

RESPONSE TO CONSULTATION
Modernising Consumer Markets: Consumer Green Paper

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Summary

1. **Reform the ADR landscape** to a **single national website** providing information and advice to consumers and businesses, a platform to contact businesses, the ability to refer unresolved complaints to Ombudsmen, and to provide feedback to businesses.
2. All ADR schemes to adopt an **Ombudsman model**, involving triage, mediation, use of AI assistance, recommendations that are not binding on consumers unless they agree, and feedback for businesses.
3. **Review** the consumer landscape and practice to see how the sequence of relevant **market control functions** are best **delivered** and to fill gaps.
4. Introduce a new mechanism for **coordination** between public authorities and for driving **best practice** among them.
5. **Review** the policies of all public enforcement bodies to ensure they are consistent and **comply with the Regulators' Code**, especially in relation to engagement with businesses and enforcement practice.
6. Spread the **Ethical Business Practice and Ethical Business Regulation** model.

I do not wish to comment on all Questions, but to focus on those where I have particular expertise, particularly Chapters 3 and 4. In relation to Chapters 1, 2 and 3, I comment briefly.

Ch 2. Better outcomes in regulated markets

I agree that the focus on outcomes in this Green Paper is correct. But one needs to look at the landscape of bodies and the relationships between them, as I discuss below.

1. *In which regulated markets does consumer data portability have the most potential to improve consumer outcomes, and for what reasons?*
2. *How can we ensure that the vulnerable and disengaged benefit from data portability?*
3. *How can we ensure these new services develop in a way which encourages new entrants rather than advantaging incumbent suppliers?*
4. *What is the best way to publish performance data so that it incentivises firms to improve and can be used by consumers when taking decisions? Should firms also offer discounts or compensation for poor performance?*

See below.

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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?*

Why is this section just about the telecoms sector? This is an example of fragmentation, referred to further below. Should not the involvement of consumer voices and advocacy have a similar form across all sectors?

Ch 3. Digital markets that work for consumers

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

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?*

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

See below on general approach to enforcement. The approach to competition enforcement is increasingly old fashioned and out of step with general Government policy and the majority of other sectors.

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

The Ombudsman system needs to apply to C2C transactions, so as to provide confidence in independent and swift resolutions, and data for (self-regulatory purposes).

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

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

A major impediment is that enforcement of unfair terms is *ex post* and there is no *ex ante* clarity, such as can be provided by submission of draft advertisements for advance vetting by the ASA, PMCPA or trade associations, or the ‘assured advice’ function available under the Primary Authority scheme. The CMA should adopt a more pro-active approach.

Chapter 4. Improving enforcement of consumer rights

There is an important point not covered by the Consultation Questions in relation to how redress can be delivered when it is required. The subject is possibly not covered because it is currently working quite well in UK, but the reasons are relevant for other issues raised.

Together with Professor Stefaan Voet of Leuven University, I have recently carried out a wide-ranging pan-EU study into the most effective and efficient means of delivering collective consumer redress.² We compared different mechanisms that are used in different European states. Many jurisdictions have focused on traditional court-based collective litigation techniques, but some have adopted ‘new technology’ approaches that are far better at delivering desired outcomes. The research findings were that two mechanisms deliver collective redress far better than others, including collective litigation. The two winners are:

- a) *Regulatory redress*, where a regulator has the desire and ability to influence a trader to agree to make voluntary redress. This is usually assisted by having a redress power, such as that contained in ‘enhanced consumer measures’ to bring about redress, compliance

² C Hodges and S Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018), ch 5.

and increasing consumer choice under the Consumer Rights Act 2015.³ Various sectoral regulators also have specific powers, such as financial services⁴ (where there have been many cases, typically involving large sums),⁵ communications,⁶ energy,⁷ water,⁸ environment,⁹ and competition law.¹⁰ This technique has recently been recommended by the Australian Law Reform Commission.¹¹

- b) *Consumer Ombudsmen*. There are various forms of ADR but Ombudsmen are a particularly developed form. Although the primary design is to process and resolve individual cases, the Ombudsmen in most sectors both process multiple similar claims (and do so to achieve consistent outcomes) and identify generic issues that might be amenable to a particular approach (such as initial resolution of important or generic issues, or through the intervention of a regulator).

