

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

Summary of responses to the consultation

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This publication is also available at: www.gov.uk/cma.

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1 INTRODUCTION AND SUMMARY

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT) are transferred to the CMA and those bodies abolished. The CMA's primary duty is to seek to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of consumer powers as a result of the changes brought about by the ERRA13. Specifically the approach to promoting business compliance with consumer protection law, the use of its civil and criminal enforcement powers, and how it will work in partnership with co-enforcers to build an effective consumer enforcement regime.
- 1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. *Consumer protection: Guidance on the CMA's approach to use of its consumer powers* (CMA7con) (the Draft Guidance) was one of a number of draft guidance documents published for public consultation on 17 September 2013.¹ The Draft Guidance outlines the CMA's approach to compliance and enforcement of consumer protection legislation (either directly or through Part 8 of the Enterprise Act 2002 (EA02)) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

Purpose of this document

- 1.4 The consultation document accompanying the Draft Guidance (the Consultation Document) sets out a series of specific questions on which views of respondents were sought. This document sets out a summary of responses received to the questions in the Consultation Document, and the CMA's views on those responses.

¹ These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-2.

Responses to the Consultation

1.5 The Consultation closed on 11 November 2013. Six written responses to the Consultation Document were received.² The Draft Guidance was also discussed at a launch event for the CMA draft guidance on 1 October 2013 attended by members of the legal, academic and business communities.

Consultation questions

1.6 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised and the CMA's views on them set out.

<u>Question</u>		<u>Chapter</u>
Q1	Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to working in partnership?	2
Q2.	Are there other factors which you feel should be taken into account when considering the CMA's approach to the use of its consumer enforcement powers?	3
Q3.	Are there other activities which you feel should be included when considering the CMA's approach to the lead authority for UTCCRs?	4
Q4.	Are there other activities which you feel should be included when considering the CMA's approach to carry out its international functions?	5
Q5.	Do you consider that the Draft Guidance covers the main changes that are introduced by the ERR13 to the CMA's consumer powers? If not, what aspects do you think are missing?	6
Q6.	Do you consider that the Draft Guidance will facilitate your understanding of the consumer protection regime when read in conjunction with the existing guidance	7

² Annexe A provides a full list of respondents.

	documents?	
Q7.	Do you agree with the list in Annexe B of the Draft Guidance of existing consumer-related OFT guidance documents proposed to be put to the CMA Board for adoption by the CMA?	8
Q8.	Do you consider that the Draft Guidance is user friendly in terms of its content and language?	9
Q9.	Do you have any other comments on the Draft Guidance?	10

- 1.7 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on the CMA webpages.³ Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures in relation to its consumer powers. Parties seeking guidance on those procedures should refer to *Consumer protection: Guidance on the CMA's approach to use of its consumer powers* (CMA7) (the Guidance).

³ www.gov.uk/cma.

2 ROLES OR OBJECTIVES WHEN CONSIDERING WORKING IN PARTNERSHIP

Question 1: Do you consider that there are any other roles or objectives that should be taken into account when considering the CMA's approach to working in partnership?

Summary of responses

- 2.1 In general respondents welcomed the approach to working in partnership. Clarification was, however, sought on both the CMA's approach to enforcement and the operation of the Consumer Protection Partnership (CPP).
- 2.2 One respondent highlighted the potential risk that, by stating the CMA will only generally pursue cases against multiple parties, it has effectively introduced impunity in relation to cases involving a single national company on the grounds that the case is resource intensive, unless it is clear that another body would take action.
- 2.3 Another respondent queried how the CMA will address regional variations in markets in the context of its approach on taking cases with market-wide implications. Specifically:
- Will consideration be given to regional variations in markets?
 - In its research will the CMA plan to conduct booster samples to ensure regional variations are captured and accounted for?
- 2.4 Some respondents sought greater clarity on how, in practice, the CMA will work with partners, including those which do not currently sit on the CPP such as the sectoral regulators, to ensure their concerns are reflected to the CPP partners.
- 2.5 One respondent suggested that in addition to the proposed mechanisms for gathering information, intelligence and emerging trends in regulated sectors, where appropriate the relevant sectoral regulator should be represented at meetings of the CPP where enforcement priorities relating to that sector are to be discussed. The current arm's length approach was considered as:
- unhelpful for customers in regulated sectors given the expertise that sits within the relevant regulators, and

- not giving sufficient voice to the concurrent regulators in contributing to decisions about enforcement priorities that may involve their sectors.

2.6 Further the respondent felt that sectoral regulators had a clear role in enforcing concurrent legislation and should therefore be identified both in the CPP diagram and through appropriate representation at the CPP as additional or guest members where any particular agenda item merits their attendance. Alternatively they may wish to bring an issue to the CPP for discussion and the governance should enable this.

2.7 Finally, one respondent asked if there are any plans to increase the membership of the Consumer Concurrences Group (CCG).

CMA's response

2.8 The CMA welcomes the overall support for the proposed approach to working in partnership.

2.9 The CMA notes the concerns over impunity in relation to cases involving a single national company and the Guidance has been amended to clarify the position in relation to the enforcement of such cases, which is now generally the responsibility of Trading Standards Services (TSS).

