to impose market pressure. Firms will be more likely to sign up if there is a benefit in doing so and a detriment to their not doing so. As noted above in the discussion of performance data, transparency is generally beneficial: shining light on firms, provided it is done in a fair and balanced way, can

¹⁸ Ibid.

¹⁹ P Causton “The ADR Directive – Airline Complaints and the Civil Aviation Authority – Journey to Nowhere” (2016). Cited in *Confusion Gaps and Overlaps*.

contribute to behaviour changing for the better. Unfortunately, without more consumers taking action through the courts or calling out poor performance on social media, firms may conclude that there is little to be gained by using ADR as complaining consumers are likely simply to go away.

One of the main difficulties in the consumer protection landscape is its lack of bite. This results in large part from a lack of capacity on the part of enforcers. Trading standards have some of the legal powers that they need to deal with breaches in some areas. For example, misleading and aggressive practices and in theory be tackled informally, by civil enforcement or by prosecution. However, enforcers lack the resources to bring enforcement action as a matter of routine. If that were addressed, firms might be more inclined to participate in ADR for fear of something worse. This will not address all disputes by any means (and most of the disputes that are likely to go to ADR are contractual rather than regulatory). However, proper resourcing of trading standards is vital to make the overall consumer law landscape work.

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

The transaction costs involved in traditional dispute resolution (particularly litigation but also self-help/voice to trader) are a significant barrier to achieving access to justice. Mandating ADR would help to address this for the reasons discussed above.

In the event that the Government is unwilling to mandate ADR then, at a minimum, it should mandate it in sectors with the highest levels of consumer harm. It should be remembered that when assessing harm account should be taken of several factors. This includes (but is not limited to): the number of consumers affected; the extent of the harm or loss; and the nature of the consumer or consumers affected (for example whether they are likely to be classed as particularly vulnerable).

16. What changes are needed to ensure local and national enforcers work together within an effective framework for protecting consumers?

Enforcers work hard to protect consumers under very difficult circumstances. The cuts that local authorities (in particular) have suffered have had a significant impact upon the ability of trading standards officers to take enforcement action. The lack of capacity is truly worrying for anyone concerned about the protection of consumers.

One of the most interesting proposals in the Green Paper is for civil courts to impose financial penalties for breaches of consumer law. A Civil Enforcement Pilot was undertaken by the Office of Fair Trading and there was some enthusiasm at the time for embracing some of the powers recommended by Professor Richard Macrory in his report.²⁰ Macrory recommended that enforcers have access to a toolkit that included variable monetary penalties and it is pleasing that the Government's proposal is that they should operate alongside other civil remedies such as injunctive relief, enforcement orders and enhanced consumer remedies.

²⁰ R Macrory *Regulatory Justice: Making Sanctions Effective* (HM Treasury, 2006).

The Government considered implementing administrative sanctions in the Regulatory Enforcement and Sanctions Act 2008 for Consumer Law in 2012, and while it concluded that it would impose the lowest costs of the available options, it was concerned that “there is a perception that it would not provide businesses with a fair hearing before sanctions are imposed.”²¹ It is, of course, important to ensure that there are appropriate procedures to protect firms under the proposals, and as any penalties will be imposed by the courts this seems unproblematic (although firms will, of course, want to see the detail). The Green Paper states that the power “will discourage infringements and promote prompt swift compliance with the law when a breach has been identified.” The discouraging of infringements – what we might call deterrence – is a very important element in an effective consumer protection regime. Its success depends not only on the availability of dissuasive sanctions but also on enforcers having the capacity to bring cases before the courts. The importance of making appropriate resources available cannot be overstated.

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²¹ Department for Business, Innovation and Skills *Civil Enforcement Remedies* (2012).