

# Consumer protection: enforcement guidance

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# 1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer authority. It aims to make markets work well for consumers, businesses and the economy. It came into existence on 1 April 2014, inheriting its functions from the Competition Commission (CC) and the Office of Fair Trading (OFT) which were abolished. Its main functions relate to competition, markets and the protection of consumers.
- 1.2 This guidance serves three purposes. In the first place, it sets out how the CMA uses its consumer protection powers to address problems in markets, including its approach to compliance and enforcement of consumer law. It supersedes previous CMA guidance on the CMA's approach to use of its consumer powers.<sup>1</sup>
- 1.3 Secondly, the CMA is required to issue guidance explaining the consumer protection provisions in Part 8 of the Enterprise Act 2002 (EA02) and to indicate how these provisions operate. This guidance updates and replaces the previously published guidance of the OFT<sup>2</sup> which is to be treated as no longer adopted by the CMA.
- 1.4 Thirdly, the CMA is required to issue guidance to explain certain provisions of Schedule 5 to the Consumer Rights Act 2015 (CRA), and to indicate how these provisions operate. Schedule 5 to the CRA contains a generic set of investigatory powers which consolidate and modernise the enforcement powers of a range of enforcers, including the CMA. This guidance fulfils that statutory requirement. It operates alongside guidance issued by other bodies, in particular the guidance produced by the Department for Business, Energy and Industrial Strategy (BEIS) which explains how the investigatory powers in Schedule 5 to the CRA apply in practice.<sup>3</sup>
- 1.5 The guidance is not intended to serve as a guide to the substantive requirements of the legislation to which it relates. These are the subject of separate publications issued by the CMA and other bodies. Nor is it a comprehensive account of all aspects of the CMA's performance of its consumer functions. It is meant to be read alongside the relevant legislation to which it refers, not to be a substitute for it. Anyone in doubt about whether they

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<sup>1</sup>Consumer protection - guidance on the CMA's approach to use of its consumer powers (CMA7) which was published in March 2014.

<sup>2</sup> [Enforcement of consumer protection legislation, Guidance on Part 8 of the Enterprise Act \(OFT512\)](#) which was adopted by the CMA on a temporary basis.

<sup>3</sup> [BEIS Investigatory Powers Guidance](#). In July 2016, the Department for Business, Innovation and Skills and the Department of Energy and Climate Change merged to form BEIS.

may be affected by the legislation referred to should seek information and guidance (see paragraph 2.10) or should consider seeking legal advice.

- 1.6 The CMA will apply this guidance flexibly. Regard will be had to it when dealing with potential breaches of consumer law but, when the facts of an individual case justify doing so, the CMA may adopt a different approach.
- 1.7 This guidance may be revised, supplemented, or replaced from time to time as appropriate in order to reflect changes in best practice, legislation and the results of experience, legal judgments and research. The CMA's webpages<sup>4</sup> will always display the latest version of its guidance.

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<sup>4</sup> CMA webpages.

## 2. The CMA's consumer powers and functions

2.1 Under the Enterprise and Regulatory Reform Act 2013, the CMA must seek to promote competition, both within and outside the UK, for the benefit of consumers.

2.2 Theory and experience strongly suggest that competition and consumer issues are closely linked. Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around. Effective compliance and enforcement of consumer law ensures that consumers are treated fairly and are able to drive effective competition through the exercise of informed choice. The CMA's consumer protection work supports competition, in particular, by:

- enabling consumers to make well-informed choices, which reward those firms that best satisfy their needs;
- tackling practices, such as a lack of transparency or obstructions to switching that hamper the ability of consumers to access information, to assess information or to choose the best deal and drive competition; and
- improving compliance across markets to create a level playing field between fair dealing businesses and traders that are not complying with the law.

2.3 The CMA's specific consumer powers form part of a wider range of legal mechanisms which it may use to examine and, where necessary, address problems found in markets. For example:

- Under section 5 of the EA02, the CMA has the power to obtain information and conduct research. Using this power, the CMA may undertake calls for information or compliance reviews, or may conduct formal market studies following publication of a market study notice under section 130A of the EA02.
- The CMA must respond to super-complaints under section 11 of the EA02.
- Part 4 of the EA02 enables the CMA to conduct market 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 Part 3 of the EA02, the CMA can investigate mergers which could potentially give rise to a substantial lessening of competition.

- The CMA may bring criminal proceedings against individuals who commit the cartel offence under section 188 of the EA02.
- Under the Competition Act 1998 (CA98) the CMA may investigate and determine whether undertakings or associations of undertakings are in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- Under the Business Protection from Misleading Marketing Regulations 2008 (BPRs), the CMA has the power to seek an injunction to prevent or stop advertising which misleads traders and unlawful comparative advertising.<sup>5</sup> It also has the power to take criminal proceedings against traders which engage in such misleading advertising. These powers are shared with other bodies.<sup>6</sup>

## Consumer enforcement powers

2.4 The CMA's main consumer enforcement powers are shared with other bodies and are as follows (further details of the consumer legislation these enforce are provided in Annex A):

- Civil powers under Part 8 of the EA02 to stop infringements of certain consumer laws - see Section 4 of this guidance. The CMA may seek an enforcement order from a civil court against traders which breach specific listed consumer laws including, in particular:
  - The Consumer Protection from Unfair Trading Regulations 2008 (CPRs). These impose a general duty on businesses not to trade unfairly with consumers (most breaches may also be enforced by the CMA using criminal powers).
  - The Consumer Rights Act 2015 (CRA), Part 2 of which protects consumers from traders that use unfair contract terms or notices.
- Criminal powers to prosecute traders that engage in most unfair commercial practices under the CPRs - see Section 5 of this guidance.
- The power under Schedule 3 to the CRA to seek an injunction<sup>7</sup> to stop businesses using unfair terms or notices with consumers. The CMA's

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<sup>5</sup> A comparative advertisement is one that, in any way, identifies a competitor or products offered by a competitor.

<sup>6</sup> It is the duty of Trading Standards Services (TSS) and, in Northern Ireland, the Department for the Economy to enforce the BPRs. The CMA and Office of Gas and Electricity Markets (Ofgem) have the power to enforce them.

<sup>7</sup> In Scotland, an interdict rather than an injunction is sought. In this guidance, where the term 'injunction' is used, it should also be interpreted as referring to an interdict, where appropriate.

enforcement powers under the CRA are described more fully in its guidance document on unfair terms, CMA37.<sup>8</sup>

- 2.5 The CMA has investigatory powers to enable it to investigate breaches of consumer law - see Section 6 of this guidance.
- 2.6 Most of the CMA's consumer enforcement powers are shared with other authorities. The CMA cooperates with them to ensure that action is taken in each case by the most appropriate body. TSS are the lead enforcers of the CPRs with a duty to enforce them, while the CMA has a power to enforce them and may take the lead in particular kinds of cases (see paragraph 3.11). Other enforcers also have power to enforce the CPRs.<sup>9</sup> Section 3 and Annex B describe how the CMA works with its consumer enforcement partners.

## International working

- 2.7 The CMA has certain functions, powers and duties to act in the interests of consumers that involve international working, in particular:
- Acting as the UK's Single Liaison Office (SLO) for the purposes of Regulation (EC) No 2006/2004 on Consumer Protection Cooperation (the CPC Regulation). The CPC Regulation established an EU-wide network of national enforcement authorities which are subject to mutual assistance obligations. The SLO in each member state is responsible for coordinating the operation of the CPC Regulation in that state.
  - Acting as a competent authority under the CPC Regulation to enforce a wide range of consumer protection laws to protect the interests of EU consumers where UK businesses are at fault.
  - Promoting good practice outside the UK to protect the economic interests of UK consumers, for example by representing the UK in the International Consumer Enforcement Protection Network (ICPEN) and the Organisation for Economic Cooperation and Development (OECD) Committee on Consumer Policy. The CMA is also empowered to represent the UK government internationally, when requested to do so by the Secretary of State, on any matters relating to its functions.
- 2.8 International working is described more fully in Annex C.

