Law Society of Scotland

Consultation Response

Modernising Consumer Markets: Consumer Green Paper

July 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Competition Law, Consumer Law and Privacy Law Sub-committees welcome the opportunity to consider and respond to the UK Government's consultation *on Modernising Consumer Markets: Green Paper.*[1] The Sub-committees have the following comments to put forward for consideration.

Response

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

Data portability can be used to enhance price transparency and allow consumers to compare products with reference to their personal circumstances. It can be particularly useful where complex pricing structures are involved. Data portability can also facilitate switching by reducing the administrative burden on consumers when the decision to move to a new provider has been taken.

In answering this question, we must first look to the underlying reasons for ensuring data portability. Data portability has the potential to reduce the hassle for individual consumers when switching between providers. To the extent that actively engaged consumers contribute to eg competitive pricing and higher quality service offerings, the ability to switch more easily could improve outcomes for consumers more generally.

The rollout of smart meters will make data portability increasingly important in the electricity and gas sectors. One of the benefits of portability is the ability to take data to a comparison website. So, for

[1] https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets

example, if you have smart meter data, you can take your usage patterns to a website. This provides a better comparison point than billing information alone as some tariffs may have off-peak benefits which would only be made clear by inputting usage data. However, to ensure that these benefits are realised, the possibility of using the right to data portability in this way needs to be well publicised so that people know what their data can achieve.

Consumers in Scotland (like those in England and Wales) have no choice over their water provider and so the only other regulated market in which consumers are likely to benefit from data portability is telecoms. We would encourage any approach to data portability to look at all services offered by telecoms providers. Increasingly telephone services are no longer the most significant part of a household telecommunications bill.

In each of electricity, gas and telecoms (defined broadly), a key barrier to effective competition is the opacity of the information available to consumers. Even if an individual consumer is given access to his or her Midata, for example, it can be very difficult for them to understand how to apply this to searching for a new tariff. Allowing a consumer to approve their data being made available to price comparison websites and competitors of their current supplier, without the need for the consumer herself to enter that data online, would allow an algorithm to calculate the best tariff for that consumer and allow the consumer to benefit from the widest possible range of tariffs, which the CMA's 2016 report on its energy market investigation endorsed.

We would encourage regulators to consider microbusinesses, and possibly SMEs more broadly, when considering how the benefits of data portability can be realised. Microbusinesses are widely recognised to behave like consumers and can often benefit from the same regulatory interventions.

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

Disengaged people are, by definition, less likely to exercise their right to data portability; the benefit would only be realised at the point where they become more engaged.

We do not consider data portability *per se* is the best starting point when considering vulnerable people. Rather the emphasis should be on empowering vulnerable individuals to make better choices by facilitating comparability and demonstrating how data portability can assist with this. Minimising the administrative burdens associated with switching providers may make the choice to switch to a new provider less overwhelming. If vulnerable people can become more engaged consumers, then they should be able to benefit from data portability.

Furthermore, vulnerability is a varied and varying subject. The best way to assist vulnerable consumers to benefit from competitive markets is likely to be in line with moves to encourage more open markets and easier switching for all consumers.

The Energy Markets Investigation (Database) Order 2016, which was one of several orders implementing the CMA's final report in its energy markets investigation, obliges suppliers to put customers who have been on the same tariff for three years or more into a database which other energy suppliers can use to approach them and offer better deals. Consumers can of course opt out of being on the database if they wish. This sort of automatic data sharing may be more likely to be effective in providing vulnerable and disengaged consumers with the benefits of competition than relying on them to exercise rights of data portability themselves. We would recommend that this approach is considered for application more broadly.

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

It is important to note that incumbent suppliers can also be innovators: the important thing is to promote a competitive environment which does not unfairly advantage incumbent suppliers or discourage new entrants.

The GDPR as implemented in the UK by the Data Protection Act 2018 provides a strong bulwark against abuse of consumers' personal data.

While it is too early to assess the impact and success of the recently open banking initiative, the legislation seeks to establish a framework that allows both new entrant and incumbent suppliers to offer services which may allow consumers to make better use of their data. If successful, this could provide a blueprint which might be expanded to other sectors to facilitate development of innovative services.

Furthermore we can see that potential benefits could be realised from establishing central databases of consumer information, of the kind established by the Database Order referred to above, and making these available to all suppliers and price comparison websites.

