

# Consumer Protection: Guidance on the CMA's approach to use of its consumer powers

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This publication is also available from the CMA's webpages at [www.gov.uk/cma](http://www.gov.uk/cma).

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# 1 Introduction

- 1.1 This guidance covers the Competition and Markets Authority's (the CMA) approach to the use of its consumer powers. It does not provide guidance on the substance of the infringements created under relevant consumer protection law that the CMA enforces. Annexe B indicates which existing consumer-related guidance documents have been adopted by the CMA Board. In the event of a conflict arising between the content of such existing guidance and this guidance, the content of this guidance will prevail.
- 1.2 On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) are transferred to the CMA and those bodies are abolished. The OFT's consumer role had already changed in the period prior to abolition as part of the rationalisation and simplification of the consumer landscape. The OFT's functions of running the Consumer Code Approval Scheme, the Consumer Direct advice service, and the national leadership role on consumer education were transferred in April 2013 to the Citizens Advice Service and Citizens Advice Scotland (Citizens Advice services) and the Trading Standards Institute (TSI). Local authority Trading Standards Services (TSS) took on a new role as the primary national enforcer of consumer protection law, with the OFT's national enforcement role focusing more on systemic problems in markets.
- 1.3 The CMA inherits most of the functions and powers which the OFT had retained as at 1 April 2013 as part of the initial package of reforms and together these constitute a different but significant role in the consumer landscape from that previously held by the OFT. The CMA will use its full range of consumer powers to tackle, in particular, market wide consumer problems or issues which affect consumers' ability to make choices. While the CMA is a consumer minded organisation, it is not involved in providing direct frontline support to consumers. The OFT stopped running the Consumer Direct advice line on 31 March 2012. Since then, consumers have been advised to contact the Citizens Advice consumer service,<sup>1</sup> which provides free, confidential and impartial advice on consumer issues.
- 1.4 The CMA has a range of tools which may be used to address problems in markets. For example:

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<sup>1</sup> See [www.adviceguide.org.uk](http://www.adviceguide.org.uk) or call 08454 04 05 06.

- the CMA has powers to enforce a range of consumer protection law such as the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs), and under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) can take civil proceedings or criminal prosecutions against appropriate breaches
  - the Enterprise Act 2002 (EA02) also enables the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
  - under the EA02, the CMA can investigate mergers which could potentially give rise to a substantial lessening of competition, and specify measures which the merging parties must take to protect competition between them while the investigation takes place
  - the CMA may also bring criminal proceedings against individuals that commit the cartel offence under section 188 of the EA02
  - finally, under the Competition Act 1998 (CA98) the CMA may investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.5 The ERR13 implemented a number of enhancements to these statutory powers to deal with competition and markets issues (compared to the powers available to the CC and OFT), in order to improve the robustness of decision-making, increase the speed and predictability of the CMA's activities and strengthen the UK's competition regime as a whole.
- 1.6 The CMA will act strategically, being selective about which cases it chooses to take on. The CMA will apply its prioritisation principles<sup>2</sup> and aim to maximise the impact of its work by taking an enforcement lead that others can follow and/or seeking delivery partners for targeting messages for business or consumers as appropriate.
- 1.7 Working in partnership is a key element of the CMA's consumer strategy. The CMA will work to build seamless partnerships with co-enforcers such as the

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<sup>2</sup> At the time of publication, the CMA is analysing feedback received to the consultation on its *Prioritisation Principles*, see [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274462/CMA16con\\_Prioritisation\\_Principles\\_consultation\\_document.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274462/CMA16con_Prioritisation_Principles_consultation_document.pdf).

TSS and the sectoral regulators<sup>3</sup> by developing Memoranda of Understanding and participating fully in the new co-ordinating groups such as Consumer Protection Partnership (CPP)<sup>4</sup> to deliver high impact outcomes. In particular, the CMA will work with others to share best practice, build enforcement capability, and help identify strategic priorities for enforcement.

- 1.8 The CMA understands and respects the aims of the Government's consumer landscape reforms. Recognising the Government's desire to give TSS and CPP a central role in the new landscape, and to ensure the space is created for them to take the initiative, the CMA will adopt a supportive and facilitative partnership role in areas of potential overlap, rather than one of leadership as the OFT would have done, prior to the legislative changes.
- 1.9 This guidance reflects the views of the CMA as at 1 April 2014 and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. The CMA's webpages will always display the latest version of the guidance.
- 1.10 Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this guidance makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the relevant Acts, Regulations or Orders. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.
- 1.11 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when dealing with potential breaches of consumer protection law but that, when the facts of an individual case reasonably justify it, the CMA may adopt a different approach.
- 1.12 This guidance takes effect from 1 April 2014. The new approach will apply to all ongoing and future cases from that date.<sup>5</sup>
- 1.13 The CMA will play a role in monitoring the operation of the new arrangements in the consumer landscape and discuss with partners whether any improvements are necessary in light of experience. The criteria for assessing

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<sup>3</sup> See chapter 4 for more detail.

<sup>4</sup> See paragraph 4.4.

<sup>5</sup> The CMA will continue with any OFT consumer enforcement action ongoing as at 1 April 2014 as if it is the OFT. The CMA and TSS will be able to take follow up action to enforce any undertakings given to the OFT or Orders obtained by the OFT, when it is appropriate to do so.

the regime would be likely to include ensuring a lack of duplication between partners, improved speed of delivery, more effective outcomes, and the absence of an enforcement gap when tackling the most significant consumer detriment affecting consumers.

## 2 The Legal Framework

### Background

- 2.1 The Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013<sup>6</sup> (the PBA Order) introduced a number of changes to the consumer enforcement role and functions of the OFT before its abolition on 31 March 2014.
- 2.2 Firstly, in April 2013 the PBA Order transferred the OFT's consumer advice scheme function (Consumer Direct) to Citizens Advice services.<sup>7</sup> In addition, the relevant energy and postal legislation was amended to ensure that industry levies to fund Consumer Direct were transferred from the OFT to Citizens Advice services.<sup>8</sup>
- 2.3 Secondly, responsibility for administering a consumer facing code approval scheme was given to the TSI and as such the OFT's Consumer Codes Approval Scheme closed on 31 March 2013<sup>9</sup>.
- 2.4 In order to signal clearly the new national enforcement role for the TSS, and to ensure the CMA is not obligated to step in and duplicate that role, amendments were made to secondary legislation. TSS retained a duty to enforce certain consumer legislation but the OFT's duty to enforce such legislation was changed to a power.<sup>10</sup> In relation to the UTCCRs the OFT, TSS and some sectoral regulators<sup>11</sup> all share a power to enforce. The CMA inherited the OFT's leadership role for the UTCCRs.

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<sup>6</sup> See [www.legislation.gov.uk/ukxi/2013/783/contents/made](http://www.legislation.gov.uk/ukxi/2013/783/contents/made).

<sup>7</sup> Article 2 PBA Order.

<sup>8</sup> Articles 5 and 6 PBA Order.

<sup>9</sup> It is expected that a second Public Bodies Act order will be laid in draft next year and will amongst other things, make provision for the transfer of OFT's estate agency functions, and the transfer of Consumer Focus functions.

<sup>10</sup> Articles 10 to 13 PBA Order, amending the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs), the Consumer Protection (Distance Selling) Regulations 2000 (DSRs), the Business Protection from Misleading Marketing Regulations 2008 (BPRs) and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

<sup>11</sup> As at 1 April 2014 the sectoral regulators who can enforce UTCCRs are: FCA, OFCOM, OFGEM, OFWAT, ORR, CAA, Utility Regulator for Northern Ireland and ICO. Which? are also able to take enforcement action under the UTCCRs.



## Consumer functions transferred to the CMA

2.5 The consumer functions transferred to the CMA at 1 April 2014 include:

- using consumer enforcement powers to tackle market wide practices including the UTCCRs (for which the CMA has the lead but shares the power to enforce with TSS), CPRs and the Consumer Protection (Distance Selling) Regulations 2000 (DSRs) either directly or under Part 8 EA02
- carrying out business facing education in relation to the application of the UTCCRs or where a need for business education has been identified resulting from a market study, UTCCRs cases or similar in which the CMA has built significant expertise
- receiving notifications from enforcers who are in particular required to notify the CMA before they apply for an enforcement order under section 214 of the EA02, and taking steps to ensure coordination of enforcement under s.216, where appropriate, acting as the UK's Single Liaison Office and ensuring compliance under the EU Regulation on Consumer Protection Cooperation (CPC),<sup>12</sup> and
- having an international role on consumer law and policy liaison<sup>13</sup>, for example representing the UK in the International Consumer Enforcement Protection Network (ICPEN) and the Organisation for Economic Co-operation and Development (OECD) Committee on Consumer Policy.

2.6 Relevant consumer legislation applicable to the CMA and its enforcement work is listed at Annexe A.

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<sup>12</sup> Regulation (EC) No 2006/ 2004.

<sup>13</sup> Schedule 4 to the ERR13 makes specific provision for this role.

### 3 Policy Objectives

- 3.1 As a result of the reviews in 2010 and 2011 of the competition and consumer landscape, the Government undertook a series of reforms to simplify the regime for consumers and plug any perceived gaps in enforcement.
- 3.2 These reforms responded to the National Audit Office's 2011 report, 'Protecting Consumers',<sup>14</sup> which reviewed consumer protection in the UK and found that although much consumer detriment occurred at national and regional level the incentives are weighted towards tackling local priorities. This, it argued, contributed to an 'enforcement gap' where large regional and some national cases might not be addressed. The Government consulted on various reforms<sup>15</sup> and in responses to the Government's consultation many stakeholders agreed that the existing consumer landscape comprising an array of public, private and voluntary bodies with overlapping responsibilities was too complex and caused considerable consumer confusion.
- 3.3 In its response to the consultation on 'Empowering and Protecting Consumers',<sup>16</sup> the Government set out its aim to increase consumer empowerment by:
- reducing the complexity of the consumer landscape – the publicly funded institutions that exist to help consumers
  - strengthening the effectiveness of enforcement of consumer rights, and
  - ensuring that activities which help consumers to be empowered are delivered more cost-effectively and in a way that links national and local intelligence about the problems consumers face.
- 3.4 Following the changes to the legislative and enforcement landscape described in chapter 2 above, Citizens Advice services are now the home of information, advice, education and advocacy on all general consumer matters. Further, the Government expects the majority of national consumer enforcement action to

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<sup>14</sup> [www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law](http://www.nao.org.uk/report/protecting-consumers-the-system-for-enforcing-consumer-law).

<sup>15</sup> Empowering and protecting consumers: Consultation on institutional changes for provision of consumer information, advocacy, education, advice and enforcement, June 2011, see [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes).