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<sup>8</sup> [Unfair contract terms guidance](#) (CMA37). See in particular paragraph 6.4.

<sup>9</sup> See Annex A for other enforcers with criminal powers under the CPRs. See Annex D for enforcers with civil powers under Part 8 of the EA02.



## Advice and guidance

- 2.9 The CMA has the general function of making the public aware of the benefits of competition and of giving information and advice to the public about its activities. It may do this by publishing educational materials, carrying out other educational activities, or supporting (financially or otherwise) others doing this.
- 2.10 This function does not extend to providing advice to individual consumers. This is the responsibility of other bodies, in particular the Citizens Advice service which also takes the national lead in providing published information for consumers. Consumers are also encouraged to report potential breaches of consumer protection legislation to the Citizens Advice Consumer Service. The CMA does not provide advice and information for businesses on consumer law in general, which is the role of the Chartered Trading Standards Institute (CTSI).<sup>10</sup>
- 2.11 The CMA publishes guidance for businesses and the public generally where this assists in the performance of its functions, in particular in dealing with contractual fairness issues in relation to which it has a lead role. For example on 31 July 2015, the CMA issued a set of guidance documents setting out the CMA's understanding of the Consumer Rights Act 2015 so far as it deals with unfair consumer contract terms and notices.<sup>11</sup>
- 2.12 Where appropriate, the CMA may publish advice or information based on detailed knowledge gained from work in the consumer arena through which it has obtained relevant expertise, such as a compliance review, a market study, or a precedent-setting case. The CMA does this as and when appropriate to achieve its objectives, for instance, in order to make known its findings or to improve compliance.<sup>12</sup>
- 2.13 The CMA also has the function of making proposals or giving other information or advice on matters relating to any of its functions to any minister or other public authority.

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<sup>10</sup> See, in particular, [Business Companion](#) which contains information about trading standards and consumer protection legislation.

<sup>11</sup> See footnote 8.

<sup>12</sup> For example, in October 2015, the CMA published consumer protection law advice for [UK higher education](#) providers in relation to their dealings with undergraduate students following a review of consumer law compliance.

### 3. The CMA's approach to compliance and enforcement

3.1 Working in partnership with other bodies having consumer functions is a key element of the CMA's consumer strategy. The CMA typically focuses its consumer enforcement action on particular types of cases to tackle, in particular, market wide consumer problems or issues which affect consumers' ability to make choices (see paragraph 3.11). It also works together with compliance partners to ensure the effectiveness of the consumer protection regime as a whole. This chapter sets out the main elements of the CMA's approach. Further detail on the CMA's compliance partners and how the CMA works with them is described in Annex B.

#### Consumer Protection Partnership

3.2 The Consumer Protection Partnership (CPP) brings together the main bodies with consumer functions with the purpose jointly to identify and prioritise areas where there is the greatest consumer harm, and to agree and coordinate collective action to tackle such detriment, making use of all available tools at the disposal of each member.

3.3 The membership of the CPP and their respective roles in the consumer landscape is summarised below.

<i>Body/Group</i>	<i>Primary responsibilities in consumer landscape</i>
Citizens Advice (England and Wales)	Consumer advocacy, education and advice
Citizens Advice Scotland	Consumer advocacy, education and advice
CTSI	Business education and Consumer Codes Approval Scheme
Consumer Council for Northern Ireland	Consumer advocacy, education and advice
CMA	Enforcement (in particular cases - see paragraph 3.11) and unfair terms leadership
BEIS	Government lead for consumer policy in the UK
National Trading Standards Board (NTSB)	Enforcement and threat assessment - regional and national in England and Wales
Trading Standards in Northern Ireland - Department of Enterprise, Trade and Investment	Enforcement - local, regional and national enforcement in Northern Ireland
Trading Standards Scotland, overseen by CoSLA	Enforcement - national enforcement in Scotland

3.4 CPP partners share intelligence, identify current or future issues that are likely to affect consumers adversely and agree priorities for work to resolve or

mitigate such problems. The CMA may lead working groups or undertake market assessments or reviews to inform CPP decision-making.<sup>13</sup> Where appropriate, it may take the lead in compliance action on behalf of the CPP, such as giving advice to businesses identified as at risk of breaching unfair terms law.<sup>14</sup>

## National Trading Standards Board

3.5 The CMA works closely with TSS to ensure that the enforcement cases which generate the most significant consumer detriment on a national level are allocated to whoever is best placed to address them. The main forum for doing this is the National Tasking Group (NTG), a sub-group of the NTSB. Further details are in Annex B.

## Established means

3.6 UK and EU consumer legislation encourages, and at certain points requires, cooperation between bodies exercising consumer functions to ensure the most appropriate mechanism is used to achieve compliance, including potential alternatives to enforcement action. 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>15</sup> The BPRs contain similar provisions.

3.7 These provisions are intended to encourage the use of arrangements other than direct enforcement, where appropriate, as a means of controlling unfair commercial practices and misleading marketing activities. Bodies with other powers, such as the Advertising Standards Authority (ASA), which is the UK's independent regulator of advertising across all media,<sup>16</sup> are regarded as suitable in principle to act as constituting 'established means' in the sense referred to above, and thus as compliance partners for the purposes of ensuring consumer protection.

3.8 The CMA seeks to refer a matter to the compliance partner best placed to resolve the problem. When making this assessment, the CMA satisfies itself that the chosen partner has an effective way of bringing about the control of

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<sup>13</sup> For example, in 2014 the CPP commissioned the CMA to conduct a review of the causes and impacts of problem debt to inform a decision on whether collective action by the CPP was warranted.

<sup>14</sup> For example, in March 2016, the CMA issued advisory letters on behalf of the CPP to wedding and event venues following an assessment of the use of advance payment and cancellation terms in business to consumer contracts.

<sup>15</sup> Regulation 19.

<sup>16</sup> The ASA ensures compliance with the Advertising Codes and has a range of potential sanctions to address non-compliance. See [the ASA website](#).

unfair commercial practices. The primary aim is to gain compliance in the most cost effective and least burdensome way that maximises the reach of consumer law. In deciding how to proceed, the CMA takes account of all relevant circumstances, and will not rely on established means, where it considers this to be inappropriate.

## **The CMA's approach to enforcement**

- 3.9 The overall aim of the CMA is to help create a framework in which competitive businesses can thrive and consumers are protected. It aims to be as robust as necessary to gain compliance while allowing maximum freedom for effective competition within the law.
- 3.10 The CMA takes a risk-based approach, prioritising its actions as described below (paragraph 3.13) to ensure resources are used to maximum effect and to avoid burdening business with the costs of unnecessary interventions. The CMA aims to ensure that its interventions deliver high impact results, for example, by changing market behaviour, clarifying laws or providing the necessary level of deterrence to those who might otherwise flout their legal obligations.
- 3.11 For the CMA, enforcement action may be appropriate, in particular:
- where breaches of the 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;
  - where there is a strong need for deterrence or to secure compensation for consumers; or
  - to uphold the effectiveness of the unfair contract terms regime embodied in the CRA.
- 3.12 The CMA will consider whether to enforce using civil powers 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, additionally or alternatively use its criminal powers, acting decisively to pursue offenders where this is likely to have an effect across the market or wider economy.

## Prioritisation principles

3.13 The CMA decides its enforcement approach to any particular case in light of all the facts before it, its current overall priorities, resources and powers. Work is generally prioritised having regard to its published prioritisation principles<sup>17</sup> although, where appropriate, the CMA may also take account of other relevant factors. Under these principles, the CMA balances the impact of its work on consumers, and its strategic significance, against the risks and resources involved in its interventions. It will take into account such issues 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;
- whether the CMA is best placed to act or there are alternatives, such as action by CMA partners;
- 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; and
- whether the resource requirements of the action are proportionate to achieving the desired results.

3.14 The CMA is committed to the principles of good regulation in relation to its enforcement action.<sup>18</sup> It aims to ensure when carrying out such activity that its action is:

- proportionate;
- consistent;
- targeted;
- transparent; and
- accountable.

