

From: Gordon Ashworth
Director, Consumer Protection

25 August 2021

Dear Sir/Madam

PCR Testing: Compliance with Consumer Protection Law

1. The Competition and Markets Authority (**CMA**) has a wide range of legal powers which it may use to examine and address problems found in markets. These include specific powers to enforce consumer protection law, including where necessary taking businesses to court to stop illegal behaviour and seek compensation for consumers and, in some cases, the power to bring criminal prosecutions. The CMA's main consumer enforcement powers are also shared with other bodies, such as local authority Trading Standards Services. Further information about the CMA's consumer powers and functions can be found in [Consumer protection: enforcement guidance \(CMA58\)](#).
2. The CMA is writing to advise providers of polymerase chain reaction testing in relation to coronavirus (COVID-19) (**PCR test providers**) to immediately review their practices and policies to make sure that they are in line with the requirements of consumer protection law and to make any changes where necessary.
3. The CMA is also continuing to investigate the information and complaints it has received to determine whether appropriate enforcement action should be taken against particular PCR test providers.
4. This is in addition to the [announcement](#) by the Department for Health and Social Care (**DHSC**) that it will be carrying out regular spot checks to ensure that PCR test providers listed on GOV.UK are following the rules and meeting transparency standards, as well as introducing a new 2-strike policy in relation to misleading information, which could lead to providers being removed from the GOV.UK list. The DHSC has stated that it will be sending a first warning to 82 PCR test providers in relation to misleading pricing information.

Complaints relating to PCR test providers

5. The information we have seen so far suggests that some PCR providers may be failing to comply with their obligations under:
 - a. The Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**), which require businesses to treat consumers fairly.¹
 - b. The Consumer Rights Act 2015 (**CRA**), which give consumers certain legal rights and prohibit unfair terms in consumer contracts.²
 - c. The Consumer Contracts (Information, Cancellation and Additional Information) Regulations 2013 (**CCRs**), which contain certain information requirements and give consumers certain cancellation and refund rights.³

6. The types of harmful conduct we have identified include:
 - a. So-called 'bait' advertising – for example attracting consumers by advertising cheap PCR tests (including on GOV.UK) which are only actually available in very small quantities or are not available at all.
 - b. Drip-pricing – advertising up-front prices for PCR tests which do not include additional charges that everyone must pay.
 - c. Failing to disclose important caveats upfront, particularly in relation to cheaper PCR tests – for example failing to make clear that consumers must attend a specific venue at a specific time.
 - d. Terms and conditions which completely limit the PCR test provider's liability or exclude statutory rights.
 - e. Failing to deliver PCR tests or provide results within stated timescales, or at all.
 - f. Significant difficulties in contacting PCR providers when problems arise.
 - g. Refusing to provide consumers with refunds where tests are not provided within advertised and/or agreed timescales, or at all.
 - h. Problems with refunds and cancellations.

Consumer protection law and PCR test providers

¹ For more information see the CMA's [guidance on the CPRs](#).

² For more information see the Trading Standards [Business Companion](#) and the CMA's [guidance on unfair terms](#).

³ For more information see the Trading Standards [Business Companion](#).

7. We set out below our views on what PCR test providers should do to help ensure that they comply with consumer protection law in relation to the issues we have identified to date:
- a. **PCR test providers should not focus their advertising on cheap tests which are only available in very small quantities or not at all. This includes pricing information provided to GOV.UK or other websites.** Certain types of 'bait' advertising⁴ are banned outright under the CPRs. Providing false or misleading information about the prices and availability of PCR tests at certain prices is also liable to breach the CPRs more generally.
 - b. **Prices shown should be the total cost, including all compulsory charges (i.e. charges which consumers cannot avoid).** There should be no hidden charges. Once a consumer selects optional extra products or services, the cost of these should then also be included in the price displayed. The misleading presentation of prices is liable to breach the CPRs.
 - c. **Any requirements or particular steps a consumer must take to obtain their test or results, for example having to attend a particular location at a particular time, should be clearly disclosed in advertising and up-front on provider's websites.** Leaving out or hiding important information about the specification of PCR tests is also liable to breach the CPRs.
 - d. **Terms and conditions used by PCR test providers must be fair.** Terms will be unfair under the CRA if they tilt the rights and responsibilities between the consumer and the trader too much in favour of the trader. All contract terms and notices must be transparent. Not only must PCR test providers use easy-to-understand, legible and plain English but the wording used must allow consumers to make informed choices. Unfair terms are not binding on consumers. The CRA also singles out terms that take away or reduce your customer's statutory rights (including those mentioned above in relation to advertised timescales).⁵ They are described as being 'blacklisted' because they are never enforceable against consumers. Relying on unfair or 'blacklisted' terms may also breach the CPRs.