<sup>16</sup> For the Governments response to the consultation see [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf).

be taken on by TSS, with the CMA focusing on tackling systemic problems in markets involving widespread practices carried out by many firms. The TSI is now responsible for administering an approval scheme for consumer facing codes of practice and providing guidance to business on consumer protection legislation. The reforms also created the National Trading Standards Board (NTSB), which is responsible for prioritising national and cross-local authority boundary enforcement in England and Wales against unfair or unlawful practices. The Convention of Scottish Local Authorities (CoSLA) has created Trading Standards Scotland to perform the same role in Scotland and the Department for Enterprise, Trade and Investment (DETI) will undertake it in Northern Ireland.

- 3.5 The structural reform of the consumer landscape is being followed by major changes to the consumer law framework through the Consumer Rights Bill,<sup>17</sup> which will potentially impact significantly on the consumer powers of the CMA.

### **The role of consumer powers in the CMA**

- 3.6 Experience strongly suggests that competition and consumer policy are linked. Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around. Competition problems can often manifest themselves in businesses failing to comply properly with consumer protection laws, which in turn can prevent consumers driving effective competition and lower prices through the exercise of informed choice.
- 3.7 An understanding of consumer policy can help competition analysis through a better understanding of consumer detriment and how consumers interact with businesses. Lessons from consumer behaviour can inform how remedies are likely to work in practice and whether they will be effective. Useful alternative or additional remedies to competition problems can sometimes be found in the consumer toolkit. For example, activating consumer choice by increasing suppliers' obligations to disclose information in combination with increased consumer awareness can kick-start markets where there is a lack of competition.
- 3.8 The CMA will seek to target consumer enforcement action where it can secure wide-ranging changes to markets and tackle significant consumer detriment, particularly in emerging trends. The CMA will place its interventions in the context of broader market analysis with cases informed by clear theories of

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<sup>17</sup> See [www.gov.uk/government/publications/draft-consumer-rights-bill](http://www.gov.uk/government/publications/draft-consumer-rights-bill).

harm which take account of dynamic economic analysis where necessary. This helps ensure that interventions are proportionate to need and do not impose unnecessary burdens on business but, on the contrary, help create a framework in which competitive business can thrive and consumers are protected.

- 3.9 For the CMA, enforcement action may be appropriate where it has determined that breaches of law point to systemic failures in a market (sector or geographic), where changing the behaviour of one business would set a precedent or have other market-wide implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for consumers. The CMA will make strategic choices about the cases it takes and apply its prioritisation principles. It is not the role of the CMA to take a case against a single national company purely because it is a large company and/or the case requires significant resource. Under the new arrangements in the consumer landscape most single trader national cases are likely to be taken by TSS. For the CMA to take a case there would often need to be an additional factor to demonstrate why the case is justified in wider market terms. However, where cases relate to breaches of the UTCCRs, it is possible that the CMA, as lead authority, would take cases without a wider market justification, to uphold the effectiveness of the regime.
- 3.10 The CMA will work with partners through the CPP to assess and provide coordinated responses to economic threats to consumers. It will work with trade bodies and firms to develop market-wide solutions and, where necessary, pursue multiparty enforcement and litigation, generally in the higher courts. The CMA will take largely civil cases, often relying on legislation such as the UTCCRs which can only be used in the civil courts. It acts mainly in the High Court and above, supported by the specialist advisory and litigation resources that are needed for such cases. Where a business, which is party to CMA action, has a primary authority relationship with a TSS office, the CMA will, where appropriate, liaise in the first instance with the relevant TSS department before approaching the business.
- 3.11 TSS shares many of the same consumer enforcement powers as the CMA but they tackle different sorts of consumer detriment. The national role of TSS has now been increased significantly by the landscape reforms, with additional funding being awarded for TSS specifically to take national cases under the control of a new national leadership structure led by the NTSB in England and Wales, and CoSLA in Scotland. It is expected that TSS will take an increased number of national cases, including those that would have previously been taken by the OFT prior to the landscape reforms. The size of a case and

resource needed to run it will not in themselves, subject to any TSS prioritisation criteria, be relevant factors for not taking a case.

- 3.12 TSS will also continue to address local and regional detriment caused by rogue traders, including doorstep crime and scams, using effective partnerships with local agencies and in-depth knowledge of local markets and businesses.
- 3.13 Part 8 EA02 (and certain other consumer protection law) place a duty on TSS and other enforcers to notify the CMA before seeking an enforcement order and after obtaining one. Enforcers are deemed to have notified the CMA when they have updated the Consumer Regulations Website with details of the case.

## 4 Working In Partnership

- 4.1 The CMA believes that it can have a greater impact on markets by working together with all partner organisations to identify and address issues that create market problems and consumer detriment.
- 4.2 The reforms to the consumer protection regime in the UK following the BIS consultation on the consumer landscape 'Empowering and Protecting Consumers'<sup>18</sup> introduced a number of changes to the roles and responsibilities of UK consumer protection bodies. These changes are in addition to the creation of the CMA via the ERA13.
- 4.3 The reforms have also created a number of new fora for UK consumer protection bodies to share intelligence, priorities and identification of risks, to ensure that consumer issues are handled by the appropriate body and do not fall between consumer bodies. The CMA will participate fully in the new co-ordinating groups such as the CPP and work to avoid duplication of effort and the emergence of enforcement gaps. The CMA will use such groups to share intelligence, best practice, and help to build enforcement capability.

### Consumer Protection Partnership (CPP)

- 4.4 The CPP was set up to ensure coherent and strategic delivery of enforcement, information provision and education across the consumer landscape. The group works together to share intelligence, identify current or future issues that are likely to adversely affect consumers and agree priorities for work to resolve or mitigate such problems. In essence, the role of the CPP is to ensure that partners work together effectively and important issues are tackled and do not fall between partners in the consumer landscape due to differing accountabilities.
- 4.5 The membership of the CPP, as at 1 April 2014, is:

Body/Group	Primary responsibilities in consumer landscape
Department for Business, Innovation and Skills (BIS)	Government lead for consumer policy in the UK
Trading Standards in England and Wales, represented by the National Trading Standards Board (NTSB)	Enforcement and threat assessment – local, regional and national in England and Wales

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<sup>18</sup> See [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf).

Body/Group	Primary responsibilities in consumer landscape
Trading Standards Scotland, overseen by the Convention of Scottish Local Authorities (CoSLA) and with co-ordination and action via Trading Standards Scotland (TSScot)	Enforcement – local, regional and national enforcement in Scotland
Trading Standards in Northern Ireland – Department of Enterprise, Trade and Investment (DETI)	Enforcement – local, regional and national enforcement in Northern Ireland
Trading Standards Institute (TSI)	Business education and Consumer Codes Approval Scheme
CMA	Enforcement to address systemic failures in a market, where changing the behaviour of one business would set a precedent or have other market-wide implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for consumers. UTCCRs enforcement leadership, enforcement and business education
Citizens advice (England and Wales) and	Consumer advocacy, education and provision of consumer advice including the Citizens Advice consumer helpline
Citizens Advice Scotland	Consumer advocacy, education and advice
Consumer Council for Northern Ireland	Consumer advocacy, education and advice

## Local Authority Trading Standards Services (TSS)

- 4.6 TSS are the CMA’s key partners in implementing the consumer law regime (which lies at the heart of UK economic policy). The CMA shares enforcement powers and works closely with them to provide an efficient and effective service for both consumers and businesses.
- 4.7 TSS are funded by, and accountable to, local authorities. They are required to work to national priorities set by government departments and agencies, as well as local priorities set by elected councillors which focus on the particular needs of the local community. They also enforce a far broader range of legislation than the CMA and often have responsibility for animal health, food safety and underage sales of tobacco, alcohol, knives and fireworks.
- 4.8 Following the BIS consultation on the consumer landscape and the Government's response 'Empowering and Protecting Consumers',<sup>19</sup> in April 2013, TSS were given greater responsibility for consumer law enforcement,

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<sup>19</sup> [www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf](http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf).

including national and cross-local authority boundary enforcement. As a result, both TSS and the CMA take cases of national scope, so partnership working between the CMA and TSS is important to ensure that the collective work of both complement each other in the protection of UK consumers via enforcement activity.

### ***England and Wales***

- 4.9 The CMA will work closely with TSS, and in particular the NTSB, which provides leadership, influence and support to ensure that regional and national cases in England and Wales are taken by TSS. The National Tasking Group (NTG), a sub-group of the NTSB with its own decision making ability, brings together representatives from across English Welsh TSS, along with representatives from the CMA. The purpose of the NTG is to consider, prioritise and task cases where harm is being caused to consumers nationally. It is the forum through which TSS and the CMA will decide who is best placed to take particular cases. The CMA will play an active role on the NTG to help ensure that the division of responsibility for priority cases is agreed on the basis of the new roles for TSS and the CMA as set out by the Government.
- 4.10 In the majority of cases that reach the NTG, TSS are likely to be best placed to lead. However, in borderline cases where action from CMA is considered, the NTG/CMA will look at factors such as the prevalence of issues of consumer choice, relevance of unfair contract term issues and the systemic nature of a problem across a market in deciding who is best placed to act.

### ***Scotland and Northern Ireland***

- 4.11 CoSLA provides political oversight and leadership to TSS in Scotland and is responsible for allocation of the funding provided by BIS for national and regional enforcement by TSScot. For Northern Ireland, all trading standards activity takes place within the DETI, rather than as part of a local authority's remit.
- 4.12 The CMA will work with CoSLA, TSScot and DETI to identify priority cases of consumer detriment in Scotland and Northern Ireland and decide whether any of these may be appropriate for the CMA.

### **The Trading Standards Institute**

- 4.13 Following the reforms to the consumer landscape, the TSI were given (in addition to code approval functions formerly exercised by the OFT) responsibility for producing the majority of education and guidance aimed at



businesses in relation to their responsibilities under consumer protection legislation.

### **CMA business guidance**

4.14 In some circumstances it will be appropriate for the CMA to issue its own guidance to business, particularly, for instance, where this relates to the UTCCRs, or is based on detailed knowledge gained from a market study, precedent setting case or similar in which the CMA has built significant expertise. The CMA will:

- consult appropriately with TSI and other partners across the consumer landscape prior to publishing such guidance in final form, and
- encourage dissemination of its guidance via the TSI along with the TSI's own portfolio of guidance to businesses.

### **Concurrent consumer enforcers**

4.15 As well as the consumer enforcement powers shared with TSS, the CMA shares most of its consumer powers with a number of other agencies, many of which have enforcement responsibilities for particular economic sectors. The CMA views working closely with these concurrent enforcers as important in order to avoid duplication in effort and instead to maximise the impact of interventions for consumers.

4.16 Through the Consumer Concurrences Group (CCG), the CMA and other agencies aim to improve clarity and share best practice on overlapping areas of responsibility, such as unfair terms legislation, especially in relation to enforcement.