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<sup>17</sup> [CMA prioritisation principles](#) (CMA16).

<sup>18</sup> See section 21 of the Legislative and Regulatory Reform Act 2006, and the [Regulator's Code](#).

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

### ***Proportionate***

3.16 In considering the proportionality of interventions the CMA takes into account issues such as:

- the available options which may typically range from advice on compliance, compliance partners' intervention, warning letters, undertakings, enforcement orders or other injunctive action (including interim orders or other measures) 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; and
- intelligence, including knowledge of the business's intent and past behaviour.

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

3.17 It is the CMA's intention to avoid a situation where a business receives multiple approaches on similar or linked issues (particularly, approaches reflecting different interpretations of the law) so that the business can deal effectively with a single body and expect a consistent approach.

3.18 Where powers are shared between separate authorities (see paragraph 2.6), 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,<sup>19</sup> (and taking account of both statutory and non-statutory schemes (including self-regulation)). The CMA also works with compliance partners to assist in ensuring a consistent interpretation of consumer protection laws.

3.19 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 rely on the same legislation or take the same steps to enforce the law in the same way on all apparently comparable cases – 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

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<sup>19</sup> Consultation may be required. See paragraph 4.22.

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

- 3.20 The CMA carries 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 considers the impact of its work in various ways, including, for example, analysing complaints, soliciting views of trade bodies and businesses affected, and independently commissioned research.

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

- 3.21 The CMA is committed to the principle of transparency in its consumer enforcement work. Detail on the CMA's approach to transparency in its consumer enforcement work, including formally opening and closing cases, can be found in *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6) (Transparency Statement).<sup>20</sup>

- 3.22 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:

- publishes information about its enforcement activities that it considers to be lawful and in the public interest to disclose, in particular on [www.gov.uk/cma](http://www.gov.uk/cma)<sup>21</sup> issuing press notices where appropriate;
- deals with enquiries about its cases and procedures in line with the Freedom of Information Act 2000; and
- shares or exchanges enforcement information with other authorities as necessary to facilitate the exercise of its functions and/or those of the authorities concerned.<sup>22</sup>

- 3.23 The transparency policy of the CMA takes into account the importance of respecting confidentiality and the need to comply with relevant statutory constraints in this regard, in particular under data protection law and Part 9 of the EA02.

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<sup>20</sup> CMA6.

<sup>21</sup> The CMA uses its webpages to comply with its obligations pursuant to the Freedom of Information Act 2000 to maintain a publication scheme in order to make certain classes of information routinely available, such as policies and procedures, minutes of certain meetings, annual reports and financial information.

<sup>22</sup> As part of mutual assistance in the CPC Regulation (see paragraph 2.7 above), the CMA also has a duty to notify other competent authorities of infringements (Article 7) and to exchange information about actual or potential infringements with other competent authorities on request (Article 8).

## ***Accountability and complaints***

- 3.24 The CMA aims at all times to deal with parties and members of the public fairly and properly.
- 3.25 The CMA's Transparency Statement<sup>23</sup> sets out how parties to an ongoing case, including consumer enforcement cases, should raise any complaints about the conduct of the CMA in relation to that case.
- 3.26 The CMA has published a complaints policy which explains how it deals with complaints from members of the public about its conduct generally.<sup>24</sup> If, after following the CMA's procedures, a complainant still thinks that an instance of maladministration has not been properly dealt with, he or she has the right to complain to an MP who may refer the matter to the Parliamentary and Health Service Ombudsman. The Ombudsman has power to investigate and recommend redress for any injustice.

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<sup>23</sup> See footnote 20 above.

<sup>24</sup> The [CMA's complaints policy](#).



## 4. The use of civil consumer enforcement powers by the CMA and other enforcers

- 4.1 The CMA may deal with infringements of consumer law using a number of different powers. Part 8 of the EA02 (Part 8) provides the principal means by which the CMA enforces consumer protection legislation, although it can also take civil action under specific legislation (such as the CRA, see paragraph 2.4 above) and uses criminal powers in appropriate cases (see Section 5). Part 8 enables the CMA and other enforcers to engage with businesses to bring to an end, or prevent, infringements of consumer law (and ensure they are not repeated).
- 4.2 Part 8 gives power to four classes of **enforcer**, including the CMA, to apply to the court for an enforcement order, or to accept an undertaking, to stop a **business** from breaching any legislation or rule of law listed under the EA02, where the breach harms the **collective interests of consumers**. Such breaches are known as either **domestic infringements** or **Community infringements**. Part 8 also provides that enforcement orders or undertakings may include **enhanced consumer measures** which require businesses to take additional steps for the protection of consumers. Terms in bold print are further explained in Annex D.
- 4.3 Domestic infringements are breaches of a wide range of specified UK laws which harm the collective interest of consumers. Community infringements are acts or omissions which breach UK legislation implementing a number of listed EU consumer protection directives or regulations and which harm the collective interests of consumers. Under Part 8 a single enforcement action may cover breaches of multiple pieces of consumer protection legislation. An enforcer may take action under Part 8 against a business, or those running a corporate business (see paragraph 4.19), where either it, or the consumers it is directing its activities towards, are in the UK.

### Consultation with the business

- 4.4 The CMA may approach businesses under Part 8 whenever it has identified possible concerns about compliance with consumer law. Whether or not it formally opens a case, as provided for in its Transparency Statement,<sup>25</sup> will depend on the circumstances of the case.

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<sup>25</sup> See paragraph 3.21 above.

4.5 Before taking court action under Part 8, an enforcer will normally attempt to stop and prevent repetition of what it considers or suspects to be an infringement by consulting with the business.<sup>26</sup> The purpose of the consultation is:

- where the infringement is occurring, to bring it to an end and ensure it is not repeated;
- where the infringement has occurred in the past, to ensure it is not repeated;
- where an enforcer believes that a Community infringement is likely, to ensure that it does not take place.

4.6 Consultation under Part 8 must generally take place before court proceedings are issued, in accordance with these requirements:

- Where an enforcer wishes to seek a final order under Part 8, a minimum of 14 days must normally be allowed for consultation with the business.<sup>27</sup>
- If the enforcer wishes to apply for an interim order (see below), a minimum of seven days must be allowed for consultation.
- However, in urgent cases, an immediate application can be made to the court with no time given for consultation with the business.<sup>28</sup> A case is likely to be regarded as urgent where immediate action is vital to safeguard consumers' interests.

4.7 In using its other consumer powers (see paragraph 4.33), the CMA is under no statutory requirement to consult, but normally does so other than in cases of urgency, as under Part 8.

## Undertakings

4.8 It is possible for an enforcer under Part 8<sup>29</sup> to accept undertakings instead of taking court proceedings. Enforcement action may be concluded, or not opened in the first place, if a business gives and adheres to a satisfactory statement in relation to conduct giving rise to concern. The CMA will not accept undertakings which it considers to be unsatisfactory, or unlikely to be honoured, or where for any other reason it is seen as essential to bring a case before the court. An

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<sup>26</sup> Other UK enforcers under Part 8 are required to consult in the same way as the CMA, and, in addition must consult the CMA before applying to the court for an enforcement order.

<sup>27</sup> In certain very limited circumstances the consultation period is extended to 28 days – see paragraph 4.31 below.

<sup>28</sup> The CMA must approve this action before a UK enforcer can dispense with the need to consult.

<sup>29</sup> See Annex D for other enforcers under Part 8.

undertaking may be accepted whether or not any finding as to an actionable infringement has been made.

4.9 Breach of an undertaking is liable to result in enforcement action and to be drawn to the attention of the court if proceedings ensue. In considering whether to make an enforcement order, the court is expressly required to have regard to non-compliance with an undertaking given under Part 8. For these purposes, the undertaking may have been given to any enforcer, not just the enforcer that is bringing the proceedings for an enforcement order.

4.10 An undertaking given for the purposes of Part 8 is complied with if the business:

- does not continue or repeat the infringing conduct (if the conduct has already taken place);
- does not engage in the infringing conduct in the course of its business, or another business; and
- does not consent to or connive in the carrying out of such conduct by a body corporate with which it has a special relationship, for example, a director or a controller.

