Empowering and protecting consumers: consultation on institutional changes for provision of consumer information, education, advocacy, and enforcement

Competition Commission response

Introduction

1. The Competition Commission (CC) welcomes BIS's objective of creating a strong consumer landscape which complements the UK's competition regime. Competition and consumer policy aim to produce well-functioning markets through delivering vigorous competition between businesses (a strong supply side) and through empowering consumers (a strong demand side). When consumers are able to engage more actively in a market and select products which maximize their welfare, industry is driven to compete more vigorously to deliver products of most value to consumers.

2. The CC has confined its response to the consultation to the issues in Chapter 5—Enforcement of Consumer Protection Legislation, which relate most closely to the reform of the competition landscape.

Background—market investigations and consumer-facing remedies

3. In the context of market investigations, the CC has on a number of occasions used demand-side remedies which provide consumers with increased market transparency and market access to enhance competition and mitigate customer harm from anticompetitive features of markets. The specific remedies implemented are detailed in Annex A. The objectives of these remedies have been threefold:

   (a) to provide clear and accessible information to consumers about a product before or after purchase, to enable them to make well-informed choices (Northern Ireland Banks, Payment Protection Insurance (PPI), Home Credit, Store Cards);

   (b) to facilitate consumers playing a more active role in a market, for example by ensuring publication of comparative tables to enable comparison between products (PPI, Home Credit) and decreasing switching costs (Northern Ireland Banks, Liquefied Petroleum Gas (LPG)); and

   (c) to change how a business sells a product so that consumers have the opportunity to compare options (for example, PPI and the 'point-of-sale advantage').

4. An important benefit of the market investigation regime is that it can identify and remedy business practices in particular markets (or potentially in future, across a number of markets) that are harming consumers, even where they do not breach the antitrust prohibitions or prohibitions in consumer law.[1]

5. In the cases referred to above the CC used its own remedial powers to make orders under Part 4 of the Enterprise Act 2002. A highly attractive, empowering aspect of such measures, from the point of view of consumers, is that where consumers suffer

[1] As part of a wider competition reform package, the Government has recently consulted on the proposal to provide a new Competition and Markets Authority with a power to promote competition across markets and proactively investigate problematic behaviour across the economy. (Department for Business Innovation and Skills: 'A Competition Regime for Growth: A Consultation on Options for Reform', March 2011).

loss or damage as a result of a breach of a market investigation undertaking or order they can take action before the courts. The CC could also, in an appropriate case, take action to modify the licences of operators in regulated sectors which regulated their dealings with consumers directly. In other cases the CC has recommended that action be taken by others, including other consumer-facing regulators; for example, it encouraged the Financial Services Authority to take steps to make more information relating to PPI available to consumers.

6. In deciding whether to take enforcement action itself or recommend action be taken by others, one relevant factor may be the interaction with the substantially EU-harmonised consumer law regime; if the preferable action were to enforce a prohibition under this, the CC would have to recommend enforcement action to the consumer law authorities rather than imposing a remedy itself.

Reform

7. The primary objective of the new Competition and Markets Authority (CMA) should be to enhance effective competition in markets in the UK, and thus consumer welfare, as the Government's consultation on the reform of the competition landscape proposes. Accordingly we see advantage in introducing reforms which create an effective structure for local and national enforcement of consumer law that does not leave the CMA as the main enforcer. In this model it should not be necessary for the CMA to have general enforcement responsibilities for consumer law itself. In general, where it identifies consumer law enforcement issues in a market study or market investigation, we would expect the CMA to refer them to the relevant consumer law enforcement authority. That will enable it to maintain its primary focus on competition.

8. The one situation where there may be some merit in modifying this approach is where, at the end of a market investigation, the CMA has decided that action should be taken to remedy, mitigate or prevent anticompetitive features of markets. In such a case, the CMA and its staff will have gathered very substantial knowledge and expertise in relation to the particular markets which it has examined and practices in them. It will be under a duty to remedy any adverse effect on competition of features in the market, and any detrimental effects on customers resulting from it, and will need to achieve as comprehensive a solution as is reasonable and practicable to them.