4.17 The CMA chairs the CCG, which as at 1 April 2014 is made up of:

Body	Sector
Advertising Standards Authority (ASA) <sup>20</sup>	Advertising
Civil Aviation Authority (CAA)	Aviation
CMA	Cross-economy
Financial Conduct Authority (FCA)	Finance
Ofcom	Communications
Office of the Rail Regulator	Railways
Ofgem	Energy
Ofwat	Water
PayphonePlus	Premium rate (or phone-paid) telephone services in the UK
TSS	Cross-economy
Which? <sup>21</sup>	Cross-economy (limited consumer enforcement powers in relation to Part 8 EA02)

## Consumer Protection Cooperation Enforcement forum

4.18 The CMA, through its role as the UK's Single Liaison Office, coordinates work at a national level under Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the CPC Regulation).<sup>22</sup> This is primarily done through an Enforcement Forum which comprises all UK designated CPC authorities<sup>23</sup> and BIS. The Forum meets shortly before each CPC Committee meeting to allow UK CPC authorities to exchange experiences, keep abreast of European and domestic developments and feed in views for the forthcoming Committee meetings.

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<sup>20</sup> The ASA has specific individual self-regulatory powers, but rely on TSS as the default statutory backstop following the 2013 landscape regime changes.

<sup>21</sup> Which? is a private consumer body, rather than a traditional enforcer and as such its enforcement powers are more limited than the CMA or the sectoral regulators listed above.

<sup>22</sup> The CPC Regulation set up an EU-wide network of national enforcement authorities with similar investigation and enforcement powers known as 'competent authorities'. From April 2014 the CMA has been designated as the UK's Single Liaison Office and a competent authority for CPC purposes.

<sup>23</sup> See paragraph 4.30.

Between meetings, UK authorities are updated on CPC developments and consulted for input, for example by questionnaires, involvement in projects and common activities.

### **Citizens Advice and other consumer bodies**

- 4.19 The CMA will make use of a variety of intelligence sources in considering where it will be appropriate to act, both in terms of enforcement action and in conducting market studies. Important to this is information gained by consumer bodies and in particular Citizens Advice services who run the national consumer advice services in England, Scotland and Wales. Citizens Advice services provide first tier advice to consumers on how to resolve their consumer complaints with traders and where appropriate refer issues/complaints to enforcers for enforcement consideration. The information obtained will be an important source of intelligence on types of consumer complaints and markets in which consumers are dissatisfied.
- 4.20 Consumer advocacy in respect of energy and postal services, and water in Scotland, has transferred from Consumer Focus to the new Consumer Futures, which is designed to represent the interests of consumers across markets subject to economic regulation. In 2014 Consumer Futures became part of Citizens Advice services.
- 4.21 In addition to working collaboratively with Citizens Advice services, the CMA will maintain working relations with other consumer bodies with differing geographical scope, for example the Consumer Council for Northern Ireland and those consumer bodies with a focus on special interest groups, for example charities with a focus on issues such as age, disability etc.

### **Self-regulation, established means and compliance partnerships**

- 4.22 Alongside the partnership working with co-enforcers of consumer protection legislation the CMA will consider, where appropriate, working with self-regulation, established means and compliance partnerships.

### ***Self-regulation***

- 4.23 The CMA is committed to working with self-regulatory solutions where they add value to its consumer protection work, both as a potential alternative to enforcement action or as a potential remedy to address market problems identified in its market study investigations.

## ***Established means/compliance partnerships in relation to the CPRs and BPRs***

- 4.24 Bodies with alternative, and sometimes non-legislative powers, may also be regarded as established means or compliance partners for the purposes of ensuring consumer protection. Such bodies may have other methods of gaining legal compliance from businesses.
- 4.25 Under the CPRs the CMA is required to: 'have regard to the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate having regard to all the circumstances of the particular case.'<sup>24</sup> The Business Protection from Misleading Marketing Regulations 2008 (BPRs) contains similar provisions.
- 4.26 The CMA understands that these regulations are intended to encourage the control of unfair commercial practices/misleading marketing activities through the use of alternative sets of arrangements where it is appropriate to do so. The primary concern is to gain compliance. If an alternative process is well placed to achieve this in place of the CMA, then this expands the reach of compliance processes in the UK.
- 4.27 In working with established means/compliance partnerships the CMA will have regard to the following principles.<sup>25</sup>

### ***PRINCIPLE 1***

- 4.28 In circumstances where the CMA is aware of, or suspects, non-compliance with the Regulations, it may deal with the matter itself, or seek to refer the matter to compliance partner(s), in line with its prioritisation principles.
- 4.29 The CMA targets its enforcement activity towards cases that are likely to deliver high impact results for consumers, in line with its prioritisation principles. The CMA will intervene in those cases where it is appropriate for it to do so, but, using appropriate 'established means' as a first port of call for resolving compliance issues will expand the reach of the Regulations and bring benefits to consumers, business and enforcers alike.

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<sup>24</sup> Regulation 19.4. Based on principles originally developed by the OFT, see [www.offt.gov.uk/shared\\_offt/consultations/OFT1043resp.pdf](http://www.offt.gov.uk/shared_offt/consultations/OFT1043resp.pdf).

## *PRINCIPLE 2*

- 4.30 The CMA will seek to refer a matter to the compliance partner best placed to resolve the problem. The CMA may consider it appropriate in some circumstances for different partners to tackle different elements of an issue. Where appropriate, the CMA will seek to nominate a 'lead partner' which may in turn seek to liaise with other interested parties. In making this assessment we will have regard to the principles of better regulation, any protocols that are in place between the OFT and its partners and the principle of who is best placed to act.
- 4.31 When assessing which partner may be best placed to deal with the issue the CMA will satisfy ourselves that the chosen partner has an effective way of bringing about the control of unfair commercial practices. The CMA will therefore not pass on an issue to a body that has shown itself unwilling or incapable of controlling unfair commercial practices. The CMA will consider and engage with those partners that are relevant to the circumstances of the particular case. So what is appropriate in one case may not necessarily be appropriate in another.
- 4.32 Factors the CMA will take into account in referring to a compliance partner or partners may include:
- degree of detriment
  - geographical location of detriment
  - sector in which the detriment is arising
  - nature and seriousness of the unfair commercial practice
  - complexity of the issue
  - history of the trader in dealing with compliance requests, and
  - degree of compliance partner's alignment with the public interest.
- 4.33 The CMA will use its discretion to decide who is best placed to meet the circumstances of each particular case. The CMA may approach a different body or use a different set of arrangements from those used on a previous occasion. This is not to say the CMA will be inconsistent in its referrals and in most cases it will be clear who is best placed to act.

### *PRINCIPLE 3*

4.34 In considering whether compliance partners are an effective means of addressing non-compliance the CMA will look for the following essential and desirable qualities.

#### Essential qualities/systems

4.35 A body, or set of arrangements, will be able to demonstrate the following:

- it has adequate resources to address instances of non-compliance within its community
- it is law abiding in its own operation
- it is recognised by its community
- it is properly incentivised to act
- it has systems to place requirements on its community
- it has systems to enforce those requirements within its community
- there is an appropriate degree of independence in governance
- there is an appropriate degree of objectivity in governance
- it has regard for principles of better regulation and the Human Rights Act with regard to the rights of consumers and traders/businesses
- it has adequate controls in place for the safeguarding of confidential information, and
- it is willing to report to the CMA on its compliance partnership activity.

#### Desirable qualities/systems

4.36 Compliance partners will also be able to display some or all of the following:

- systems for providing information/communication within markets
- a public facing element that may incorporate a complaint handling facility, and

- systems for staying abreast of developments in the law

#### *PRINCIPLE 4*

- 4.37 Ultimately, the CMA is empowered to enforce the Regulations
- 4.38 The CMA wishes to foster trust with its compliance partners. However, the CMA will only consider making referrals to compliance partners that appear to it to meet the qualities described above to a sufficient degree. If a body fails to address an unfair commercial practice in a market speedily and successfully, the CMA may refer a matter to another compliance partner or take action itself to prevent continued harm to consumers. The CMA expects action taken by a compliance partner will be successful in the vast majority of cases. However, it will always retain its discretion to refer or not to refer to a compliance partner and whether to intervene in any case following referral.

#### **International partnerships – partnership working across the European Union**

- 4.39 The CMA is part of a pan European network of public consumer protection bodies introduced with the CPC. The CPC was formally adopted by the European Parliament and Council in October 2004 and aims to improve and formalise and facilitate co-operation between public authorities responsible for the enforcement of consumer protection laws on behalf of Member States on cross-border infringements of EU consumer law. It ensures the quality and consistency of enforcement of consumer protection laws and the monitoring of the protection of consumers' economic interests by enabling national authorities to exchange information and cooperate with counterparts in other Member States as easily and seamlessly as with other authorities in their own country.
- 4.40 The CPC requires the creation of a network of public enforcement bodies ('competent authorities', see paragraph 4.24 above for a definition) across the EU. These bodies are responsible for the enforcement of consumer protection legislation in Member States. A member of the network can call upon a member in another Member State to supply information about, or to take action against, a trader in their jurisdiction whose acts and or omissions may be causing detriment to the consumers in another Member State in breach of specified EU consumer protection laws (an 'intra-Community infringement'). This is described in the CPC as 'mutual assistance'. Competent authorities receiving such a request (referred to in the CPC as 'requested authorities') effectively have to address and act upon the alleged breaches in the same way they would if they were dealing with a purely domestic case. Accordingly,

the CPC creates a series of duties on the enforcement bodies in the network in order to deliver an effective EU wide enforcement system.

### ***Single Liaison Office and Competent Authorities***

- 4.41 The operation of the network involves the setting up and designation of various enforcement bodies, as below.
- Single Liaison Offices (SLOs): This is the public authority in each Member State which has ultimate responsibility for coordinating the application of the CPC in their country. The CMA is the SLO for the UK.
  - 'Competent Authorities': These are the public authorities (whether at national, regional or local level) which have specific responsibilities to enforce the laws which protect consumers' interests and which have rights and duties under the mutual assistance provisions of the CPC. There is no limit on the number of competent authorities in each Member State. In the UK, competent authorities currently comprise of the CMA, the Civil Aviation Authority, the Office of Communications, the Financial Conduct Authority, the Medicines and Healthcare Regulatory Authority and the Information Commissioner's Office.
  - 'Article 8(3)' bodies: The CPC permits Member States to designate other public authorities or private enforcement bodies which have a legitimate interest in the cessation or prohibition of consumer law breaches in their jurisdiction, in order to help carry out Member States' obligations under the CPC. Under Article 8(3) competent authorities can effectively sub-contract the enforcement of cross-border cases to such a body (subject to conditions), though ultimate responsibility for ensuring the case is dealt with remains with the competent authority which has received the mutual assistance request. In the UK, the following have been designated as Article 8(3) bodies:
    - every local weights and measures authority in Great Britain (TSS)
    - PhonepayPlus.