4.11 However, the CMA is not restricted to accepting undertakings about stopping or not repeating infringing conduct. Businesses may also provide undertakings under Part 8 in relation to enhanced consumer measures (see paragraph 4.24 below) or, where appropriate about giving publicity to matters agreed with the enforcer.

4.12 An investigation may also be concluded, or not opened in the first place, on the basis of statements made to the CMA by a business about its future conduct, or on other grounds that lead the CMA to conclude that further action is not required.

## **Court proceedings**

4.13 Under Part 8, any listed enforcer, including the CMA, may apply for an enforcement order where resolution is not possible through undertakings, or it is a matter of urgency. Enforcement proceedings are brought in the High Court or County Court (the Court of Session or Sheriff Court in Scotland<sup>30</sup>).

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<sup>30</sup> An order made in a court in one jurisdiction of the UK (ie England and Wales, Scotland or Northern Ireland) has effect in any other jurisdiction of the UK as if it were made by a court in that jurisdiction.

- 4.14 An enforcement order made against the business under Part 8 must identify the conduct which infringes the legislation and impose requirements to the same effect as those for an undertaking given for the purposes of Part 8 (see paragraph 4.10 above). Failure to comply with a court order of any kind is liable to be treated as contempt of court, and as such can lead to a fine or imprisonment.
- 4.15 The court may also itself accept an undertaking from the business instead of making an enforcement order (under Part 8 or otherwise). Breach of an undertaking given to the court (as opposed to an enforcer) is liable to result in contempt of court proceedings in the same way as breach of a court order. Where the original proceedings were brought by a CPC enforcer under Part 8, any other CPC enforcer has the power to bring proceedings for failure to comply with the order or undertakings given to the court.
- 4.16 The business will normally be informed about the proceedings, except in circumstances where it is appropriate for an enforcer to make an application for an interim order without notice. Where an application is made with notice, the business will have the opportunity to dispute the enforcer's case and to make representations to the court. If the circumstances warrant it, the court may be asked to make an interim order. This is a temporary order made to continue until the court finally determines whether or not to make an enforcement order. Such an order is normally therefore made to last until the final hearing.
- 4.17 At the final hearing, if the case succeeds, the court will make a final order to require the cessation of or otherwise prohibit the infringement. If the CMA establishes its case and an order is made or undertakings given, the business is normally required by the court to pay the enforcer's costs.
- 4.18 Examples of remedies that an enforcer may seek where proceedings are brought under Part 8 include orders:
- to stop infringing conduct;
  - to comply with legal obligations such as to provide consumers with refunds of money due to them because they have a right to cancel a contract;
  - to stop relying on certain terms in contracts, and not to include those or similar terms in future contracts.

## **Persons who can be subject to enforcement action**

- 4.19 Where a business is a body corporate, enforcement action may be directed towards those who direct the running of the company in addition to, or instead

of, the company itself. Under Part 8, in particular, the court or an enforcer may accept an undertaking from, or the court make an enforcement order against, an ‘accessory’. This means a person who has a special relationship with the company (by virtue of being a director, manager, secretary or other similar officer (or person purporting to act in such a capacity) or a person who is a controller of the company) who has consented to or connived in the infringement. Orders can also be made under Part 8 that are binding on all members of a group of interconnected companies.<sup>31</sup>

## Publicity

- 4.20 Where the CMA closes or refrains from opening a case in consequence of having accepted undertakings or other statements made as regards future conduct from a business, the CMA will publish as much of these and of other relevant details (including the names of the parties) as it considers appropriate, subject to its legal duties in relation to disclosure (see above, paragraph 3.23).<sup>32</sup> If undertakings are given or statements are made with no admission that any infringement has occurred, the publicity given to them by the CMA will make this clear.
- 4.21 An undertaking given to the court may also include a further undertaking to publish the terms of the undertaking and a corrective statement to such extent as the court thinks appropriate for the purpose of eliminating the continuing effects of the infringement. Similar provisions apply to enforcement orders. This may apply, for example, where the trader has published misleading advertisements or has otherwise misled consumers.

## Additional procedures for enforcers that are not the CMA

- 4.22 Where an enforcer other than the CMA takes action under Part 8 it must:
- notify the CMA of any intention to apply for an enforcement order at least 14 days before the application is made for a final order (or seven days in the case of an interim order) – unless the CMA considers that an application should be made without delay;

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<sup>31</sup> Two bodies corporate are interconnected if one of them is a subsidiary of the other, or if both are subsidiaries of the same company. If the company that is subject to an order, or interim order, becomes a member of a group of interconnected companies after the order is made, or an existing group of which it is a member is enlarged, the CMA has the power to apply to the court for the order to be binding on all other members including new ones.

<sup>32</sup> Where signed undertakings are given the CMA would normally expect to publicise the content in full, save for the signatures themselves.

- notify the CMA of the result of any application to the court for an order;<sup>33</sup>
- notify the CMA of any undertaking given to it under Part 8, including the terms of the undertaking and the identity of the person who gave it;
- notify the CMA of any application in respect of a failure by a trader to comply with an enforcement order or undertakings to the court.

4.23 The CMA is able to direct that any application to court be made by another enforcer or the CMA.

## Enhanced consumer measures

4.24 The CRA introduced ‘enhanced consumer measures’ (ECMs) for use in addition to purely injunctive remedies under Part 8.<sup>34</sup> The CMA, together with other enforcers such as TSS, has the power to incorporate additional measures into Part 8 undertakings.

4.25 ECMs, which can, in an appropriate case, be sought as part of an undertaking or included by the court in an enforcement order, fall within three categories:

- **redress measures**, which provide for compensation or other redress (such as the right to cancel the contract) in cases where consumers have suffered loss as a result of conduct giving rise to the enforcement action;
- **compliance** measures intended to prevent or reduce the risk of future breaches;
- **choice measures** to enable consumers to choose more effectively between suppliers.

4.26 ECMs are available as an additional remedy in relation to infringements of all the laws enforced using Part 8. Where legislation provides for prosecution, as in the case of the CPRs, ECMs can be sought in addition to or as an alternative to criminal sanctions. The decision whether or not to use any particular measure rests with the enforcer.

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<sup>33</sup> For completeness, it should be noted that similar provisions apply under the CRA whereby enforcers (termed ‘regulators’ in the CRA) taking action against blacklisted or unfair terms or notices are required to notify the CMA of their intention to apply for a court order, the outcome of proceedings, and the details of any undertaking they accept in lieu of court proceedings. Under the BPRs also, TSS must also normally give the CMA 14 days’ notice of intention to bring proceedings and notify the CMA of the outcome of the proceedings.

<sup>34</sup> ECMs were introduced under paragraph 8 of Schedule 7 to the CRA which amends Part 8 EA02. BEIS produced [guidance for enforcers](#) of consumer law in May 2015.

- 4.27 An enforcer can only include an ECM in an undertaking if it considers that it is just and reasonable. In reaching this conclusion it must consider whether the proposed ECM is proportionate. This involves taking into account:
- the likely benefit to consumers of any measure to be proposed;
  - the likely cost to the business of putting the measure in place; and
  - whether there will be a cost to consumers of obtaining the benefit of the measure.
- 4.28 In the first instance, as with injunctive remedies, the CMA seeks to agree appropriate undertakings with the trader. At this stage it is made clear to the trader, and confirmed in writing, what measures the enforcer is seeking and what the trader will have to do to put them in place. It is open to the trader to suggest alternative measures. If the CMA considers such suggested alternatives to be appropriate, it can accept an undertaking that embodies them, either together with or instead of the measures it has itself proposed.
- 4.29 If suitable ECMs that address the breach of the law cannot be agreed, the CMA may, once the relevant minimum consultation period has expired, present its case to the court. In deciding whether to make an order including ECMs, the court must consider whether the ECMs are just and reasonable, taking into account the same proportionality factors set out in paragraph 4.27 above.
- 4.30 In either case, it would be normal for the undertaking or order to specify the period within which the trader must take the ECMs, and to require the trader to provide information or documentation to enable the enforcer to determine if the ECMs have been put in place.
- 4.31 As set out in paragraph 4.6 above, the standard minimum consultation period under Part 8 is 14 days. This period is extended to 28 days if the trader is a member of, or represented by, a trade association or other business representative body that operates an approved consumer code of practice.
- 4.32 As part of ECMs, traders can be required to provide information to show that they have carried out the agreed measures. The CMA is always concerned to ensure, by its own action and through its enforcement partners, that undertakings given to it are complied with and that consumers receive any redress that has been agreed to or ordered.