⁴ 'Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply, or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered' – paragraph 5 of Schedule 1 to the CPRs. 'Making an invitation to purchase products at a specified price and then refusing to take orders for it or deliver it within a reasonable time ... with the intention of promoting a different product' – paragraph 6 of Schedule 1 to the CPRs.

⁵ For the purposes of consumers' statutory rights under the CRA the CMA takes the view that contracts for PCR testing are contracts for the supply of a service.

- e. **Terms and conditions should be clear and easy to find, and should not hide important information in the ‘small print’.** Terms that have a significant impact for consumers should be particularly drawn to their attention. Terms which are difficult to find or unclear are more likely to be unfair. Failing to clearly set out relevant terms and conditions may also breach the CPRs and the CCRs.⁶
- f. **PCR test providers should not use terms which remove or limit their liability to consumers where the provider is at fault and things go wrong.** This includes terms that prevent or hinder consumers from seeking redress (e.g. compensation) when providers are at fault. Such terms are likely to be unfair and unenforceable under the CRA.
- g. **Information on the timescales for receiving tests and results should be honest, accurate and clear.** False or misleading information about when tests or results will be received is liable to breach the CPRs.
- h. **PCR test providers should also ensure that PCR tests and results are provided within advertised timescales.** Under the CRA if a PCR test provider makes statements about how quickly PCR tests or their results will be received, which a consumer is likely to see, then the provider is likely to find itself legally bound to meet those timescales. Failure to do so will be a breach of contract and consumers will also be legally entitled to an appropriate refund. This should be provided without undue delay, and no later than 14 days from the day the provider agrees that a consumer is entitled to a refund. These rights are in addition to any available under the general law and, as noted above, cannot be excluded.
- i. **PCR test providers should ensure any terms and conditions or policies on cancellations and refunds are fair and reflect consumers’ statutory rights.** Terms which say no refund is available in any circumstances, or impose disproportionate cancellation charges, are likely to be unfair under the CRA. Providers should also respect any applicable statutory cancellation and refund rights under the CCRs,⁷ as well as the rights noted above where providers are at fault.
- j. **PCR test providers should ensure that they provide an adequate level of customer service.** Poor customer service, for example setting up processes that are difficult to access, complex to use or not clearly

⁶ The CMA takes the view that contracts for PCR testing are service contracts for the purposes of the CCRs.

⁷ The CMA takes the view that, in most cases, the exemption for medicinal products under regulation 27 of the CCRs is unlikely to apply to PCR tests.

presented, which prevents or makes it difficult for consumers to exercise their rights is liable to breach the CPRs.

8. The above does not cover every legal requirement that PCR test providers must comply with. You should check that your practices and policies are in line with all the requirements of consumer protection law,⁸ and any other legislation specific to the PCR testing sector. This might require you to consult with your legal adviser.⁹ **Importantly, you should consider the above points when providing information to the DHSC for publication on GOV.UK, or to other intermediaries which list information about your services online, including how that information will appear. You should also review how your services are presented by third parties to ensure that all information is accurate and not misleading.**

Why this is important

9. Businesses which do not comply with consumer protection law risk enforcement action from the CMA or local authority Trading Standards Services. This could include taking a business to court to stop them breaking the law and seeking compensation for consumers. In some cases businesses could also face criminal prosecution. We will be making local authority Trading Standards Services aware that we have written to PCR test providers.
10. In addition to any action which the CMA or Trading Standards Services may take, individual consumers also have the option of pursuing their own claims against businesses, for example in the small claims court. This could include a claim for damages, as well any claim in relation to their statutory rights. As noted above, terms which remove or limit a business' liability to consumers where the business is at fault are unlikely to be enforceable.
11. As noted above, the CMA is continuing to investigate the information and complaints it has received to determine whether appropriate enforcement action should be taken against particular PCR test providers.¹⁰

⁸ For more information on compliance with consumer protection law see the [Trading Standards Business Companion](#).

⁹ This letter is not a substitute for the law itself, nor does it replace the role of a court, which provides a definitive interpretation of the law. This letter sets out the views of the CMA, and PCR test providers may wish to seek their own legal advice on the law.

¹⁰ The DHSC also has a 2-strike policy in relation PCR test providers listed on GOV.UK, which means that providers may be removed from the list if they provide misleading information.

Yours faithfully

Gordon Ashworth

Director, Consumer Protection