## **International – wider international working**

### ***ICPEN***

4.42 The CMA<sup>26</sup> is a member of the International Consumer Protection and Enforcement Network (ICPEN).<sup>27</sup>

4.43 ICPEN was set up in 1992 to help governmental consumer law enforcers in different countries join forces in tackling cross border problems. The CMA actively supports the aims of ICPEN, which are to:

- protect consumers' economic interests around the world
- share information about cross-border commercial activities that may affect consumer welfare
- encourage global co-operation among law enforcement agencies (including co-ordinating an annual worldwide internet sweep searching for sites that make false or deceptive promises).

### ***OECD***

4.44 The Organisation for Economic Co-operation and Development (OECD) was set up in 1961 to assist countries in fostering good governance and reforming and improving their economic policies to generate greater economic growth. It provides a forum in which governments can work together to share experiences and seek solutions to common problems.

### ***London Action Plan***

4.45 The London Action Plan was agreed by 19 bodies from 15 countries to communicate and cooperate on enforcement action to tackle economic threats to consumers online and malware.

4.46 The plan aims to develop international links to address spam and spam-related problems. Participating government bodies have made commitments to actions including:

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<sup>26</sup> The CMA took the place of the OFT in ICPEN from April 2014.

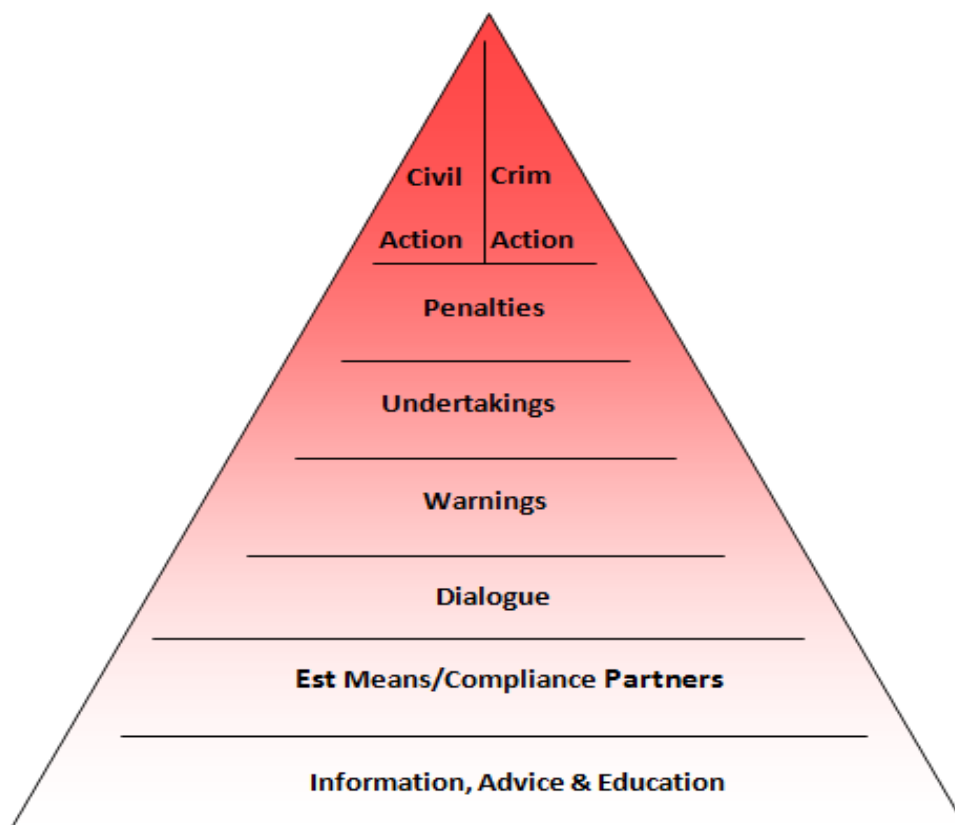
<sup>27</sup> <https://icpen.org>.

- encouraging communication and coordination between agencies to achieve efficient and effective enforcement
- regular conference calls to discuss: cases, legislative developments, investigative techniques, ways to address obstacles to enforcement, consumer and business education projects
- encouraging dialogue between government agencies and private sector representatives to promote ways to support government agencies in bringing spam cases and pursue their own initiatives to fight spam.

4.47 The action plan is open for other interested government agencies and for appropriate private sector representatives to join in order to expand the network of bodies working together to combat economic threats to consumers online.

## 5 The CMA's Approach To Compliance And Enforcement Of Consumer Protection Law

- 5.1 Consumers are best served by competitive markets where businesses compete fairly for custom in compliance with the law. The CMA believes that most businesses aim to treat their customers fairly and comply with the consumer protection law that the CMA enforces.<sup>28</sup>
- 5.2 The law sets minimum standards for behaviour in markets and the CMA has a range of enforcement options to ensure compliance with them.
- 5.3 The diagram<sup>29</sup> below illustrates the range of enforcement and compliance options available to the CMA. It shows enforcement options including civil and criminal powers but also the flexibility of the CMA approach in using clear, targeted and timely information, advice and education to secure compliance. Further detail on the CMA's approach to compliance and enforcement is set out below.



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<sup>28</sup> See Annexe A for a list of consumer protection legislation enforced by the CMA.

<sup>29</sup> The diagram does not replicate the order in which options are considered.

## **The CMA's Approach to Compliance**

- 5.4 As set out in Chapter 4, the CMA encourages higher standards using tools other than enforcement either itself or through working with compliance partners.
- 5.5 For example, the CMA supports the provision of clear, targeted and timely information and guidance to businesses, to educate, enable and encourage their compliance with consumer protection legislation, and to consumers, to educate and empower them and so reduce the need for enforcement action.
- 5.6 The CMA may issue specific guidance to businesses in a sector where, for example, it has published a market study, or to businesses in relation to the application of the UTCCRs.
- 5.7 The CMA relies, where appropriate, on its compliance partners to educate consumers,<sup>30</sup> to encourage compliance and also to deal with consumer complaints.<sup>31</sup>
- 5.8 Further detail on the CMA's relationship and division of work as between compliance partners is set out in chapter 4.

## **The CMA's Approach to Enforcement**

- 5.9 When it is necessary to use enforcement action to achieve compliance, the CMA aims to ensure that such interventions deliver high impact results, for example, by changing market behaviour, clarifying laws or providing the necessary level of deterrence to those who would deliberately flout their legal obligations. The CMA takes a risk-based approach, prioritising its actions to ensure resources are used to maximum effect and to avoid burdening business with the costs of unnecessary interventions. The CMA aims to be as robust as necessary to gain compliance while allowing maximum freedom for effective competition within the law.

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<sup>30</sup> In relation to consumer guidance on consumer law, the role in educating consumers is provided by Citizens Advice services.

<sup>31</sup> While the CMA has powers under the CPRs to take enforcement action in response to a complaint concerning misleading advertising, in practice the CMA will give existing organisations, in this case the Advertising Standards Authority (a self-regulatory body which as a compliance partner acts as 'established means' for this purpose) the opportunity to deal with complaints in the first instance.

5.10 The CMA is committed to the principles of good regulation in relation to its enforcement action as set out in statute<sup>32</sup> and aims to ensure when carrying out such activity that its action is:

- proportionate and consistent
- targeted
- clear, and
- accountable.

5.11 The way the CMA applies these principles is set out below.

### ***Proportionate***

5.12 The CMA decides its enforcement approach to any particular case in light of all the facts before it, its current overall priorities, its appropriate resources and the appropriate legal considerations such as whether there is a power to act.

5.13 The CMA generally prioritises its work according to its prioritisation principles<sup>33</sup> however where appropriate, the CMA may also take account of other relevant factors.

5.14 The CMA fully recognises the need to ensure that its interventions are proportionate. In considering the proportionality of interventions the CMA takes into account issues such as:

- the likely direct effect of enforcement on consumer welfare in the market or sector where the intervention takes place
- the indirect effects of any action, particularly on the working of relevant markets, including deterrence; for example where the practice is new and likely to be repeated or copied, the deterrent effect of enforcement action is likely to be higher

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<sup>32</sup> See section 21 of the Legislative and Regulatory Reform Act 2006 and in the Regulator's Compliance Code 2007 – currently due for relaunch in revised form in April 2014.

<sup>33</sup> The CMA consulted on its *Prioritisation Principles* and is analysing responses at the time of publication, see [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274462/CMA16con\\_Prioritisation\\_Principles\\_consultation\\_document.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274462/CMA16con_Prioritisation_Principles_consultation_document.pdf).

- the likelihood of a successful outcome and the risks of not taking action bearing in mind the seriousness of any breach of the law and any impact on the effectiveness of the consumer protection regime
- the available options, from advice on compliance, compliance partners' intervention, warning letters, undertakings, interim measures, injunctive action or enforcement orders through to criminal prosecution
- the extent of any administrative burdens likely to be imposed by these various interventions, particularly taking account of the size of the business or businesses involved
- the type of action to which the particular business will best respond
- intelligence, including knowledge of the business's intent and past behaviour
- whether the resource requirements of the action are proportionate to achieving the desired results.

### ***Consistent and targeted***

- 5.15 It is the CMA's intention to avoid a situation whereby a business receives multiple approaches on similar or linked issues, or approaches reflecting different interpretations of the law, so it can deal effectively with a single body and expect a consistent approach.
- 5.16 Where powers are shared between separate authorities, the CMA works on the principle that action should always be taken by the body that is best placed, following appropriate consultation with other compliance partners, particularly where consultation is required, and taking account of both statutory and non-statutory schemes (such as voluntary or self regulation). The CMA will also work with compliance partners to assist a consistent interpretation of consumer protection laws. Further detail on the CMA's work with other partners is set out in chapter 4.
- 5.17 In carrying out its functions, the CMA endeavours to act fairly and applies its procedures to achieve consistent outcomes in the market. This does not mean that the CMA will always take the same steps to enforce the law in the same way on apparently comparable cases or use the same legislative option – rather the CMA aims to tailor the action to the individual circumstances. The CMA, across all its consumer enforcement activities, assesses each case on

its own merits, taking account of risk and of the need for proportionality, deterrence and achieving high levels of compliance.

- 5.18 The CMA will carry out projects that estimate and evaluate the impact of its work, which seek to ensure its actions are cost-effective, well targeted and that any burdens imposed on legitimate businesses are proportionate to benefits obtained for consumers. The CMA will consider the impact of its work in various ways, including, for example, analysis of complaints, soliciting views of trade bodies and businesses affected and independently commissioned research.