### **Civil enforcement other than under Part 8**

- 4.33 The CMA adopts the same approach, so far as possible, to use of these powers as has been described above in relation to use of its powers under Part

8 of the EA02. This applies particularly to its focus on making markets work well, its commitment to transparency, its willingness to accept and publicise undertakings, and the circumstances in which it will consider taking court proceedings. The CMA aims to use all its powers in a consistent way, subject to the need to comply with requirements specific to each piece of legislation. It should be noted that the ECMs are available only in relation to action under Part 8.



## **5. The use of criminal consumer enforcement powers by the CMA**

- 5.1 In addition to civil powers outlined in Section 4 above, the CMA also has criminal prosecution powers under the CPRs and the BPRs.<sup>35</sup> Its criminal powers, too, are shared with other enforcers.<sup>36</sup> The CMA works with other enforcers to ensure any action is taken by the most appropriate body (see Section 3).
- 5.2 The CMA will generally use its civil powers to enforce consumer protection law wherever doing so is likely to meet its objectives. But it will not hesitate to use its criminal powers in an appropriate case.
- 5.3 The remainder of this section provides guidance on the circumstances in which 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**

- 5.4 The CMA generally uses 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.
- 5.5 See below under 'Prosecution' the test to which the CMA must have regard when it is considering prosecution.
- 5.6 Particular circumstances in which the CMA is therefore likely to consider commencing a criminal investigation include:

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<sup>35</sup> As indicated above, the CMA's criminal powers are in addition to its civil powers to enforce both sets of regulations.

<sup>36</sup> For other bodies with criminal powers, see Annex A. In Scotland, however, prosecutions are conducted by the Crown Office and Procurator Fiscal Service (COPFS) on behalf of the Lord Advocate.

- 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 is best calculated to send a strong deterrent message;
- 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.<sup>37</sup>

5.7 As the CPRs confer 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.

## Prosecution

5.8 A decision by the CMA to prosecute a case criminally will be taken in accordance with the two stages set out in the 'Code for Crown Prosecutors' (the Code), that is, the 'evidential stage' and the 'public interest' stage.<sup>38</sup>

5.9 Evidential stage - the CMA must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect. It must be satisfied that the evidence is admissible, reliable and credible. 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.

5.10 Public interest stage - if the evidential stage is passed, then the CMA will go on to consider whether a prosecution is in the public interest. A prosecution will

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<sup>37</sup> These are also likely to be factors relevant to a subsequent decision to prosecute. While these are particular circumstances which may lead the CMA to open a criminal investigation, they should not be interpreted as precluding criminal investigation where these circumstances do not appear present. The CMA will consider each case on its own facts.

<sup>38</sup> [Code for Crown Prosecutors](#). The Code does not apply to offences committed in Scotland which are subject to considerations in the COPFS Prosecution Code. Further details of how the Code for Crown Prosecutors and the COPFS Code are applied are contained in the [Cartel Offence Prosecution Guidance](#) (CMA9).

usually take place unless the CMA is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour

5.11 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.

5.12 The CMA decides who should face prosecution on a case-by-case basis, having regard to the stages of the Code.

5.13 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.

## **Penalties**

5.14 The general penalties are:

- on summary conviction, a fine of any amount;<sup>39</sup>
- on conviction on indictment, an unlimited fine or imprisonment not exceeding two years or both.

## **Confiscation orders**

5.15 Where appropriate, the CMA will ask the sentencing court to make a confiscation order under the Proceeds of Crime Act 2002.

## **Director Disqualification orders**

5.16 Under the Company Directors Disqualification Act 1986 the court may make a disqualification order if an offender has been convicted of any indictable offence committed in connection with the promotion, formation, management or

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<sup>39</sup> On 12 March 2015 the £5,000 cap that used to limit the maximum fines magistrates could impose was removed by section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

liquidation of a company, or with the receivership of the company's property. The maximum period of disqualification is 15 years in the Crown Court and five years when imposed in the Magistrates' Courts. Breach of a disqualification order is a criminal offence.

## **Time limits**

- 5.17 Prosecutions are subject to a time limit of three years from the commission of the offence, or one year from the date of discovery of the offence by the prosecutor, whichever is earlier.

## 6. Powers of investigation

- 6.1 The CRA consolidated the majority of the CMA's former powers to investigate civil and criminal breaches of consumer law into a single set of powers.<sup>40</sup> These powers are set out in Schedule 5 to the CRA. BEIS has produced detailed guidance explaining how these provisions apply in practice (see footnote 3). The guidance on these powers set out in this section operates alongside the BEIS guidance.
- 6.2 Under Schedule 5 to the CRA different powers of investigation are available to different types of enforcer. Enforcers are classified on the basis of which consumer laws they enforce. For the purposes of Schedule 5 the CMA is a 'domestic', 'EU' and 'unfair contracts term' enforcer.<sup>41</sup>

### Power to require the production of information

- 6.3 The CMA can send a written notice to any person or business requiring them to provide information (including documents). The notice will specify the purpose for which the information is required and the function the CMA is exercising.
- 6.4 The CMA can use this power to:
- exercise or consider whether to exercise its powers under Part 8 of the EA02 (including establishing whether there has been a domestic or Community infringement);
  - ascertain compliance with enforcement orders or undertakings under Part 8 of the EA02;
  - ascertain whether there has been a breach of consumer legislation which it enforces in its capacity as a domestic enforcer (where it reasonably suspects a breach);
  - exercise or consider whether to exercise its powers as an unfair terms enforcer (where it reasonably suspects the use, proposed use, or the recommending of the use of an unfair term or notice);
  - ascertain compliance with an unfair terms injunction; and

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<sup>40</sup> It should be noted that some of the CMA's existing investigatory powers remain unchanged, for example additional powers of seizure from premises under section 50 of the Criminal Justice and Police Act 2001. The CMA also has compulsory information-gathering powers when exercising a number of other functions described in paragraph 2.4.

<sup>41</sup> Within the meaning of an EU enforcer, the CMA acts as a CPC enforcer under Part 8 of the EA02.

- enable certain other enforcers to consider whether to take action under their powers.
- 6.5 The CMA can specify the time within which the information must be provided and the form in which it must be given. It can also require the recipient to create a new document containing the relevant information. Information provided must be legible. The notice cannot require a person to provide legally privileged information.
- 6.6 If a person does not provide the required information, then the CMA can apply for a court order requiring them to comply. The court can also require the recipient of the notice to pay the costs of making the application.
- 6.7 Information provided in response to a notice:
- can be used in civil proceedings against the recipient of the notice, for example an application for an enforcement order under Part 8 of the EA02 or an unfair terms injunction under the CRA;
  - cannot be used in criminal proceedings against the recipient unless the CMA re-acquires the information using other powers.<sup>42</sup> Information obtained from a third party in response to a notice may be used against a trader under investigation.

## **Power to observe the carrying on of business**

- 6.8 The CMA may visit a trader's website to observe how a trader carries on business under its general power to acquire information under section 5 of EA02 (see paragraph 2.3). In addition, Schedule 5 contains an express power that the CMA can enter the public parts of premises to observe the carrying on of a business where this is for the purpose of ascertaining compliance with laws which it enforces as a domestic enforcer, or where it reasonably suspects an infringement of laws it enforces as a CPC enforcer. This power can be exercised without giving notice and without a warrant.