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?

Performance data is more likely to be of use to consumers where it is easily accessible and comparable. Too many categories of performance measure can obscure the overall performance of individual suppliers. Aggregated data or rankings, of the kind provided by independent research or comparison agencies, such as Which?, are more likely to help consumers balance price against performance and can be helpful in price comparison exercises.

Compensation is already required in certain circumstances for poor performance by regulated companies – for example the Electricity (Standards of Performance) Regulations provide consumers with compensation for power cuts. Consumers may benefit from all compensation rights being set out in one place. It is important recognise that immediate compensation rights may be more beneficial than rights to future discounts, particularly where those being compensated are on lower incomes.

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?

As noted in our response to question 2, the most effective means of delivering consumer benefits are through empowerment and transparency generally. If this is done well, it has potential to deliver benefits, extending to those who are most vulnerable.

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

Data portability is not so much an end in itself as a means to facilitate switching and encourage more active consumer engagement with markets with a view to driving competition between providers. The focus should therefore be on facilitating comparability and providing consumers with the tools they need to make informed choices. The benefits of data portability will be realised across the digital economy if better informed decision-making leads to more competition between providers to provide competitively priced offerings to consumers.

We note that if switching between providers leads to increased exercise of the right to data portability, the suppliers will have to “build” the systems that facilitate it.

A number of practical barriers to data portability may present themselves to businesses including:

- compatibility of systems and the ability of one businesses system to “read” records obtained from another system and
- different companies holding different data sets.

Information audits carried out under the new GDPR, as implemented in the UK by the Data Protection Act and increased enforcement around data protection may need to companies holding less superfluous personal data which may help contribute to greater consistency. However, any initiatives to promote standardisation of information to facilitate data portability should be industry led and should not stifle

flexibility of business models where service providers gather and hold information for legitimate purposes or on the basis of consent.

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?

It is important to ensure that innovation in data use continues while at the same time preserving strong privacy rights. Similarly, access to data can be important in encouraging competition between businesses. It is often possible to collect and/or store data in a way that is both in the interests of an individual, a particular set of consumers or the public at large and to encourage innovation without unnecessary retention of personal data or undesired personalisation of offerings.

The GDPR sets out a robust framework which should guarantee high levels of transparency and protection for personal data. One of the central questions in terms of collection and storage of personal data relates to the necessity of storing that personal data. However, often what is really needed to support innovation is aggregate data which can be detached from the original individual. As long as the original can no longer be identified, it will therefore cease to be considered personal data and the risk to individual privacy will be removed. Pseudonymisation is not a blanket solution but may therefore offer a helpful solution in many scenarios.

We also note that the concept of privacy links with issues around collection of data more generally, for example where the person giving the data does not have a free choice to do so. This plays into debates around (arguably unnecessary or undesirable) paternalism versus ensuring adequate levels of consumer protection and promoting competition.

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

Digital markets pose a number of competition issues including the detail of comparing like with like; algorithmic decision-making; price fixing; the emergence of intermediaries for data and questions around where transaction power lies from a competition perspective; and behaviour in online market places. A further issue arises in terms of the increasing overlap between providers or agents for providers, for example a platform which offers a marketplace for other sellers while also offering goods or services in its own right. Across the board, we note that it can be difficult to ensure transparency in complex situations.

See further our response to question 20 below.

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

It is assumed that “consumer-to-consumer” transactions refers to contracts between individuals outwith the course of business, for example an individual selling second-hand goods through a platform. Transparency is essential to ensuring fairness in this context: it should be made clear to the purchaser that the counterparty is an individual and the usual consumer law protections will not, therefore, apply.

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?

We have no evidence on this topic. It may take longer for the requisite evidence base to emerge to answer this question fully.

However, we note that many consumers will not be aware that “personalisation of price” criteria can be applied. They will not know how that price has been established and far less whether they have been offered the ”best” price by that provider in a whole of market scenario. The consumer may not understand how they have been targeted or conflicts which may exist, to their prejudice, in the business supply and information chain which set the price. Setting effective requirements on transparency for the benefit of the consumer should therefore be subject to review at this stage.

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

We have no comment on this question.

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

It could be helpful for the CMA to publicise alternative dispute resolution (ADR) through its website and other platforms. It would also be helpful ADR to be brought to the attention of consumers where they raise a dispute.