### ***Transparency in the CMA's consumer enforcement work***

- 5.19 The CMA is committed to the principle of transparency in its consumer enforcement work. Detail on the CMA's overall commitment to transparency and its approach to disclosure can be found in *Transparency and disclosure: Statement of the CMA's policy and approach (CMA6)*.<sup>34</sup>
- 5.20 In general, the CMA aims to be as transparent as it can about its enforcement activities to aid consumer and business understanding of how it seeks to ensure markets work well. The CMA seeks to provide full, clear and timely information and guidance on legal requirements. In addition, the CMA:
- deals with enquiries about its enforcement activities in line with the requirements of the Freedom of Information Act 2000 (FOIA), while also having regard to legal protections enjoyed by information subjects
  - publishes information that it is in the public interest to disclose, in particular via an approved Information Scheme<sup>35</sup> under FOIA, and
  - where possible and appropriate, shares or exchanges information with other regulators (as far as permitted by legal disclosure restrictions), to facilitate the exercise of its functions and/or the exercise of the functions of the regulators concerned.

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<sup>34</sup> See [www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach](http://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach).

<sup>35</sup> The Freedom of Information Act requires every public authority to have a publication scheme, approved by the Information Commissioner's Office (ICO), in order to make certain classes of information routinely available, such as policies and procedures, minutes of meetings, annual reports and financial information.

- 5.21 In making disclosures to the public, the CMA takes into account the need to comply with any statutory constraints on the disclosure of information that protect businesses and individuals under Part 9 of the EA02 and under the Data Protection Act 1998 (DPA98), and has full regard to the importance of confidentiality.
- 5.22 When the CMA decides to launch an investigation of a case which falls within its prioritisation principles it will inform the parties directly involved of the decision to open a case. This may be done in the course of contact with the parties or a case initiation letter.
- 5.23 Although the level of detail may vary depending on the circumstances of the case, the CMA aims to tell the businesses concerned:
- the business activity or practice causing concern
  - the law(s) allegedly breached and/or the law to be enforced, including the CMA's enforcement role
  - an explanation of the next steps including timescales and the possible consequences of failure to respond
  - the risks the CMA has identified which it believes make enforcement necessary, and
  - the contact details for the main CMA contacts for the case.
- 5.24 However, it may not be appropriate to inform the parties directly involved when doing so may prejudice an investigation. For example, in a criminal investigation, there will be circumstances where the CMA will move without notice towards the exercise of criminal powers without any notification to the parties or business subject to the investigation.
- 5.25 The CMA will place a case opening announcement on the CMA's webpages to announce its decision to formally begin a case, unless to do so would prejudice the case or would otherwise be inappropriate.
- 5.26 On completing a case in relation to which a formal case opening announcement has been made, the CMA will publicise the outcome of court or administrative proceedings, the successful negotiations of undertakings, requirements, determinations, interim measures and orders, unless it would be inappropriate to do so. The CMA will also, where appropriate, publish case



closure decisions on prioritisation grounds on the CMA's webpages,<sup>36</sup> taking account of the need to:

- deter others from engaging in similar kinds of conduct
- warn consumers about practices that are detrimental to their interests
- increase consumers' awareness of their rights
- facilitate complaints about further breaches, and educate other businesses in the market
- create an open public record of the CMA's consumer enforcement work.

### ***Accountability***

5.27 The CMA is accountable to the public through Parliamentary scrutiny in Westminster and the devolved administrations, for example through inquiries by select committees.

5.28 A member of the public may complain to the Parliamentary and Health Service Ombudsman via a Member of Parliament about the CMA's administrative actions, after seeking to resolve the complaint with the CMA. The CMA will have regard to the Ombudsman's Principles of Good Administration, which are:

- getting it right
- being customer-focused
- being open and accountable
- acting fairly and proportionately
- putting things right, and
- seeking continuous improvement.

5.29 The CMA will set out its consumer objectives, as part of its Annual Plan which is laid before Parliament. The CMA is accountable to Parliament for the delivery of these objectives via the presentation of its Performance Report.,

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<sup>36</sup> Sections 215(1), 219(2) and 220(2) and (3) of the EA02 and other relevant consumer protection legislation.

which will also provide information on its ongoing consumer work in the public domain.

- 5.30 Further detail on the CMA's commitment to accountability and its complaints procedure is set out in '*Transparency and disclosure: Statement of the CMA's policy and approach (CMA6)*'.<sup>37</sup>

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<sup>37</sup> See document CMA6 on [www.gov.uk/cma](http://www.gov.uk/cma).

## 6 The Use Of Civil Consumer Enforcement Powers By The CMA

- 6.1 Part 8 of the EA02 deals with provisions for the enforcement of consumer protection legislation. It gives the CMA, along with other enforcers,<sup>38</sup> powers to apply to the courts for an enforcement order to stop a business from breaching certain legislation, where the breach harms the collective interests of consumers. Such breaches are known as either domestic infringements or Community infringements.
- 6.2 Domestic infringements are breaches of a wide range of specified UK laws. Community infringements are acts or omissions that breach UK legislation implementing a number of listed EU consumer protection directives or regulations and which harm the collective interests of consumers.<sup>39</sup> In each case the breach must affect, or have the potential to affect, consumers generally or a group of consumers. This must be established by the evidence gathered by the CMA or other enforcer.
- 6.3 For the CMA, enforcement action may be appropriate where it has determined that breaches of law point to systemic failures in a market, where changing the behaviour of one business would set a precedent or have other market-wide implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for consumers. The CMA will make strategic choices about the cases it takes and apply its prioritisation principles.
- 6.4 This chapter summarises the consumer enforcement powers conferred on the CMA under Part 8 of the EA02, as well as the procedures that apply and the limits to those powers. More detailed guidance on Part 8 of the EA02 is available in the OFT guidance '*Enforcement of consumer protection legislation*' (OFT512).<sup>40</sup>

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<sup>38</sup> Including TSS, sectoral and specialist regulators and Which?.

<sup>39</sup> The list of EU legislation was amended by the Enterprise Act 2002 (Amendment) Regulations 2006 (see [www.legislation.gov.uk/ukxi/2006/3363/pdfs/ukxi\\_20063363\\_en.pdf](http://www.legislation.gov.uk/ukxi/2006/3363/pdfs/ukxi_20063363_en.pdf)) so that it includes all the EU consumer protection laws covered by the CPC (see section 210(7A) of and Schedule 13 EA02).

<sup>40</sup> Enforcement of consumer protection legislation (OFT512) available to download at: [www.gov.uk/cma](http://www.gov.uk/cma) .

6.5 The proposals in the Government's Consumer Rights Bill<sup>41</sup> will impact on the civil consumer enforcement regime and this document will be updated to reflect those changes once the new legislation is in place.

## **Power of investigation**

### ***Access to information***

6.6 The CMA has the power to require any person to answer questions in writing, or provide information, and to produce specified documents relevant to an investigation. This power must be exercised by serving a written notice.<sup>42</sup> If a person fails to comply with the notice then it is possible for the CMA to make an application to the court<sup>43</sup> for an order to be granted requiring the person to provide the information.

### ***On-site inspection powers***

6.7 The CMA also has the power:

- to gain access to premises without a warrant<sup>44</sup>
- to require persons to produce goods or documents (including information recorded in any form), and to require persons to give an explanation about such goods or documents, during inspections with and without a warrant<sup>45</sup>
- to seize goods or documents for certain purposes during inspections with and without a warrant<sup>46</sup>
- to enter and search premises under a warrant.<sup>47</sup>

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<sup>41</sup> For further details the draft Bill can be seen at [www.gov.uk/government/publications/draft-consumer-rights-bill](http://www.gov.uk/government/publications/draft-consumer-rights-bill).

<sup>42</sup> Under section 224 or 225 of EA02 or the equivalent provisions of other legislation.

<sup>43</sup> Under section 227.

<sup>44</sup> Section 227A.

<sup>45</sup> Section 227B.

<sup>46</sup> Section 227B.

<sup>47</sup> Section 227C.

6.8 These powers can be used in respect of premises including vehicles but not in respect of premises which are used only as a dwelling.<sup>48</sup>

### **Power to gain access to premises without a warrant**

#### ***When the power can be used***

6.9 The CMA can exercise its on-site inspection powers if there is a 'reasonable suspicion' that a Community infringement has been committed in order to investigate whether one has occurred (or, in the case of a reasonable suspicion that one is likely to be committed, to investigate whether it is likely to occur).

6.10 The CMA can also exercise this power, again with reasonable suspicion, to investigate whether a person has complied with or is complying with an enforcement order or an interim enforcement order which has already been made on its application, or an undertaking already given by the business to it or to the court relating to Community infringements. This will enable the CMA to police its enforcement orders, interim enforcement orders, or undertakings which are already in place.

#### ***The scope of the power***

6.11 For the purposes set out above, any officer of the CMA authorised in writing (referred to in the text below as 'an authorised officer') can enter premises in order to:

- observe the carrying on of a business on the premises
- inspect goods or documents on the premises
- require any person on the premises to produce goods or documents within such period as the officer considers to be reasonable. Where a document contains illegible information, a legible copy of the information can be required
- seize goods or documents in order to carry out tests on them on the premises or seize, remove and retain them to carry out tests on them elsewhere, or

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<sup>48</sup> Section 227A(9).

- seize, remove and retain goods or documents which he reasonably suspects may be required as evidence of a Community infringement or a breach of a relevant enforcement measure.

6.12 An authorised officer entering premises without a warrant may in addition require:

- any person who is required to produce any goods or documents by virtue of the exercise of the power
  - to state to the best of his knowledge and belief, where the goods or documents are
  - to provide an explanation of the goods and documents produced, and
  - to secure that any goods or documents produced are authenticated or verified in such a manner as the authorised officer considers appropriate.

6.13 An authorised officer may take copies of, or extracts from, any documents to which he has access by virtue of exercising his powers, subject to rules relating to legally privileged communications (see further below).

### ***The procedure***

6.14 An authorised officer may enter any premises in connection with an investigation if the occupier of the premises has been given at least two working days' written notice of the intended entry, such notice being delivered, left at the premises, or sent by post. 'Working day' means a day which is not Saturday or Sunday or Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971<sup>49</sup> in the part of the UK in which the premises are situated.

6.15 An authorised officer may enter premises without a warrant and without notice if the officer has taken all reasonably practicable steps to give notice but has been unable to do so.

6.16 In all cases, the authorised officer entering the premises must produce to any occupier evidence of his identity and authorisation if asked to do so.

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<sup>49</sup> See [www.legislation.gov.uk/ukpga/1971/80/contents](http://www.legislation.gov.uk/ukpga/1971/80/contents).