## **Power to purchase products**

- 6.9 The CMA also has the power to make test purchases or enter into an agreement to do so, in order to ascertain compliance with laws which it enforces as a domestic enforcer, or where it reasonably suspects an

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<sup>42</sup> The exception is where those proceedings are for an offence relating to obstruction, perjury or false statements.

infringement of laws it enforces as a CPC enforcer.<sup>43</sup> For the purpose of exercising this power, at any reasonable time the CMA can also enter the public parts of premises to inspect products available to the public. This power also can be exercised without giving notice and without a warrant.

## **Power to enter premises and exercise powers**

6.10 The CMA can enter premises, and exercise various other powers (set out in paragraph 6.15 below) to ascertain compliance with laws which it enforces as a domestic enforcer, and where it reasonably suspects an infringement of laws it enforces as a CPC enforcer.<sup>44</sup>

6.11 At any reasonable time the CMA can enter any part of business premises (except those part used wholly or mainly as a dwelling) to ascertain compliance with consumer law.<sup>45</sup> If premises are used wholly or mainly as a dwelling then an enforcer can obtain a warrant from the court to enter and investigate.

6.12 When carrying out routine inspections the CMA must give the occupier at least two days' notice in writing before exercising its power of entry (unless the occupier waives this requirement).

6.13 However, the CMA can also carry out unannounced visits if:

- it reasonably suspects a breach of law it enforces as a domestic enforcer;
- it reasonably considers that giving notice would defeat the purpose of the visit; or
- it is not reasonably practicable to give notice (particularly if there is an imminent risk to health or safety).

6.14 When carrying out unannounced visits, the CMA must generally provide persons on the premises with a document setting out why entry is necessary and informing them that obstructing is a criminal offence. CMA officers should also produce evidence of their identity and authority. The CMA can take equipment and other people onto the premises if necessary, and is able to authorise subcontractors to enter premises on its behalf.

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<sup>43</sup> Paragraph 21 of Part 4 of Schedule 5 to the CRA. This could apply, for example, to making test purchases of goods, services or digital content from a trader's website.

<sup>44</sup> In exercising its powers the CMA will have regard to any relevant codes of practice issued under the Police and Criminal Evidence Act 1984. Domestic and CPC enforcers are described in Annex D.

<sup>45</sup> In most cases, this will be only where the CMA reasonably suspects an infringement.

- 6.15 The CMA can search premises to investigate breaches of consumer law. In particular, it can:
- require persons on the premises to provide assistance;
  - break open containers and access electronic devices, including devices from which information may be accessed (for example where it is stored on a server off site, potentially in a different jurisdiction);
  - inspect products;
  - test equipment;
  - require traders to produce and give explanations of documents<sup>46</sup> (if it reasonably suspects a breach of the law); and
  - seize and detain goods and documents (if it reasonably suspects they are or might be evidence of a breach of the law).
- 6.16 Where necessary, for example because the premises are used wholly or mainly as a dwelling or it has not been possible to gain access, the CMA can apply to the Magistrates' Court (Sheriff Court in Scotland) for a warrant.
- 6.17 If the Magistrates' or Sheriff Court is satisfied that certain conditions are met then it may issue a warrant authorising entry to the premises at any reasonable time and exercise the powers set out above. Where necessary, this includes the use of reasonable force to gain entry. Where access is obtained by force the investigator must leave a notice explaining what has happened, and secure the premises against trespassers. The CMA must produce a copy of the warrant to persons on the premises.
- 6.18 If the CMA seizes and detains goods or documents, the person who had custody or control at the time they were seized can ask for supervised access (although they may have to pay the reasonable costs of complying with the request). This can include access to take photographs or copies. The CMA does not have to allow access if it might prejudice its investigation.
- 6.19 If certain conditions are met a person with an interest in the goods or documents can apply to the court for them to be released or for compensation for loss or damage caused by the seizure.
- 6.20 If the CMA tests goods it has seized (or purchased), and as a result it brings proceedings for a breach of the law, then it must notify the person from whom

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<sup>46</sup> Documents include information recorded electronically.



they were seized or purchased of the results of the test and, if reasonably practicable, allow them to test the goods themselves.

## **Offence of obstruction**

- 6.21 Any person who intentionally obstructs the CMA in exercising or seeking to exercise its powers to enter and search premises, or fails to comply with a request for assistance, commits a criminal offence.

## Annex A: Consumer legislation under which the CMA has enforcement powers

1. The table below summarises the principal consumer legislation under which the CMA has enforcement powers. These powers are shared with other bodies.

<i>Legislation</i>	<i>Description</i>
CRA (unfair contract terms and notices)	<p>The <a href="#">CRA</a> gives consumers rights and remedies when traders supply goods, digital content or services (Part 1) and also protects consumers against unfair terms in consumer contracts and unfair notices (particularly in Part 2 but also in Part 1).</p> <p>Under Schedule 3 to the CRA, the CMA, TSS and sector regulators have the power to pursue legal action to prevent the use of unfair terms in consumer to business contracts and unfair consumer notices issued by a business. If the CMA considers that a term or notice is unfair, fails to meet the requirement of transparency, or excludes or restricts liability in a way Parts 1 or 2 of the CRA renders not binding or enforceable, the CMA has powers to ask a court for an injunction to prevent it being used or recommended for use (civil enforcement).</p> <p>Enforcement action may also be taken under Part 8 of the EA02.</p> <p>The CMA has produced <a href="#">guidance on the unfair terms provisions</a> in the Consumer Rights Act 2015.</p>
The CPRs	<p>The <a href="#">CPRs</a> implement the Unfair Commercial Practices Directive in the UK.</p> <p>The CPRs include a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards consumers. 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>Infringements of the CPRs include:</p> <ul style="list-style-type: none"> <li>• contravention of the 'general prohibition' (Regulation 3) misleading actions (Regulation 5);</li> <li>• misleading omissions (including the omission of specified information in invitations to purchase);</li> <li>• aggressive practices (Regulation 7); and</li> <li>• specific unfair commercial practices (Schedule 1).</li> </ul> <p>Breach of the CPRs is for the most part, a criminal offence but may also be enforced under Part 8 of the EA02.</p> <p>Other enforcers with criminal prosecution powers include TSS and, in Northern Ireland, the Department for the Economy. In Scotland, prosecutions are conducted by the COPFS on behalf of the Lord Advocate.</p> <p>Detailed guidance on the CPRs is available in a joint BERR/OFT document issued in 2008 - '<a href="#">Guidance on the Consumer Protection from Unfair Trading Regulations 2008</a>' (OFT1008).</p>
Part 8 of the EA02	<p>Under <a href="#">Part 8 of the EA02</a>, bodies responsible for consumer law enforcement, including the CMA, have powers to seek court orders against businesses that breach a range of specific laws, including the CPRs and CRA (under both Parts 1 and 2). Enforcement action under Part 8 of the EA02 may also be taken by the CMA under a range of other legislation including, for example:</p> <ul style="list-style-type: none"> <li>• the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which impose various information and other requirements on traders when selling to consumers;</li> <li>• the Electronic Commerce (EC Directive) Regulations 2002, which impose information requirements on traders who provide online services with an economic value (including services provided free to the consumer at the point of use, such as search engines or online auctions);</li> </ul>

	<ul style="list-style-type: none"> <li>• the Provision of Services Regulations 2009, which include information requirements that traders need to comply with if they supply services;</li> <li>• the Consumer Rights (Payment Surcharges) Regulations 2012, which prohibit traders from charging consumers excessive fees for the use of payment methods.</li> </ul>
The CPC Regulation*	The CPC Regulation provides for cooperation between the enforcement authorities of member states. The CMA's role is described in paragraph 2.7 and Annex C of this guidance.

\* Regulation (EC) No 2006/ 2004.

## Annex B: Compliance partners

1. The UK's consumer protection regime was reformed following consultation in 2012.<sup>47</sup> This altered both the institutional structure and the roles and responsibilities of consumer protection bodies. These reforms confirmed that it was the CMA's mission to focus on the working of markets and accordingly gave key compliance partners of the CMA a national lead in certain other areas which had previously fallen to the OFT. In particular they gave the TSS a leadership role in relation to the bulk of UK consumer enforcement.