The two mechanisms (regulatory redress and Ombudsmen) are particularly effective when they can act together.

The UK is one of the leading countries in the use of these two mechanisms, in advance of many countries but not all, but further steps are urgently needed to consolidate the approach based on these two techniques, so as to obtain more effective outcomes. In particular, the issues arise of the disparate ADR models and complexity of the ADR landscape, referred to below.

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

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

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

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

My answers to these questions are basically the same: the answer lies in having a **clearer and simpler national architecture of ADR bodies**, which covers as many sectors as possible and is consistent. Simplicity of the structure and consistency will make it easier for consumers to know what to do if they experience a problem in any sector (first contact the trader, then the ombudsman). Simplicity is essential for consumers to remember, identify and access a system. There should be the same basic simple approach across all consumer sectors.

³ Enterprise Act 2008, s 219A, inserted by the Consumer Rights Act 2015, s 79 and Sch 7, art 8.

⁴ Financial Services and Markets Act 2000, s. 404 and 404 F(7). Redress has been particularly emphasised: see *Our future Mission* (FCA, 2016) and *Our Approach to Enforcement* (FCA, 2018).

⁵ In 2016 and 2017 enforcement cases included £1.3 billion in redress.

⁶ eg Communications Act 2003, s94.

⁷ Electricity Act 1989, s 27G, and the Gas Act 1986, s 30G. In 2015-16, nearly £43 million was secured in redress.

⁸ Water Industry Act 1991, s 22A(1).

⁹ The Environmental Civil Sanctions (England) Order 2010/1157 and The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Order 2010/1159. From 28 January 2017 to 31 August 2017 civil sanctions totalling around £60 million were paid by 44 companies, of which 21 were reactive cases where the company contacted the agency: *Enforcement Undertakings accepted by the Environment Agency* (Environment Agency, 2017).

¹⁰ Competition Act 1998, s. 49C, as amended by the Consumer Rights Act 2015.

¹¹ *Inquiry into Class Action Proceedings and Third-Party Litigation Funders (DP 85). Discussion Paper* (Australian Law Reform Commission, May 2018), ch 8; at

<https://www.alrc.gov.au/publications/inquiry-class-action-proceedings-and-third-party-litigation-funders>

The Green Paper is correct to identify that key problems are lack of take-up in non-regulated sectors where ADR is not mandatory, low consumer awareness, and difficulties in making complaints (paras 144-152). Those are problems in relation to the *users* of ADR (consumers and traders) but some of the answers arise from the need to reform the *intermediaries*, namely the ADR system itself, its landscape and entities.

Some may regard ADR entities as providing services, and wish to treat them as operating in a market. I believe that view is fundamentally misconceived. There is clear evidence that price competition amongst ADR entities risks undermining standards (ultimately a race to the bottom, and possible corruption): that outcome is unacceptable. ADR entities are vital to upholding the rule of law. We do not allow competition between courts. We should not permit competition between ADR entities in a sector on quality grounds. As noted below, there are also other reasons, based on delivering wider regulatory functions based on collection of data.

We are at a transitional point in time, and decisions taken—or not taken—now are critical. First, it has been recognised that ‘ADR’ is good for resolving consumer-trader disputes but a number of different forms of ADR exist, which have been created over time as the concept of ADR has evolved, and some are more advanced than others. The current picture is one of confusion, in relation to both the nature of ADR (since the models used by different ADR bodies differ) and its landscape (because of lack of simplicity and structure).

Second, it is clear that some forms of ADR can provide more *functions* than just dispute resolution. That point can be grasped as a strong rationale for Government leading modernisation of consumer-trader ADR.

The ADR landscape is fragmented and inconsistent. In my view, the country should move swiftly towards an ADR system in which

- A. There should be *a simple national system*, involving basically the same framework model (whilst permitting some relevant divergence and innovation). The state of the art model is that of the Ombudsmen and that should be the standard model.
- B. There should be *a single integrated national architecture*. This would comprise:
 - i. A single national website for providing consumer advice and signposting the relevant Ombudsman.
 - ii. An integrated national structure for Ombudsmen, involving only a small number of Ombudsmen (fewer than at present).

I expand on these ideas here.