- 6.17 If the authorised officer is carrying out an inspection of premises without a warrant the written notice of the intended entry must state:
- why the entry is necessary, and
  - the nature of the offence that may be committed if a person obstructs or fails to co-operate with an authorised officer when the powers of inspection are exercised.
- 6.18 If the authorised officer is entering the premises without a warrant and without written notice, he must produce to any occupier that he finds on the premises a document containing the following information:
- the reasons why the entry is necessary
  - the nature of the offence that may be committed if a person obstructs or fails to co-operate with an authorised officer when the powers of inspection are exercised (described below).
- 6.19 An authorised officer may only enter premises at a reasonable time and will normally arrive at the premises during office hours. On entering the premises, an officer will produce evidence of his identity and will also hand over a separate document which sets out the powers of the authorised officer. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the authorised officer during the inspection. At the end of the inspection, the authorised officer will provide, unless it is not practicable to do so, a list of goods and documents that have been seized, a list of extracts from documents of which copies have been taken and copies of documents that have been seized. In circumstances where it is not practicable to do so at the end of the inspection, a list will be provided as soon as possible afterwards.
- 6.20 If the premises are unoccupied or the occupier is temporarily absent, the authorised officer will take reasonable steps to ensure that when he leaves the premises they are as secure as they were before he entered.

### ***Access to legal advice***

- 6.21 The CMA is required to give at least two working days' notice of an intended entry for an inspection. A business is entitled to seek legal advice but, as it has received prior notice of intended entry, the authorised officer will commence the inspection immediately on arrival at the premises.

## **Power to enter premises under a warrant**

6.22 An application can be made to a justice of the peace (or to a sheriff in Scotland, and in Northern Ireland to a lay magistrate) for a warrant for an authorised officer to enter and search any premises including vehicles but does not include any premises used only as a dwelling.

### ***When the power can be used***

6.23 A warrant may be issued where the CMA can show that there are reasonable grounds for believing that there are goods or documents on the premises to which they would be entitled to have access<sup>50</sup> and that any of the conditions detailed below are met.

6.24 These conditions are:

- that an authorised officer has been, or would be likely to be, refused admission to the premises or access to the goods or documents
- that the goods or documents would be likely to be concealed or interfered with if an appropriate notice were given
- that there is likely to be nobody at the premises capable of granting admission.

### ***The scope of the power***

6.25 The warrant will authorise an authorised officer to:

- enter the premises specified in the warrant (using reasonable force if necessary)
- do anything on the premises that an authorised officer would be able to do if he had entered the premises without a warrant
- search for goods or documents which they have required a person on the premises to produce where that person has failed to comply with such a requirement

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<sup>50</sup> Under sections 227A, 227B and 227C(2).



- take any other steps which he considers to be reasonably necessary for preserving such goods or documents or preventing interference with them
- to the extent that it is reasonably necessary to do so, require any person who is responsible for discharging any of the functions of the business carried on at the premises to break open a container and, if that person does not comply with the requirement or if such person cannot be identified, despite all reasonably practicable steps taken to do so himself.

### **Additional powers**

6.26 For inspections both with and without a warrant, the authorised officer can take persons they consider necessary to assist in the search. Such persons may be needed to provide expertise which is not available within the CMA but is necessary to exploit fully the terms of the warrant. For example, an IT expert who would assist the CMA officers to retrieve information from computers located on premises for which the warrant was issued. Or, such persons may be contracted from investigation agencies who accompany authorised officers to allow the search to proceed quickly and efficiently. These are illustrative examples and should not be read as limiting the exercise of this power.

6.27 An authorised officer may also take with him such equipment as he deems necessary. For inspections conducted under warrant this will include equipment that can be used to enter the premises using reasonable force if necessary (for example, equipment that can be used to break locks) as well as equipment that can be used to facilitate the search (for example, computer equipment).

6.28 In addition, for inspections conducted under warrant, an authorised officer will also have the power to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized, if at all, but where there are reasonable grounds to believe that it may be or contain something authorised to be seized.<sup>51</sup> The power also applies in relation to property which clearly can be seized but which is contained in something that cannot, and it is not reasonably practicable for the property to be separated out.<sup>52</sup> This may be the case, for example, where there is a large bulk of

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<sup>51</sup> Under section 50(1) of the Criminal Justice and Police Act 2001 (CJPA) which can be located at [www.legislation.gov.uk/ukpga/2001/16/contents](http://www.legislation.gov.uk/ukpga/2001/16/contents).

<sup>52</sup> Under section 50(2) of the CJPA.

material or where special technical equipment is needed to separate out material the authorised officer would be entitled to take from material which they are not (for example, material held on a computer).

6.29 The factors that the authorised officer will take into account in deciding whether to exercise these seize and sift powers include:

- how long the determination or separation of material would take if carried out on the premises, and
- in the case of separation, whether carrying out the separation on the premises would prejudice the use of the material to be taken.

6.30 The exercise of seize and sift powers is subject to strict safeguards, which include a requirement by the authorised officer to provide a written notice to the occupier of the premises or the person from whom the material has been seized specifying:

- what has been seized
- the grounds for the exercise of the seize and sift powers
- the grounds for a person with a relevant interest in the seized property to apply to a judicial authority for the return of seized material
- the duty of officers to secure property in certain circumstances when such an application is made
- the name and address of the person to whom notice of such an application must be given, and
- to whom an application may be made to allow the attendance at the initial examination of the property to determine which of the property may be retained and which must be returned.

6.31 The power to obtain information does not extend to legally privileged material (see below). If it appears that legally privileged material has been seized, the CMA has a duty to return this material as soon as reasonably practicable.

### ***The procedure***

- 6.32 Application for a warrant must be made to a Justice of the Peace (in Scotland, a Sheriff and in Northern Ireland to a lay magistrate), supported by information on oath (in Scotland, evidence on oath) given by an officer of the CMA.
- 6.33 The warrant ceases to have effect at the end of the period of one month beginning with the day of issue.
- 6.34 The warrant will indicate:
- the premises to which it applies
  - the date of issue and the date of expiry
  - the reasons why the entry is necessary
  - the nature of the offences that may be committed if a person obstructs or fails to co-operate with an authorised officer when the powers of inspection are exercised (described below).
- 6.35 The authorised officer will normally arrive at the premises during office hours. On entering the premises, the authorised officer will produce evidence of his identity to any occupier of the premises. If requested, they must produce the warrant to the occupier of the premises for inspection. He will also hand over a separate document which sets out the powers of the authorised officer. Where possible, the occupier of the premises should designate an appropriate person to be a point of contact for the authorised officer during the search. At the end of the inspection, the authorised officer will provide, unless it is not practicable to do so, a list of goods and documents that have been seized, a list of extracts from documents of which copies have been taken and copies of documents that have been seized. In circumstances where it is not practicable to do so at the end of the inspection, a list will be provided as soon as possible afterwards.
- 6.36 If the premises are unoccupied or the occupier is temporarily absent, the authorised officer will take reasonable steps to ensure that when he leaves the premises they are as secure as they were before he entered.

### ***Access to legal advice during searches***

- 6.37 When carrying out a search, the authorised officer is not required to wait for an individual's or a business's legal advisers to arrive before commencing the

search. That said, generally, the authorised officer will wait for legal advisers where to do so does not unreasonably delay the commencement of the search. If the authorised officer considers it reasonable in the circumstances to do so, and if that officer is satisfied that the individual or business is complying with, or will comply with, such conditions as he considers it appropriate to impose,<sup>53</sup> the authorised officer will grant a request to allow a reasonable period for a legal adviser to arrive at the premises before the inspection continues. For these purposes, a 'reasonable period' is such period of time as the authorised officer considers is reasonable in the circumstances.

- 6.38 If the search does commence prior to the arrival of a legal adviser, the authorised officer would, as far as practicable, avoid removing any material from the premises until the legal adviser has had the opportunity to make representations.
- 6.39 If the individual or business decides to seek legal advice it should do so promptly and this must not unduly delay or impede the inspection. Any delay must be kept to a strict minimum.
- 6.40 If the individual or business has an in-house legal adviser on the premises, or if it has received prior notice of the inspection, the authorised officer and other persons will not wait for an external legal adviser to arrive.
- 6.41 The authorised officer will not generally administer a caution during the course of a search under warrant. A caution may be administered during the course of a search under warrant if a person voluntarily decides to provide information to the authorised officer. In this case the officer may consider it appropriate to give a caution and advise the person that he is free to seek legal advice. A person is not required to be cautioned prior to being asked questions that are necessary solely for the purpose of furthering the proper and effective conduct of a search, such as to obtain computer passwords or safe combinations.

## **Limitations on the use of the powers of investigation**

### ***Legally privileged communications***

- 6.42 The power of the CMA to obtain documents under the EA02, whether by a written notice, or pursuant to the power to access premises, or during the

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<sup>53</sup> Typical conditions would be designed to ensure that documents were not subject to tampering.

execution of a search warrant, does not extend to communications covered by legal professional privilege. A person is not required to produce or disclose any information or document which he would be entitled to refuse to produce or disclose on grounds of legal professional privilege in proceedings in the High Court or in the Scottish Court of Session on grounds of confidentiality of communications. This is generally defined to mean a confidential communication:

- between a professional legal adviser and his or her client for the dominant purpose of obtaining or giving legal advice, or
- made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.

- 6.43 If the occupier of premises entered with or without a warrant considers that a document or information is subject to privilege, he should provide the authorised officer or accompanying persons with a sufficient explanation such as to demonstrate to his satisfaction that the document or information, or parts of it, for which privilege is claimed, fulfil the conditions for it being privileged.
- 6.44 If no agreement is reached during the inspection as to whether or not the conditions for privilege have been made out in relation to particular documents or information, the authorised officer will suggest to the occupier that the authorised officer make a copy of the documents or information and places this in a sealed envelope or package in the presence of the occupier. The authorised officer will then discuss with the occupier the appropriate arrangements for the safe-keeping of the documents or information by the CMA pending resolution of the issue of privilege. The authorised officer may, if it is agreed that the disputed material will be retained by the occupier's legal adviser, require the occupier's legal adviser to give (or if no legal adviser is present, that the occupier give) a written undertaking that the disputed material will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.
- 6.45 In addition, where entry is made under warrant, and the authorised officer exercises the powers of seize and sift described above, any legally privileged items which have been seized will be returned as soon as reasonably practicable.

### ***Privilege against self-incrimination***<sup>54</sup>

- 6.46 CPC enforcers exercising their powers under the Enterprise Act 2002 (“EA02”) may compel an individual or business to provide certain information or documents. This could include information or documents which might involve an admission on the part of the individual or trader of the existence of a breach of consumer law. Such information may be admissible as evidence in civil proceedings for an enforcement order under Part 8 of the EA02. However, the CMA is likely to face restrictions on using such information in relation to any separate criminal action, because of the right against self-incrimination in criminal proceedings (although information relating to facts or pre-existing documents may be admissible).
- 6.47 The CMA will not normally exercise its powers under the EA02 to require information or documents which might involve an admission on the part of the individual or trader of the existence of a breach of consumer law in cases where criminal proceedings are also contemplated (although it may still require information relating to facts and the production of pre-existing arguments).