### Trading Standards Services

2. TSS have responsibility for most consumer law enforcement, including cases at national level under the control of the NTSB in England and Wales, and Trading Standards Scotland in Scotland and across local authority boundaries. The CMA shares powers with TSS (and other enforcers) and works closely with them to provide an efficient and effective service for both consumers and businesses, particularly via the CPP as mentioned in paragraph 3.2 above.
3. TSS in England, Wales and Scotland 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. In Northern Ireland the trading standards service is funded by and accountable to the Department for the Economy. TSS 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. Both TSS and the CMA can take cases of national scope, and partnership working between the CMA and TSS is accordingly important to ensure that they complement each other in taking enforcement action to protect UK consumers. The focus of the CMA is on markets, while the TSS tackle consumer detriment more generally. An example of work that falls clearly into the remit of TSS is addressing local, regional and national 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. Another example would be a case that involves a single large business – again whether at local, regional or national level – unless there are additional factors which

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<sup>47</sup> [Empowering and Protecting Consumers: Government response \(April 2012\)](#)

make it suitable for the CMA in terms of (for instance) changing the working of a market as a whole or setting a legal precedent.

5. Part 8 of the EA02 and certain other consumer protection laws place a duty on TSS and other enforcers to notify the CMA in relation to enforcement action, particularly before seeking and after obtaining an enforcement order. Enforcers are deemed to have notified the CMA when they have updated the Sanctions Intelligence Database administered by the National Anti-Fraud Network on behalf of the NTSB with details of the case.

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

6. The CMA works 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 NTG, a sub-group of the NTSB with its own decision-making role, brings together representatives from across English and Welsh TSS, along with representatives from the CMA. The purpose of the NTG is to consider, prioritise and task members of the group with cases where harm is being caused to consumers nationally. It is the forum through which TSS and the CMA decide who is best placed to take particular cases. The CMA plays an active role on the NTG to help ensure that the division of responsibility for priority cases is consistent with the respective roles for TSS and the CMA.
7. In the majority of cases that reach the NTG, TSS are likely to be best placed to lead. However, in borderline cases where action by the CMA is considered, the NTG/CMA looks at factors such as the prevalence of issues affecting 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***

8. Convention of Scottish Local Authorities (CoSLA) provides political oversight and leadership to TSS in Scotland through Trading Standards Scotland and is responsible for allocation of the funding provided by BEIS for national and regional enforcement by Trading Standards Scotland. For Northern Ireland, all trading standards activity takes place within the Department for the Economy, rather than as part of a local authority's remit.
9. The CMA works with CoSLA, Trading Standards Scotland and the Department for the Economy in Northern Ireland to identify priority cases of consumer detriment in Scotland and Northern Ireland, and to decide whether any of these may be appropriate for the CMA.

## The Chartered Trading Standards Institute

10. The CTSI is a not-for-profit membership organisation whose primary purpose is to support and represent trading standards professionals.<sup>48</sup> The CTSI is the main source of advice for business on consumer law, although the CMA plays a lead role in issuing guidance relating to unfair contract terms and notices.<sup>49</sup> It also operates a scheme under which codes of practice are approved and monitored for consumer protection purposes in general.

## Concurrent consumer enforcers

11. As well as the consumer enforcement powers shared with TSS, the CMA shares consumer functions with a range of other agencies. The majority of these are public authorities discharging regulatory responsibilities for particular economic sectors. Others (the ASA and PhonePayPlus) are self-regulatory agencies or (in the case of Which?) enjoy charitable status, and have more limited enforcement powers. The CMA views working closely with all these concurrent enforcers as important in order to avoid duplication in effort and instead to maximise the impact of interventions for consumers.
12. Through the Consumer Concurrencies Group (CCG), the CMA and other regulators aim to improve clarity and share best practice on overlapping areas of responsibility, such as unfair terms legislation, especially in relation to enforcement. For practical purposes the CCG meets together with the Consumer Enforcement Forum of Competent Authorities.

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<sup>48</sup> [Chartered Trading Standards Institute](#)

<sup>49</sup> See paragraph 2.9 for the CMA's role in issuing guidance.

13. The CMA chairs the CCG, which includes the following bodies.

<i>Body</i>	<i>Sector</i>
ASA	Advertising
Civil Aviation Authority	Aviation
CMA	Cross-economy
Financial Conduct Authority	Finance
Office of Communications (Ofcom)	Communications
Office of Rail and Road	Railways and Roads
Ofgem	Energy
Water Services Regulation Authority (Ofwat)	Water
PhonePayPlus	Premium rate (or phone-paid) telephone services in the UK
Local Authority Trading Standards Services	Cross-economy
The Consumers' Association (Which?)	Cross-economy
The Department for the Economy in Northern Ireland	Cross-economy
The Northern Ireland Authority for Utility Regulation	Utilities
The Information Commissioner's Office	Cross-economy

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

14. The CMA makes use of a variety of intelligence sources in considering where it is appropriate to act, both in terms of enforcement action and in conducting market studies. Important to this is information passed on by other consumer bodies, in particular CitA which runs the national consumer advice service in England and Wales, Citizens Advice Scotland and Trading Standards Service Northern Ireland which manages the Consumerline advice service. These bodies 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.
15. In addition, the CMA maintains working relations with other consumer agencies with differing geographical scope, for example the Consumer Council for



Northern Ireland<sup>50</sup> and those consumer bodies with a focus on special interest groups, for example charities with a focus on issues such as age, disability etc.

## **Other compliance partnerships**

16. Alongside its formal partnership working with co-enforcers of consumer protection legislation, the CMA where appropriate works with a wide range of other agencies and groups, including self-regulatory bodies. The CMA is committed to encouraging self-regulatory solutions where they add value to its consumer protection work, as a potential alternative to enforcement action or other potential remedies to address market problems identified in its investigations. It is required under statute, in relation to certain of its powers, to seek compliance through 'other established means' (see paragraph 3.6 of the guidance).

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<sup>50</sup> The Consumer Council is a non-departmental public body, which was set up in 1984 to promote and safeguard the interests of consumers in Northern Ireland, with specific statutory duties in relation to energy, postal services, transport, water and sewerage.

## Annex C: Wider international working

### The Consumer Protection Cooperation network

1. The CPC Regulation was adopted by the European Parliament and Council in October 2004. It aims to improve, formalise and facilitate cooperation 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. It does this 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.
2. The CPC Regulation set up an EU-wide network of national enforcement authorities with similar investigation and enforcement powers known as 'competent authorities' with mutual assistance obligations. The CMA is part of this network. A member of the CPC 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 Regulation as 'mutual assistance'. Members receiving such a request (referred to in the CPC Regulation as 'requested authorities') effectively have to consider 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

3. The operation of the network involves the setting up and designation of various enforcement bodies, as below:
  - SLOs: This is the public authority in each Member State which has ultimate responsibility for coordinating the application of the CPC Regulation 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 national 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.<sup>51</sup>

- 'Article 8(3)' bodies: The CPC Regulation 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 Regulation. Under Article 8(3) competent authorities can effectively subcontract the enforcement of cross-border cases to such a body (subject to conditions), though ultimate responsibility for ensuring the case is dealt with appropriately 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 trading standards service in Great Britain; and
  - PhonePayPlus.

## **CPC liaison**

4. Liaison with other CPC authorities in the UK is primarily achieved through an Enforcement Forum which comprises all UK designated CPC authorities and BEIS. The Forum meets regularly through the year to allow these authorities to exchange experiences, keep abreast of European and domestic developments and feed in views for forthcoming CPC Committee meetings in Brussels. Between meetings, UK authorities are updated on CPC developments and consulted for input, for example by questionnaires, involvement in projects and common activities.
5. The CMA also liaises with other EU authorities over enforcement at EU and international level, in particular via attending meetings of the CPC Committee. It also works with authorities representing other member states, undertaking certain common activities with them with the support of the European Commission. These include joint initiatives designed to seek compliance with unfair terms law by businesses operating across the EU, and joint enforcement against traders operating throughout the EU. The CMA also participates with EU CPC partners in specialist coordination networks and groups, including particularly an expert group focusing on E-enforcement issues.