We also note that Scottish solicitors are required to discuss and explain dispute resolution options, including identifying when ADR would be appropriate.213. What model of alternative dispute resolution provision would deliver the best experience for consumers?

The three most common models of ADR are mediation, conciliation and arbitration. Different models can offer advantages in individual situations. In all cases it is more effective for consumers if a complaint is dealt with without triggering any need for dispute resolution. Online dispute resolution may offer a helpful and cost-effect resolution method for consumers with easy online access.

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

We note that mandatory alternative dispute resolutions offerings already exist in essential regulated sectors – such as, for example energy and aviation.15. Should there be an automatic right for consumers to access alternative dispute resolution in sectors with the highest levels of consumer harm? It could be beneficial to extend this approach where this is clear evidence of high levels of consumer dissatisfaction and disputes. However, this should not restrict the ability of consumers to access justice through the courts when this is the desired or more appropriate route to resolving a dispute. We also note that there is debate around the effectiveness of compulsory ADR.

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

We note that sector competition regulators (the CMA, FCA etc) already come together to discuss competition issues and share best practice. We support this collaboration and consider that regulators should work together to maximise the potential benefits of this approach.

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

We note that consumer advocacy and advice fall within the devolved competence of the Scottish Government. We have no further comment on this question.

[2] See Guidance rule B1.9

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

The 2014 reforms abolished the Competition Commission and Office of Fair Trading and introduced the new CMA to take on their functions.

One of the reasons behind the reforms was problems in the Competition Appeal Tribunal (CAT). There was a feeling that companies were "gaming" the system - not introducing all the defence evidence initially and then producing it at the CAT to get the decision annulled.

Benefits from the changes are already apparent and decision-making seems to be more robust. The possibility for the CAT to review decisions is recognised as a positive development.

However, it is too early for a full review of the effectiveness of these changes. Above all, the new powers are not being fully used and have not therefore been tested in the CAT. It would be inappropriate to introduce further changes until the new system has had time to become fully operational.

There has been a suggestion of watering down the powers of the CAT to make them more akin to the judicial review system, particular in relation to telecoms. However, we do not consider that this would be a positive development as the possibility of a substantive review hearing helps to ensure more robust decision-making. Furthermore, in the telecoms sector it is arguable that some of the quality of regulation is very low. It is important that the CMA should be subject to a real standard of review. This was reinforced in the recent judgment in *Gallaher*[3] and is also the approach taken, for example in the US.

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

As a general rule, the current system works well.

However, as noted above, the lack of use of the new powers means that the precise scope of the existing toolkit may be unclear in certain respects. A key example is the CMA's new questioning power: we are not

[3] *R (on the application of Gallaher Group Ltd and others)* v *The Competition and Markets Authority* [2018] UKSC 25

aware of this power having been used extensively to date and therefore it is not clear what it would or would not allow.

One issue to consider is the number of sector regulators and the roles they play. There are issues of consistency and as they are tasked with protecting the same consumers, have similar objectives and often raise similar themes, there would be benefits from coordinating efforts and ensuring a more joined-up approach.

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

Generally speaking we believe that competition law as such is fit for purpose to deal with new technologies – ie collusion by an algorithm is collusion just the same. One of the strengths of competition law is that the principles-based nature of the regime gives greater flexibility to deal with changing markets. However, there are still difficulties in terms of enforcement in evolving markets: an issue which could be dealt with by competition law may still be missed or the competition law relevance may be overlooked. The key question in fast moving markets is time taken to run complex cases – by the time decision is reached and litigated, the market has moved on. So fast-tracking / having nimbler enforcement tools may be something to think about.

There is also an inherent difficulty in less obvious cases as nature of chapters 1 and 2 mean that focus is on past conduct. Often a particular action or behaviour will only be prohibited after an incidence of it has already occurred.

In both these cases the speed of decision-making in enforcement cases is a central consideration. While there may be advantages to fast-track decision-making in certain cases, there is a danger that pushing through cases too fast could erode the rights of the defence. On the other hand, significant delays can allow businesses to continue exploiting an advantage or gaining further market share. In this respect powers to take interim measures can have a positive effect. A possible solution would be to focus on changes the balance of risk, recognising the role of competition law in managing change while guarding against anti-competitive practices and ensuring protection of consumers.

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?

We have no comment on this question.

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