### ***Disclosure of confidential information***

- 6.48 The EA02<sup>55</sup> imposes a general restriction on the disclosure of ‘specified information’, defined as information relating to the affairs of an individual or the business of an undertaking which has come to the CMA in connection with the exercise of its functions, unless such disclosure is permitted under one of the ‘information gateways’ in Part 9 EA02 which are set out below. Such information must not be disclosed during the lifetime of that individual or while the undertaking continues in existence.<sup>56</sup>
- 6.49 Further information on the CMA’s approach to the treatment and disclosure of information, including to identifying confidential information, is available in the

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<sup>54</sup> Privilege against self-incrimination is an aspect of the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. This is given effect in the UK by the Human Rights Act 1998.

<sup>55</sup> Part 9 of the EA02.

<sup>56</sup> Section 237 of the EA02.

guideline '*Transparency and Disclosure: Statement of the CMA's policy and approach*' (CMA6).<sup>57</sup>

### ***Retention of documents and goods***

6.50 Documents seized on the premises, under the powers described above, may be retained for no more than three months. The same time limit applies to goods seized under those powers unless the goods are reasonably required in connection with the exercise of any function of the CMA under Part 8 of the EA02. In such a case the goods may be retained for as long as they are so required.

### ***Complaints procedure***

6.51 Anyone who has a complaint about the conduct of the CMA in carrying out an on-site inspection can find details of the complaint procedure in the '*Transparency and disclosure: Statement of the CMA's policy and approach*' (CMA6)<sup>58</sup> and at [www.gov.uk/cma](http://www.gov.uk/cma).

### **Offences relating to the Powers of Investigation**

#### ***Offences created by Part 8 of the EA02***

6.52 A criminal offence is committed where a person, without reasonable excuse, intentionally obstructs or fails to co-operate with an authorised officer who is exercising or seeking to exercise a power of inspection (outlined above).<sup>59</sup>

6.53 A person guilty of such an offence is liable on summary conviction, to a fine not exceeding level 5 on the standard scale.<sup>60</sup>

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<sup>57</sup> See CMA 6 Transparency and Disclosure (available at [www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach](http://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach))

<sup>58</sup> *Ibidem*, particularly chapter 5 on 'Complaints and accountability'.

<sup>59</sup> Section 227E of the EA02.

<sup>60</sup> £5,000 as at 1 April 2014.

## **Powers to require defendants to make payments into the public purse**

6.54 In relation to Community infringements, the CMA has the power itself (or more likely by applying to the courts) to require the losing defendant to make payments into the public purse in the event of a failure to comply with the decision.<sup>61</sup> In the UK, courts can impose fines for contempt of court consisting of disobedience of court orders to cease Community infringements.

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<sup>61</sup> Article 4(6) (g) of the CPC Regulation.



## 7 The Use Of Criminal Consumer Enforcement Powers By The CMA

- 7.1 While the CMA's main enforcement instrument is Part 8 of the EA02, giving the CMA, and other designated enforcers, the power to apply to a court for an enforcement order to stop breaches of a range of consumer law the CMA also has criminal prosecution powers (along with various other enforcers)<sup>62</sup> under the CPRs and the BPRs.<sup>63</sup>
- 7.2 Detailed guidance on the CPRs is available in the OFT guidance '*Guidance on the Consumer Protection from Unfair Trading Regulations 2008*' (OFT1008). In summary, the CPRs contain a general prohibition of unfair trading, prohibitions of misleading and aggressive trading practices and specific prohibitions of particular practices considered to be inherently unfair. The CPRs cover business to consumer practices<sup>64</sup> and apply to conduct by traders which is directly connected to the promotion, sale or supply of a product (including goods, services and intangibles) to or from consumers.
- 7.3 If a trader misleads, behaves aggressively or otherwise acts unfairly towards consumers, then the trader is likely to be in breach of the CPRs and may face action by enforcement authorities. TSS are the lead enforcers of the CPRs with a duty to enforce them, and responsibility for coordinating their application in the UK. The CMA has a power and not a duty to enforce them. However, the CMA and TSS have complementary powers and will work in partnership (see chapter 4), to ensure that action is taken by the most appropriate enforcement body.
- 7.4 For the CMA, action may be appropriate where it has determined that breaches of law point to systemic failures in a market, where changing the behaviour of one business would set a precedent or have other market-wide

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<sup>62</sup> As at 1 April 2014, the enforcers with criminal prosecution powers in addition to the CMA are Weights and Measures authorities (the TSS), the Department of Enterprise, Trade and Investment in Northern Ireland, and the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate in Scotland, may also conduct prosecutions under the CPRs. A number of other enforcers have the power to take civil injunctive action under Part 8 EA02, such as the sectoral regulators.

<sup>63</sup> See [www.legislation.gov.uk/ukxi/2008/1277/contents/made](http://www.legislation.gov.uk/ukxi/2008/1277/contents/made) and [www.legislation.gov.uk/ukxi/2008/1276/contents/made](http://www.legislation.gov.uk/ukxi/2008/1276/contents/made).

<sup>64</sup> See [www.legislation.gov.uk/ukdsi/2008/9780110811475/contents](http://www.legislation.gov.uk/ukdsi/2008/9780110811475/contents) - Misleading business to business practices and comparative advertising are covered by the Business Protection from Misleading Marketing CPRs 2008.

implications, where there is an opportunity to set an important legal precedent or where there is a strong need for deterrence or to secure compensation for consumers. The CMA will make strategic choices about the cases it takes and apply its prioritisation principles.

- 7.5 The CMA will consider whether to enforce the CPRs either by using the civil injunctive powers in Part 8 of the EA02 or by carrying out a criminal investigation with a view to prosecuting those responsible. Although the CMA is more likely to take civil cases it will, where appropriate, use its criminal powers, acting decisively to stop offenders where this is likely to have an effect across the market or wider economy.
- 7.6 The remainder of this chapter provides guidance on the circumstances in which, having determined that enforcement action under the CPRs is appropriate, and that the CMA is the appropriate authority to enforce, the CMA is likely to take criminal enforcement action. It should be recognised, however, that each case must be considered on its merits and particular circumstances, and in some circumstances an approach different from that suggested by this guidance may be required.

### **Considerations in deciding whether to commence a criminal investigation**

- 7.7 Where the CMA determines that enforcement action is required, it will generally use its criminal powers when:
- civil enforcement is unlikely to be effective in achieving a change in behaviour, and/or
  - the breach is sufficiently serious that the conviction and punishment of offenders ought to be pursued, for example to protect the public and to provide wider deterrence.
- 7.8 See below under 'Prosecution' the test which the CMA must have regard to when it is considering prosecution.
- 7.9 Particular circumstances in which the CMA is therefore likely to consider commencing a criminal investigation include:
- where traders deliberately or recklessly use deceptive, misleading or fraudulent practices
  - where traders deliberately or recklessly use aggressive, intimidating or coercive practices

- where flagrant and/or persistent offending by a trader or group of associated traders has occurred or is occurring
- where a particular unlawful practice is widespread, or there is a risk of it becoming widespread, to the serious detriment of consumers and criminal enforcement will send a strong deterrent message
- where a particular unlawful practice is novel or unusual and it is determined that criminal enforcement is likely to be the most effective means by which to set a precedent for future action
- where false statements are made or false documents provided in the course of dealings with the CMA or another enforcement body or where an investigation is otherwise obstructed.

7.10 Where cases do not have any of those features, or any combination of those features, the CMA will generally consider alternative means of encouraging compliance such as civil enforcement, other compliance activities or no enforcement, depending on the potential desired outcomes. The CMA will work with other enforcers to ensure action is taken by the most appropriate body.

7.11 As the CMA has both civil and criminal enforcement powers, if it becomes apparent during the course of an investigation that a breach of the CPRs has occurred, but for any reason criminal enforcement is no longer appropriate, the CMA may stop the criminal investigation and deal with the breach by alternative means, such as civil enforcement.

### **Carrying out investigations**

7.12 The CPRs grant certain powers to authorised officers of the CMA conducting investigations under the CPRs.<sup>65</sup> These include powers:

- to make test purchases in order to determine whether the CPRs are being complied with<sup>66</sup>
- to enter premises and inspect goods in order to determine whether a breach of the CPRs has been committed<sup>67</sup>

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<sup>65</sup> Note that these differ from the investigation powers set out in Part 8 of the EA02.

<sup>66</sup> Regulation 20 of the CPRs.

- where there is reasonable cause to suspect a breach of the CPRs has been committed, to:
  - require the production of business documents, and take copies
  - seize goods and documents to determine whether a breach of the CPRs has been committed, or as evidence.<sup>68</sup>

7.13 The CMA is also able, in certain circumstances,<sup>69</sup> to apply to a magistrates' court for a warrant to enter premises, for the purpose of exercising the powers of production and seizure outlined above.<sup>70</sup>

7.14 The CMA will only exercise its powers under the CPRs when it considers it is necessary and proportionate to do so. The CMA will only seize goods or require documents to be produced that it believes to be necessary in order to carry out an investigation effectively.

7.15 The CMA's officers carrying out criminal investigations will have regard to the provisions of the Police and Criminal Evidence Act 1984 and the associated Codes of Practice and will respect the rights and freedoms guaranteed by the European Convention on Human Rights and the Human Rights Act 1998.<sup>71</sup>

## Prosecution

7.16 A decision by the CMA to prosecute a case criminally will be taken in accordance with the two stage test set out in the 'Code for Crown Prosecutors', that is, the 'evidential sufficiency test' and the 'public interest' test:<sup>72</sup>

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<sup>67</sup> Regulation 21(1)(a) of the CPRs.

<sup>68</sup> Regulation 21(1)(b)-(d).

<sup>69</sup> Where the CMA believes there are goods or documents on the premises which are likely to disclose evidence of a breach of the CPRs, or a breach of the CPRs has been, is being, or is about to be committed on any premises and either admission to the premises has been or is likely to be refused and a notice of intention to apply for a warrant has been given; or applying for admission or giving a notice of intention to apply for a warrant would defeat the object of the entry; or the premises are unoccupied; or the occupier is absent and it might defeat the object of the entry to await his return.

<sup>70</sup> Regulation 22.

<sup>71</sup> Codes A-H issued by the Secretary of State pursuant to Section 66 PACE. See [www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice](http://www.gov.uk/police-and-criminal-evidence-act-1984-pace-codes-of-practice).

<sup>72</sup> [www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors](http://www.cps.gov.uk/publications/code_for_crown_prosecutors).