A. Modernise the Model: Switch from arbitration or other ADR models to only Ombudsmen

A number of ADR bodies are based on arbitration, in which parties must agree to be legally bound by the result beforehand. That binding effect is intrinsically unattractive to many consumers. The main alternative model is that of an Ombudsman, where mediation may also be available as a first step, but any final recommendation by the Ombudsman is typically not legally binding on the consumer unless the consumer accepts it, in which case it is binding on the trader. That model is more attractive to consumers, who are able to preserve their right to go to court if they wish.

Some sectors have successfully operated Codes of Practice, especially those approved under the CTSI scheme, which draw on self-regulatory mechanisms and include arbitration-style ADR systems. Good as those schemes are, their numbers tend to be small, they do not aggregate data across similar cases or schemes, and so they may miss identifying systemic points across multiple sectors that could be useful for driving traders’ improvement. It is time to evolve to a more contemporary system.

The arbitration-alone model is now out of date. Triage and mediation stages are what people want, not an anonymous faceless determination of legal rights by a person they cannot identify or verify. People want quick determinations, which can be delivered by communication/mediation by an *independent, trusted* intermediary, i.e. an ombudsman.

The current leading Ombudsmen have the state-of-the-art model of processing contacts, as shown in Figure 1.

Figure 1: An escalating pyramid technique



This model provides a sequence of stages: triage, mediation and decision. Points of law can be referred to court for clarification and then referred back.

Further, unlike mediation-only or arbitration-only ADR models, Ombudsmen perform a wider range of functions than just dispute resolution (noted at page 50). The functions that are needed for controlling an effective market are:

1. Establishing clear rules and their interpretation
2. Identification of individual and systemic problems
3. Cessation of illegality
4. Decision on whether behaviour is illegal, unfair, or acceptable
5. Identification of the root cause of the problem and why it occurs
6. Identification of which actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk
7. Application of the actions (a) by identified actors (b) by other actors
8. Dissemination of information to all (a) firms, (b) consumers, (c) other markets
9. Redress
10. Sanctions
11. Ongoing monitoring, oversight, amendment

ADR is traditionally only thought of as functions 4 and 9. Indeed, dispute resolution is all that the traditional mechanisms are designed to do: courts or arbitration-ADR. However, consumer ombudsmen deliver more functions: certainly 2, 4, 8, 9, and, with Resolver, they are moving into other functions. The rationales for preferring the Ombudsman model as a design choice are: ease of identification is promoted by consistency and simplicity of the structure, and provision of a greater number of valuable functions than just dispute resolution.

The key here is to see how a system can deliver all of the functions, and the answers lie with intermediaries that have particular designs, and that operate together. In the UK context, this

functionality can be delivered by Resolver + Ombudsmen + Regulators in a ‘regulated self-assurance’ model,¹² especially if it is also based on Ethical Business Practice & Regulation (see below). The advice function would be delivered by Resolver and Ombudsmen websites, with a reformed Citizens Advice structure. The Citizens Advice model was based on local availability of person-to-person advice: whilst some element of that may still be necessary, the modern approach should be based on digitised centrality and there is no cost justification for maintaining separate diverse systems.

The Green Paper emphasises the *importance of data* in future markets (e.g. the need to collect and publish performance data, paras 67 and 68). Older ADR models or courts do not provide for collection, aggregation or feedback of market data: Ombudsmen and Resolver do this well. The system should be redesigned so as to collect data that will then be used to drive behaviour and enforcement. Hence, this necessarily involves a switch to universal application of an Ombudsman model of ADR.

The question that arises is how to maximise information coming into the system. The parameters for such a system should be:

1. A small number of clearly identifiable and linked pathways¹³
2. User-friendliness
3. Clear, integrated pathways for consumers: eg advice, triage, mediation, decision, application.

These issues all point to building on the current Ombudsman model, building in other sources, including Information from traders and suppliers’ own monitoring, from competitors, and from users (questions, social media, complaints and claims). This points to a review of the architecture involving Citizens’ Advice, consumer associations and platforms such as Resolver.

In relation to providing feedback to businesses, the leading Ombudsmen and Resolver are already performing innovative ways of doing this, to businesses of all sizes, not least including SMEs. Development of those actors should save resources of public bodies.