9. In that situation there could be cases where the most appropriate action, either as a one-off measure or, more likely, as part of a broader package of remedies, is for an enforcement measure to be taken under consumer law. The CMA would need to be confident that such action was taken or at least fully considered by an enforcement authority. One approach might be for the CMA to rely upon recommendations to Trading Standards, locally or nationally. Another might be to enable the CMA to exercise such powers itself for a limited period of time immediately following a market investigation, as envisaged by Option 3 in the consultation paper.

10. Whatever powers to enforce the CMA is given, it would be sensible to establish a Memorandum of Understanding between the CMA and other consumer enforcement bodies setting out principles guiding whether and when a consumer protection issue identified by the CMA in the course of its work should be transferred from the CMA to Trading Standards, locally or nationally.

Responses to specific questions in Chapter 5

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

The CC agrees with Option 3 as a model for consumer enforcement. Option 3 enables one consumer body (Trading Standards) to have a clear focus and lead on consumer enforcement matters. The CMA should only have any role in the exercise of consumer enforcement powers as part of its remedial toolkit following a market investigation (see response to question 25).

Question 21: In relation to Option 3, do you agree with the Government's principles for the operation of the new TSPB [Trading Standards Policy Board]? Do you think this model would deliver effective enforcement against large businesses tempted to break the law? Which areas of enforcement activity should warrant specialist national teams? Do you think that an indemnity fund to enable local authorities to take the risk of losing cases is desirable and deliverable?

The CC has no comment to make on these questions.

Question 22: Would you prefer to retain the status quo in terms of powers and responsibilities, but with improved collaboration between OFT/CMA and Trading Standards? If so, would one of the JEB [Joint Enforcement Board] models be the best solution? Which one and why?

The CC has noted the National Audit Office's comments on the confusing nature of the current arrangements and, as set out in its response to question 20 above, considers that Option 3 would be more likely to deliver Ministers' objectives for reform.

Question 23: In relation to the various JEB models, how would you ensure effective Trading Standards participation in the JEB? Do you think that this option would deliver integration of enforcement across local, regional and national levels? Should other organizations be involved in the JEB, either as members or as participants in discussions? Would retention of such unrestricted consumer enforcement powers and responsibilities affect the CMA's singularity of purpose and distract it from its core competition remit?

As set out in its response to question 20 above, the CC considers that Option 3 would be more likely to deliver Ministers' objectives for reform and therefore has no comment on the various models for the JEB. If the CMA retains limited consumer enforcement powers, to be exercised only where it is applying remedies in market investigations, the risk of distracting the CMA from its core competition remit is avoided.

Question 24: How can your preferred new model work best with business?

The CC believes that it can safely be left to enforcement authorities to develop their approach to working with business. Its experience suggests that transparency in its process and decisions is helpful to and valued by businesses; we would encourage the CMA and other bodies with enforcement responsibilities to build on this approach.

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?

The CC considers that the CMA should have the role of conducting market investigations that can identify competition problems in markets, and then identifying and, where possible,

putting in place appropriate remedies for them. Not all such competition problems are structural in nature; some relate to the behaviour or conduct of businesses or consumers and the CMA needs to retain powers to address such issues where they give rise to an adverse effect on competition.

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

As indicated above, the CC believes that such powers should only be exercisable by the CMA, if at all, for limited period following a market investigation.

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?

See response to questions 25 and 26 above.

The CC considers that consumer protection law enforcement is not an appropriate remedy for structural problems in a market. So the CMA's ability to apply consumer protection law remedies should not be restricted to structural problems alone.

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 in the relevant market?

The CC agrees that the CMA should retain responsibility for market studies (as government proposals for the reform of the competition landscape envisage); these may find both competition and consumer protection issues in the relevant market. The CMA will then have the power to decide how best to address any issues it finds, whether through competition law enforcement, reference for a fuller market investigation, or reference to the appropriate consumer law enforcement authority.