- 7.17 Evidential sufficiency – the CMA will only commence a criminal prosecution when satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction'. If the case does not pass the evidential test, it will not go ahead, no matter how important or serious the allegation may be. The CMA may decide to look at the case under its other powers, or refer to another body if this is deemed appropriate.
- 7.18 Public interest - when deciding whether to prosecute, the CMA will consider the public interest factors set out in the Code for Crown Prosecutors, including whether, in light of all the evidence, the case might more appropriately be dealt with in another way.
- 7.19 Prosecutions may be brought against:
- individuals responsible for the offences
  - corporate bodies, or
  - officers of corporate bodies who have consented or connived in the commission of the offence or where the commission of the offence by the relevant corporate body is proved to be attributable to the officer's neglect.<sup>73</sup>
- 7.20 The CMA will decide who should face prosecution on a case-by-case basis, having regard to the evidence, and the best means of achieving the CMA's enforcement aims. In general, the CMA will seek to act against those who are genuinely responsible for the offence(s).
- 7.21 The CMA will determine the most appropriate charge or charges in each case on the evidence and with a view to ensuring that a court on conviction will have sufficient powers to impose sentences that properly reflect the seriousness of the offence. Charges may include offences under the CPRs and any other statutory or common law offences that are disclosed by the evidence.
- 7.22 The offences under the CPRs are:

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<sup>73</sup> Regulation 15.

- contravention of requirements of the 'general prohibition'<sup>74</sup>
- misleading actions<sup>75</sup>
- misleading omissions (including the omission of specified information in invitations to purchase)<sup>76</sup>
- aggressive practices<sup>77</sup>
- specific unfair commercial practices.<sup>78</sup>

7.23 The offences above are all strict liability offences, apart from contravention of the general prohibition (as explained in footnote 74), which requires proof of 'mens rea'.<sup>79</sup> For strict liability offences it need only be shown that there has been a prohibited act or omission.

7.24 Breach of most of the prohibitions contained in the CPRs means that an offence may have been committed, unless a defence can be shown. The defences available for the strict liability offences are those of due diligence<sup>80</sup> and innocent publication.<sup>81</sup> These defences are not available for the general prohibition.

<sup>74</sup> Regulation 3 - For a person to be convicted of a contravention of the general prohibition, which is a 'mens rea' offence, it must also be shown that he had a specified state of mind and his actions distort (or are likely to distort) the economic behaviour of the average consumer. The specified state of mind will be knowingly or recklessly engaging in a commercial practice which fails to comply with the requirement of professional diligence.

<sup>75</sup> Regulation 5 (except 5(3)(b) – code commitments).

<sup>76</sup> Regulation 6.

<sup>77</sup> Regulation 7.

<sup>78</sup> Schedule 1 – apart from numbers 11 and 28.

<sup>79</sup> This is a legal term implying a mental element in the offence, for example knowledge or recklessness.

<sup>80</sup> To be able to rely on the defence of due diligence, the person accused must prove that the commission of the offence was due to a mistake, reliance on information given by another person, the act or default of another, an accident, or another cause beyond his control, and, in addition, that he took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under his control committing it.

<sup>81</sup> The person accused who wishes to rely on this defence must prove that he is a person whose business is to publish or arrange publication of advertisements, he received the advertisement in the ordinary course of business, and that he did not know and had no reason to suspect that the publication would amount to an offence.

7.25 In qualifying cases the CMA will usually ask the sentencing court to proceed with a view to making a confiscation order under the Proceeds of Crime Act 2002 unless it would be unjust to do so.

## **Penalties**

7.26 The general penalties are:

- on summary conviction, a fine not exceeding the statutory maximum<sup>82</sup>
- on conviction on indictment, an unlimited fine or imprisonment not exceeding two years or both.

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<sup>82</sup> This is as at 1 April 2014.

## ANNEXES

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## A. Consumer legislation under which the CMA has enforcement powers

A.1 The majority of consumer powers previously held by the OFT are transferred to the CMA, as of 1 April 2014, under ERA13.

A.2 The table below summarises the principal areas of consumer legislation under which the CMA has enforcement powers from 1 April 2014:

Legislation	Description
The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)	<p>These regulations protect consumers against unfair standard terms in contracts they make with traders. Under the UTCCRs, the CMA and other qualifying bodies have the power to pursue legal action to prevent the use of unfair standard terms in consumer contracts. If the CMA believes that a term is unfair, the CMA has powers to ask a court for an injunction to prevent it being used or recommended for use (civil enforcement).</p> <p>Legislation available at:  <a href="http://www.legislation.gov.uk/ukxi/1999/2083/contents/made">www.legislation.gov.uk/ukxi/1999/2083/contents/made</a></p>
The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)	<p>The CPRs implement the Unfair Commercial Practices Directive (UCPD)<sup>1</sup> in the UK.</p> <p>The Regulations include a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards their customers. They apply primarily to business to consumer practices (but elements of business to business practices are also covered where they affect, or are likely to affect, consumers).</p> <p>In addition to civil enforcement powers, the CPRs provide the CMA with a criminal enforcement power under these regulations.</p> <p>Legislation available at:  <a href="http://www.legislation.gov.uk/ukxi/2008/1277/contents/made">www.legislation.gov.uk/ukxi/2008/1277/contents/made</a></p>
The Consumer Protection	The DSRs are designed to protect consumers who purchase

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<sup>1</sup> As part of this implementation, the Business Protection from Misleading Marketing Regulations 2008 (BPRs) were created. These regulations prohibit advertising which misleads traders, regulate business-to-business marketing and set out the conditions under which comparative advertising is permitted. The CMA also has both civil and criminal enforcement powers under this business protection legislation.

<p>(Distance Selling) Regulations 1999 (DSRs)</p>	<p>goods and services without face to face contact with the supplier. The DSRs give extra protection to consumers who shop using methods such as the internet, mail order, telephone or cable television.</p> <p>The CMA has civil enforcement action powers in respect of the DSRs.</p> <p>Legislation available at: <a href="http://www.legislation.gov.uk/uksi/2000/2334/contents/made">www.legislation.gov.uk/uksi/2000/2334/contents/made</a></p>
<p>Part 8 of the Enterprise Act 2002 (Part 8 of the EA02)</p>	<p>Under Part 8 of the EA02, bodies responsible for consumer law enforcement, including the CMA, have powers to seek court orders against businesses that breach a range of specific consumer protection laws.</p> <p>Civil enforcement action under Part 8 of the EA02 can be taken by the CMA against:</p> <ul style="list-style-type: none"> <li>• Community infringements - a breach of laws by a business which harms or is likely to harm the collective interests of consumers under the UK laws which transpose certain EU Directives/Regulations. These UK laws cover activities such as unfair terms in consumer contracts, unfair commercial practices, sale of goods, distance selling, doorstep selling and e-commerce.</li> <li>• Domestic infringements - a breach of UK laws by a business that harms the collective interests of UK consumers. These cover a wide range of trading activities, including sale of goods and supply of service laws.</li> </ul> <p>Under part 8 of the EA02 a single enforcement action may cover breaches of multiple pieces of consumer protection legislation.</p> <p>Legislation available at: <a href="http://www.legislation.gov.uk/ukpga/2002/40/part/8">www.legislation.gov.uk/ukpga/2002/40/part/8</a></p>

<p>The Regulation on Consumer Protection Cooperation (CPC),<sup>2</sup></p>	<p>The European Council adopted the CPC Regulation on 7 October 2004, providing for wider and formalised co-operation between Member States on cross border infringements of EU consumer laws.</p> <p>Under the CPC the CMA acts as the UK's single liaison body facilitating this co-operation.</p>
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<sup>2</sup> Regulation (EC) No 2006/ 2004.

## B. Status of OFT consumer guidance documents and publications

B.1 The table below indicates the status of OFT guidance documents and publications relevant to enforcement of and compliance with consumer legislation that had been published and were in effect prior to the transfer of the various consumer functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new regime, and to minimise disruption to parties and the CMA.

OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>85</sup>	Adopted by the CMA Board <sup>86</sup>
OFT1221	Statement of consumer protection enforcement principles	✓	-
OFT311	Unfair contract terms guidance	-	✓
OFT911	A quick guide to competition and consumer protection laws that affect your business	-	✓
OFT512	Enforcement of consumer protection legislation – guidance on Part 8 Enterprise Act 2002	-	✓
OFT1292	The OFT's approach to promoting business compliance with consumer protection law	✓	-
OFT143	Unfair standard terms	-	✓
OFT734	Guidance on unfair terms in holiday caravan agreements	-	✓
OFT737	Guidance on unfair terms in home improvement contracts	-	✓
OFT668	Guidance on unfair terms in package holiday contracts	-	✓
OFT667	Guidance on unfair terms in consumer entertainment contracts	-	✓
OFT635	Guidance on unfair terms in care home contracts	-	✓
OFT373	Guidance on unfair terms in health and fitness club agreements	-	✓

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<sup>85</sup> OFT publications listed in this column have, at the date of publication of this guidance, been replaced, or rendered obsolete, by CMA guidance or publications.

<sup>86</sup> OFT publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future).

OFT CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/obsolete <sup>85</sup>	Adopted by the CMA Board <sup>86</sup>
OFT356	Guidance on unfair terms in tenancy agreements	-	✓
OFT1008	Consumer protection from unfair trading	-	✓
OFT979	The Consumer Protection from Unfair Trading Regulations: a basic guide for business	-	✓
OFT1273	Criminal enforcement of the Consumer Protection from Unfair Trading Regulations	✓	-
OFT1318	Consumer Contracts Quick Guide	-	✓
OFT884	Guidance for the use of on-site inspection powers under the Consumer Protection Cooperation Regulation	✓	-
OFT858	The EU Regulation on Consumer Protection Co-operation – on-site inspection powers	✓	-
OFT1494	Key issues in ongoing contracts: a practical guide	-	✓

B.2 Parties should refer to those documents listed above as having been adopted by the CMA board (the adopted guidance) for further details on the substance and procedure around the CMA’s powers and duties in relation to enforcement and compliance. This is subject, in particular, to the following general limitations:

- all references in the adopted guidance listed above must be read in the light of the CMA consumer guidance ‘*Consumer protection: Guidance on the CMA’s approach to use of its consumer powers*’ (CMA7).
- in the cases of conflict between this guidance document and the adopted guidance, this guidance document prevails
- the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- all the adopted guidance should be read subject to the following cross-cutting amendments:
- references to the 'OFT' (except where referring to specific past OFT practice or case law), should be read as referring to the CMA

- references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union (TFEU)
- certain OFT departments, teams or individual roles may not be replicated in the CMA, or may have been renamed; a copy of the CMA's organisational chart is available on the CMA's webpages, and
- parties should check any contact details against those listed on the CMA's webpages, which will be the most up to date.