B. Landscape: Rationalise the number of (ADR bodies and) Ombudsmen

I agree that having more than one provider per sector is not beneficial (para 152). It is important that ADR should not be approached as a market. We do not have a market in courts or regulators. The same should be true in relation to Ombudsmen. Sectors that have a single ADR (Ombudsman) are working well. No sector that has more than one ADR provider is working entirely satisfactorily at present: competition is lowering quality, reputation of and trust in the Ombudsman/ADR system, and confusing consumers and traders. Differences in price are undermining quality. Some ADRs that technically satisfy the quality criteria raise significant concerns.

Belgium has an admirable single national website, providing advice and dispute resolution, that links to a small number of major Ombudsmen, linked together in a unified National Consumer Ombudsman Service. That system could be improved, but is better than the UK

¹² *Regulatory Futures Review* (Cabinet Office, 2017).

¹³ This issue has recently been emphasised by the United Nations Commissioner for Human Rights in a Report on ADR (stating ‘The need for realistic and *readily-identifiable pathways* to an effective remedy’, emphasis added): *Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms: explanatory notes to final report - Report of the United Nations High Commissioner for Human Rights - Note by the Secretariat* UNCHR 1 June 2018.

model. All Nordic states have a simple unified national ADR system (which copes effortlessly with ‘residual’ claims, i.e. all types of claims), comprising a national complaints Board and a small number of sectoral complaints Boards for the major sectors. The Nordic states also have the leading ADR-like models covering personal injuries, in administrative compensation schemes. The Netherlands has an integrated ADR structure that covers many sectors under a single administrative body, providing consistency and clarity. It also has two other admirable features: a mechanism for regular agreement on terms and conditions for all major sectors (which leads to high quality of practice, backed by trade self-regulatory pressures) and a trade association guarantee to consumers that the association will pay if any trader member fails to honour an ADR award against it. It also has a new mechanism for referring points of law to for determination by a court at an early (pre-judicial process) stage. However, the Netherlands is only starting to include mediation in its ADR procedures.

There are strong arguments for consolidation of ‘providers’ across sectors, as discussed below. Various developments in UK are moving in this right direction:

- The **motor** sector has successfully shifted from its Motor Codes scheme into an independent Motor Ombudsman, which has (not surprisingly) led to an increase in consumer contacts, given a high level of trust in the concept on an independent Ombudsman.
- The Government is right to provide for a rationalisation of ADR in the **housing** market, with a single Ombudsman, mandatory for all landlords, estate agents, letting agents etc.¹⁴
- The possibility of a single Transport Ombudsman. For **rail** and **aviation**, it should be standard for traders to make automatic electronic (re)payments to customers, *without the need for passengers to make a complaint*, backed by an Ombudsman system. The Government is right to reconsider ‘how a compensation scheme should work in the interests of consumers’ and whether there should be a single mandatory ADR scheme’.¹⁵ This would be efficiently backed by a single Ombudsman scheme, mandatory for all suppliers.
- There should be a single Ombudsman for **utilities** (energy, water) **and postal services**.
- The **Pensions** Ombudsman and the **Financial Services** Ombudsman should be merged.
- There should be a single Ombudsman for **professional services**, extending the Legal Ombudsman.

It would be efficient if some of these sectors were served by a small number of Ombudsmen, rather than one for each sector.

The rationale of providing simple accessibility for consumers, rather than a multiplicity of diverse sources of assistance, has just been implemented by HM Government in the consolidation of consumer advice for pensions, debt, money, and consumer protection into the single financial guidance body.¹⁶

Evolution and Timing

I do not agree that it would impose significant or unnecessary cost on business if every sector were to switch to a unified Ombudsman model (para 155). I believe that the continued existence of the current non-uniform model imposes significant cost on the market and its users, and fails to achieve the self-regulatory improvements in quality and trading standards that a unified Ombudsman model should produce. The major complaint by traders in many sectors is that the law is simply not enforced on unscrupulous or poorer quality traders, so there is an absence of fair competition (a clear conclusion from a recent BEIS’ Business Reference Panel meeting). Reforming the complaints system through a combination of Ombudsmen and resolver should fill a significant part of that gap in public enforcement. This

¹⁴ *Strengthening consumer redress in the housing market A Consultation* (DHCLG, 18 February 2018).

¹⁵ *Beyond the horizon, The future of UK aviation. Next steps towards an Aviation Strategy* (HM Government, 2018).