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 prioritize cases referred by the CMA?

As set out in the response to question 28, the CMA should continue to conduct market studies and market investigations. If its primary focus is on competition, it would be unlikely to prioritize a study in a market unless it had some reason to believe the consumer detriment arises from competition problems in that market.

Where a market study identifies that there are no competition issues meriting further investigation, the CMA might still refer any other consumer law issues that appear to be appropriate for Trading Standards or TSPB enforcement action to those bodies.

There should be a clear arrangement between the CMA and TSPB for how cases referred by the CMA for enforcement action are taken forward in line with Trading Standards prioritization criteria. The Government is committed to responding within 90 days to recommendations made by the CC following a market investigation; a similar arrangement might be appropriate in this case.

Question 30: Do you agree that the Government's proposed approach is a sensible way of ensuring effective collaboration between the various bodies in the proposed new landscape?

Yes. It will be important to ensure that the controls on the handling of confidential information under the new regime do not unduly inhibit the ability of the various bodies to collaborate and operate effectively.

Question 31: Do you agree that it would be helpful to have some resource that required joint agreement between the CMA, TSPB and consumer advocacy bodies for its release, to be used to investigate or address consumer and market issues that would otherwise risk an enforcement or advocacy gap? If so, at what level should funds be set and how best should they be administered?

The CC does not consider it necessary to have a fund requiring joint sign off for markets where problems are unclear at the outset. Emphasis should be on effective referral and flexible funding mechanisms rather than joint budgets which risk creating further confusion about roles and responsibilities.

Question 32: Do you believe that an enforcement model branded as run by Local Authority Trading Standards Services [LATSS] would deter illegal behaviour? If not, how could the threat of enforcement needed to back up self-regulatory schemes be made more credible?

The CC has no comment to make on this question.

Question 33: Do you agree the TSI [Trading Standards Institute] 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?

The CC has no strong view on the most appropriate location for these functions, but they do not appear to be appropriate for a CMA with a primary focus on competition.

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?

The CC has no strong view on the most appropriate location for these functions, but they do not appear to be appropriate for a CMA with a primary focus on competition.

Question 35: Do you think the requirement for LATSS' and other designated bodies' (under Part 8 of the Enterprise Act 2002) court orders to be directed by a central body needs to be retained in the new consumer enforcement model and if so, why?

The CC has no comment to make on this question.

Question 36: Do you agree that responsibility for chairing the consumer concurrencies group should remain with the CMA?

The CC has no strong view on the most appropriate location for this function, but it does not appear to be appropriate for a CMA with a primary focus on competition.

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?

The CC sees no reason to change the current supercomplaint arrangements as a result of these proposals.

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?

The CC has no comment to make on this question.

Question 39: Do you think that a lead local authority could take on the OFT's estate agency and related anti-money laundering functions?

The CC has no strong view on the most appropriate location for this function, but it does not appear to be appropriate for a CMA with a primary focus on competition.

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?

There are significant interrelationships between the proposed changes to the consumer and competition landscape. The CC considers that the two sets of changes should be considered together as far as possible, and the implementation of both sets of proposals should be co-ordinated to avoid confusion and gaps in enforcement.

Consumer-facing remedies in market investigations

Store Cards

Provision of pricing information in a clear and easily accessible format including:

- an annual percentage rate (APR) warning above a certain threshold;
- details of monthly charges and risks of making minimum payments; and
- information on ‘how to pay’ and how to amend or cancel credit arrangement.

Northern Ireland Banks

Provision in an easily accessible format of:

- descriptions of personal current account (PCA) services;
- explanations of the level of charges and interest rates and how and when they are applied;
- key account information;
- annual summary of charges and interest;
- advance notice of charges and debit interest incurred; and
- regular ‘rights’ reminder.

PPI

Provision of:

- key information in marketing material; and
- price information for use in price comparison websites.

LPG

Provision of improved information to consumers about suppliers to encourage switching.

Home Credit

Provision of:

- price information to an independent website operator to enable consumers to compare prices of loans; and
- more information on statements.