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<sup>51</sup> List of [competent authorities](#).

## Injunctions Directive

6. Part 8 of the EA02 gives effect in the UK to the EU's Injunctions Directive of 1998.<sup>52</sup> It allows enforcers including the CMA to take injunctive action in other EU member states, after consultation, in relation to Community infringements affecting UK consumers, just as it also allows qualifying enforcers from other member states to take action in the UK to protect their consumers. This power was successfully used by the CMA's predecessor body, the OFT.<sup>53</sup> However, since 2004 the CPC Regulation has provided an enforcement cooperation mechanism which reduces the need for enforcers across the EU to take cross-border action of this kind themselves.

## ICPEN

7. The CMA<sup>54</sup> is a member of ICPEN.<sup>55</sup>
8. 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; and
  - encourage global cooperation among law enforcement agencies (including coordinating an annual worldwide internet sweep searching for sites that make false or deceptive promises).

## OECD

9. The 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.

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<sup>52</sup> [EU's Injunctions Directive](#).

<sup>53</sup> [OFT v D Duchesne SA](#) and [OFT v Best Sales B.V.](#)

<sup>54</sup> The CMA took the place of the OFT in ICPEN from April 2014.

<sup>55</sup> The presidency of [ICPEN](#) rotates between its members. The CMA, on behalf of the UK, undertook the presidency from 1 July 2015 until 30 June 2016. Under paragraph 19 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013, the CMA may, if so requested by the Secretary of State, represent the government of the UK in matters relating to international relations in any field connected to its functions, and promote good practice outside the UK in the carrying on of activities which may affect the economic interests of consumers in the UK.

## **Annex D: Explanations of terms used in Part 8 of the Enterprise Act 2002**

1. This annex sets out definitions and explanations of terms used in Part 8 which are referred to in this guidance.

### **Business**

2. The definition of 'business' in the EA02 includes professional practices, activities conducted 'for gain or reward', and operations that charge for the supply of goods or services.

### **Collective interests of consumers**

3. Part 8 of the EA02 can be used only where an infringement harms the collective interests of consumers. The breach must affect, or have the potential to affect, consumers generally or a group of consumers. The evidence relied on by an enforcer needs to demonstrate how a particular infringement has, or may in the future have, an adverse effect upon consumers. It may include an assessment of the importance of the practice or provision in question or of the prevalence and likely impact of the infringement. Some isolated breaches may not be harmful to the collective interest of consumers. However, examples of individual consumer harm may be used as evidence. There is no obligation to establish a specific number of individual consumer complaints or incidents of infringement.

### **Community infringement**

4. A Community infringement is an act or omission which harms the collective interests of consumers, and which:
  - contravenes a directive listed in Schedule 13 to the EA02 given effect by legislation or other provisions in the UK or any other European Economic Area (EEA state); or
  - contravenes such legislation or other provisions which provide additional permitted protections. These are consumer protection provisions that are provided in addition to the minimum protections required by the relevant directives, but which are also permitted by those directives;

- contravenes a regulation listed in Schedule 13 or any legislation of an EEA state which gives effect to such a regulation.<sup>56</sup>
5. The CMA takes the view that, as regards UK law, the scope of the community legislation covered includes any provision which directly implements provisions in the directives listed in the Injunctions Directive or provides greater consumer protection of a related kind.

## Consumer

6. Generally speaking, in order for an enforcer to take action under Part 8 in respect of a breach of the law, the enforcer must be able to demonstrate harm to the collective interests of consumers. However, the types of people who are to be treated as consumers differ between a domestic and a Community infringement.
7. For a domestic infringement, a consumer is an individual who receives, or seeks to receive, goods or services from a supplier. The supplier must be acting in the course of a business, but does not need to have a place of business in the UK. So a consumer must be an individual who is not acting in the course of a business, although the definition does extend to individuals who are setting up businesses but have not yet begun to trade.
8. For a Community infringement, the definition of a 'consumer' is taken from the Injunctions Directive and the European Directives listed in the annexe to that directive. The CMA takes this as meaning those directives as implemented in the UK. The specific definition will therefore depend upon the legislation that is being enforced. However, generally speaking a consumer will be a person not exercising in commercial, industrial, craft, or professional activity.

## Domestic infringement

9. A domestic infringement is a breach:
- that harms the collective interests of consumers;
  - that is committed by a person in the course of a business, where that person either has a place of business in the UK, or is seeking to supply products to or for a person in the UK;

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<sup>56</sup> The relevant EC Directives and the UK laws are specified by Statutory Instrument under section 212 of the EA02. The list of EU legislation was amended by the [Enterprise Act 2002 \(Amendment\) Regulations 2006](#) so that it includes all the EU consumer protection laws covered by the CPC (see section 210(7A) and Schedule 13 to EA02).

- of law as specified by the Secretary of State, by Statutory Instrument made under section 211 of the EA02. Details of the legislative provisions and rules of law specified for the purposes of section 211 can be found on the legislation.gov website. Information about them is available in particular from the Business Companion website maintained by the CTSI.

## Enforcers

10. Under Part 8 of the EA02 four types of enforcers are identified: general enforcers, designated enforcers, Community enforcers and CPC enforcers.
11. **General enforcers:** In addition to the CMA, TSS and the Department for the Economy in Northern Ireland are specified in Part 8 as having the power to act as general enforcers.
12. **Designated enforcers:** A designated enforcer is any public or private body in the UK which the Secretary of State designates in a Statutory Instrument, having identified that s/he thinks the person or body has the protection of the collective interests of consumers as one of its purposes. The Secretary of State has designated the following bodies:
  - the Civil Aviation Authority;
  - the Financial Conduct Authority;
  - Ofcom;
  - Ofwat;
  - The Gas and Electricity Markets Authority (Ofgem)
  - the Information Commissioner's Office;
  - the Office of Road and Rail;
  - the Consumer's Association (Which?); and
  - the Northern Ireland Authority for Utility Regulation.
13. **Community enforcers:** A Community enforcer is a qualified entity for the purposes of the Injunctions Directive which is a body listed in the Official Journal of the European Communities, but which is not a general, a designated or a CPC enforcer; thus, it will apply only to enforcers from other EEA states. (In practice, the cross-border enforcement needs of Community enforcers are now largely met via arrangements under the CPC Regulation as described in Annex C).

14. **CPC enforcers:** A CPC enforcer is a body designated by the Secretary of State under Article 4(1) or 4(2) of the CPC Regulation to take action in respect of Community infringements. The following are CPC enforcers:
- the CMA;
  - the Civil Aviation Authority;
  - the Financial Conduct Authority;
  - the Secretary of State for Health;
  - the Department of Health, Social Services and Public Safety in Northern Ireland;
  - Ofcom;
  - the Department for the Economy in Northern Ireland;
  - TSS;
  - an enforcement authority within the meaning of section 120(15) of the Communications Act 2003; and
  - the Information Commissioner's Office.

### **Enhanced consumer measures**

15. Enhanced consumer measures are defined under section 219A of the EA02 as measures which fall into one of the following categories:
- the redress category;
  - the compliance category; or
  - the choice category.
16. The measures in the redress category are defined as:
- (a) measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking;
  - (b) where the conduct referred to in paragraph (a) relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract;



- (c) where such consumers cannot be identified, or cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers. This means that the enforcer could, for example, seek a measure requiring the business to pay the equivalent of the loss suffered to a consumer charity, or to fund an awareness campaign being run by a government department.
17. The measures in the compliance category are defined as measures intended to prevent or reduce the risk of the occurrence or repetition of the conduct to which the enforcement order or undertaking relates (including measures with that purpose which may have the effect of improving compliance with consumer law more generally).
  18. The measures in the choice category are measures intended to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services.
  19. Under the EA02, publication requirements imposed on traders by enforcement orders or undertakings are not enhanced consumer measures.