¹⁶ Financial Guidance and Claims Act 2018, Part 1.

would benefit markets by making more playing fields more level, and identifying and resolving problems speedily. I have observed in discussions with various trade bodies over the past decade that they would be content to move to an Ombudsman model if Government pushes this, even if their formal position is against change.

I suggest that the goal should be to make joining an ombudsman scheme mandatory in all sectors that are currently voluntary, or clearly set that as the objective (which would itself encourage development of capacity) and progressively include individual sectors under a mandatory regime by giving the Secretary of State a power to implement a mandatory requirement in an individual sector when he/she sees fit. One would obviously start with the sectors where most consumer complaints occur, and the value of problems (the chart on page 51 is very helpful in this respect), namely vehicle sales, home improvements, rail, household appliances and car parking.

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

It is manifestly correct that the consumer enforcement system is ‘under considerable pressure’ (para 160). The basic reasons for this are a lack of resource at TS/LA level and a lack of coordination between a fragmented enforcement network.

The option of radically increasing LA funding presumably has to be discounted as currently politically and economically unacceptable. Hence, we need to find more imaginative solutions, and I suggest that effective options lie in increasing coordination and adopting innovative ways of working. In relation to strengthening national coordination, I agree with the idea of a strong national body (para 163) but supplemented by a new way of working.

There is currently a **lack of effective coordination** between enforcement bodies. Multiple authorities are involved. The Green Paper lists ‘the current enforcement landscape’ on page 48, listing Local Authority Trading Standards, the CMA, ‘sectoral regulators’ and some advice bodies. That description masks the scale of the coordination problem, when one considers that other bodies involved include FCA, Pensions Regulator, Gambling Commission, CTSL, OPSS, FSA, HMRC, MHRA, Ofcom, Ofgem, Ofwat, DWI, ORR, HSE, EA, Eq&HRC, NTSB and various others, and there are over 300 LAs.

No comprehensive national coordination mechanism currently exists, and the picture is confusing and outcomes are unclear. It is instructive to analyse three mechanisms.

First, the *Primary Authority scheme* has proved that it can be a highly effective coordination mechanism. It covers LAs and businesses, overseen by OPSS, recently expanded to include five national authorities as supporting authorities and also other business entities such as trade associations. But it still has some weaknesses. The next issues to be tackled in its development include: gaining full support from all LAs; ensuring full involvement and support from all ‘supporting’ national authorities; joining in all currently non-supporting national authorities (this may take time, but does any plan exist?). The Consumer Protection Partnership, providing welcome engagement between government and trade associations, could be developed further in this context. OPSS performs a vital function of coordination and this structure could be built on further.

Second, *UKRN* consists only of a number of economic sectoral regulators, and its outputs are unimpressive. There is otherwise no general coordination between those bodies, and certainly between them and the many other regulators. The output of UKRN is inadequate because it has no cohesive driving force, ability to adopt an independent and holistic overview or ability to exercise some persuasive authority on its members.

Third, coordination of *Trading Standards* is undertaken by the NTSB/CTSI. I do not believe that those bodies have enough resource. NTSB currently focuses on enforcement only of major crime issues, and I believe should be strengthened. A structural reform is needed that retains (a) a collaborative approach between all authorities and with businesses, (b) enables specialist expertise to be allocated more effectively and efficiently between a central and localised authorities, and (c) enables effective action to be taken against unlawful trading.

These objectives could be realised by **merging NTSB and OPSS**, in order to create synergies in national enforcement that are now available through the activities of what has become OPSS, especially as it has coordinated Local Authorities through the Primary Authority scheme. Maintaining both the local presence and a national capability are both important. I would be strongly **against merging NTSB with the CMA**, for various reasons, some of which relate to differences in function and in approaches to enforcement (see below). The new coordinating body should be an independent authority, and build on familiar and effective lines.¹⁷

There remains an issue of a **lack of coordination across multiple national and local bodies**. One model would be for a supervisory body to coordinate sectoral regulators, such as BEIS/OPSS provides for LAs under the Primary Authority model, or possibly (but not my choice) CMA. But the UKRN agencies are currently omitted, and should be brought in, and be subject to some external oversight. An interesting possible inspiration here for increased coordination that operates on a more collaborative basis is the Canadian Community of Federal Regulators, a central body to which all federal regulators subscribe, which is sufficiently large to adopt an independent and persuasive role.

I would urge the top of Government to examine creating an **holistic coordination and oversight mechanism** that would drive best practice in enforcement. One option may be a high-level regulatory oversight body, possibly in or close to Cabinet Office. Alternatively, BEIS/BRE might consider a Canadian model, possibly building on OPSS and bringing in UKRN.

An important issue is the current **fragmentation of regulatory practice and of enforcement policy**. Many UK regulators adopt a supportive approach towards assisting businesses to comply. A limited number of authorities, in this context the competition side of CMA, is increasingly not aligned by adopting a punitive deterrent approach to enforcement (discussed below), that neither succeeds nor helps business. Hence, there is a need for closer alignment in approaches between the diverse regulatory agencies.

These points lead to the considerable opportunities in improving outcomes and reducing (public and private) costs that should flow from adopting a *cooperative approach to compliance, surveillance and improvement* that is afforded by an Ethical Business Practice and Ethical Business Regulation model.¹⁸ That model has started to be piloted in various diverse sectors, and should be expanded. It enlists and challenges the private sector to take ownership of their own risks, demonstrate that they are self-regulating themselves effectively, whilst saving public resources. In relation to regulators, Chapter 2 rightly talks about 'Updating our approach to regulated markets' and to reviewing the approach to *consumers* based on new understandings on behavioural biases (para 40) but it is surely appropriate to apply a similar review to the *public* bodies involved.

¹⁷ See *Striking the Balance. Upholding the Seven Principles of Public Life in Regulation* (Committee on Standards in Public Life, 2016).

¹⁸ See C Hodges and R Steinholtz, *Ethical Business Practice and Regulation. A Behavioural and Values Based Approach to Compliance and Enforcement* (Hart, 2017).

Ch 5. A regulatory and competition framework

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

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

I believe that the enforcement policy of the CMA in relation to competition law, namely focusing on deterrence and very large penalties with a leniency policy that does not incentivise firms to have an ethical culture and to cooperate with authorities (merely to be the first to own up, probably when a cartel is decaying), has been shown to be ineffective. (This is a generic point about global enforcement of competition law, in which the UK approach is not an outlier amongst antitrust authorities.) There is no evidence that the incidence of cartels has reduced. Virtually all cartels are identified by firms and not by the CMA. Importantly, the CMA is an outlier amongst many other UK regulatory authorities, who adopt a notably different approach from consistent deterrence, and aim to assist businesses to comply.

Where a business asks for assistance under, for example, the Primary Authority scheme results in relevant regulators responding with assistance, support and ‘assured advice’ rather than (in the case of the CMA) a large fine. It should be no surprise that other regulators are achieving better results. Their approach of engagement is inherently more likely to be successful with genuine businesses. The CMA’s approach based on deterrence alone leads to it applying a hard enforcement approach to *every* business, rather than just to criminals. There is clear behavioural evidence that a punitive approach on people who are trying to obey the law produces resentment and *reduces* compliance rather than increases it: deterrence does not work on them. A differentiated (responsive) approach is needed.

The CMA’s whole approach to achieving compliance and enforcement should be externally reviewed and brought into line with the majority of other regulators.

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

The tools are basically fine, it is the whole approach to competition compliance and enforcement that is the problem.

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

No, it needs to adopt an approach based on a more engaged partnership with ethical businesses.

However, I have serious concerns that the CMA will be able to wield a power to ask a court for a civil fine up to 10% of turnover,¹⁹ because this is claimed to increase deterrence. It will be vitally important to make clear that this power is only appropriate as a response to actions taken with clear criminal intent and it should not be used ‘as deterrence’ in response to any genuine business who has broken rules.

21. Do you agree with the approach set out in the draft Strategic Steer to the CMA? Are there any other areas you think should be included?

I support the objectives that the CMA should ‘Support the Industrial Strategy’s Aims’ and ‘Champion consumers’.

The CMA has fallen behind thinking and practice by most other consumer enforcers because it excluded itself from the Regulators’ Code on the ground that it is not a ‘regulator’. It needs to catch up and adopt the same thinking and practice as others. As noted above, The CMA should adopt a more pro-active approach to engaging with businesses to assist them, as required under the Regulators’ Code.

¹⁹ Better Markets Bill.