2.10 The CMA also notes the concerns raised over regional variations in markets and ensuring that any research effectively captures the concerns of consumers in regional markets. The CMA is committed to working with partners including to gain an understanding of the problems consumers face in transacting in regional markets and how these can be overcome. Further to this, the Guidance sets out at paragraph 3.8 that interventions will be placed in the context of broader market analysis including dynamic economic analysis where necessary.

2.11 The Guidance is intended to provide clarity on how CMA will use its consumer powers and not to set out the processes and procedures which will support the wider functioning of the regime. Whilst the CMA supports the inclusion of sectoral regulators at CPP meetings where consumer issues in their sectors or priorities in relation to legislation with shared enforcement powers are being discussed, the membership of the CPP is a matter for the Department of Business, Innovation and Skills and is not under the control of the CMA.

2.12 The CCG, which will be chaired by CMA, is open to partners who share enforcement powers under either:

- The Enterprise Act 2002
- The Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs), and/or
- Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (The Consumer Protection Cooperation Regulation).

3 USE OF CONSUMER ENFORCEMENT POWERS

Question 2: Are there other factors which you feel should be taken into account when considering the CMA's approach to the use of its consumer enforcement powers?

Summary of responses

- 3.1 Overall respondents welcomed the approach to the use of its consumer powers. However, most respondents stated that further information on the CMA's prioritisation principles would provide clarification on how and when the CMA will use its consumer powers.
- 3.2 One respondent commented that where possible the CMA should seek to enforce existing rules to ensure consistency of principles and enforcement, rather than seeking to supplement them by specific additions to meet particular abuses.
- 3.3 Another respondent advocated the use of behavioural economics specifically as a useful tool in enabling enforcement strategies that provide more choice, confidence and better value for money for consumers.
- 3.4 One respondent sought confirmation that the CMA's approach will not be unfairly weighted towards business need rather than consumer need.
- 3.5 One respondent sought greater clarification on the role of Primary Authorities when the CMA considers enforcement action and on prosecutions under the CPRs.

CMA's Response

- 3.6 The CMA consulted on its *Prioritisation Principles*,⁴ setting out the proposed approach to how the CMA will generally target resources according to the impact of work on consumers and the strategic significance of the work. This will be balanced against the risks and resources involved.

⁴ The CMA is analysing responses to the consultation before it publishes its response. www.gov.uk/government/uploads/system/uploads/attachment_data/file/274462/CMA16con_Prioritisation_Principles_consultation_document.pdf.

- 3.7 The CMA notes the response advocating the use of behavioural economics in developing enforcement strategies to provide better outcomes for consumers.
- 3.8 The Guidance has been amended at paragraph 3.10 and Chapter 7 to clarify the role of Primary Authorities and prosecutions respectively.

4 APPROACH TO THE LEAD AUTHORITY FOR UTCCRS

Question 3: Are there other activities which you feel should be included when considering the CMA's approach to the lead authority for UTCCRs?

Summary of responses

4.1 One respondent sought greater clarification on the CMA's strategic objective in relation to unfair contract terms.

CMA's response

4.2 The recently published *Vision, Values and Strategy for the CMA*⁵ sets out the CMA's high level strategy including the goal of refocusing consumer protection by:

- working with partners across the UK to coordinate activity and share intelligence and best practice
- pursuing cases where the CMA is best placed to do so and where it can be confident of high impact or precedent value, allocating other cases to the most appropriate enforcer
- acting where consumer enforcement supports competition, as where consumer choice is inhibited by poor, misleading or unbalanced information or bias
- integrating the use of competition and consumer tools so that whichever best serves the interest of the consumer can be used in each case
- embedding the new regime – telling a compelling story about the importance of consumer protection and its interaction with competition, and building strong relationships and working with consumer protection partners, such as local authority Trading Standards Services and the Citizens Advice Service, to ensure that the roles of the different organisations regarding enforcement and education are understood, that the consumer protection regime remains robust and highly effective and the CMA's contribution to it is maximised.

⁵ See

www.gov.uk/government/uploads/system/uploads/attachment_data/file/274059/CMA13_Vision_and_Values_Strategy_document.pdf.

5 APPROACH TO INTERNATIONAL FUNCTIONS

Question 4: Are there other activities which you feel should be included when considering the CMA's approach to carrying out its international functions?

Summary of responses

5.1 None of the respondents answered this question.

6 MAIN CHANGES INTRODUCED BY THE ERRA13

Question 5: Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's consumer powers? If not, what aspects do you think are missing?

Summary of responses

6.1 None of the respondents answered this question.

7 CONSUMER PROTECTION REGIME

Question 6: Do you consider that the Draft Guidance will facilitate your understanding of the consumer protection regime when read in conjunction with the existing guidance documents?

Summary of responses

7.1 None of the respondents answered this question.

8 ADOPTION OF EXISTING OFT AND CC GUIDANCE DOCUMENTS

Question 7: Do you agree with the list in Annexe B of the Draft Guidance of existing consumer-related OFT guidance documents proposed to be put to the CMA Board for adoption by the CMA?

Summary of responses

8.1 Those who answered this question agreed with the list of guidance.

9 USER FRIENDLINESS OF THE GUIDANCE

Question 8: Do you consider that the Draft Guidance is user friendly in terms of its content and language?

Summary of responses

9.1 One respondent felt the guidance was very dense and could be layered to provide greater clarity and support to the user.

The CMA's response

9.2 The CMA welcomes the suggestion and will review the effectiveness of published guidance periodically.

10 OTHER ISSUES

Question 9: Do you have any other comments on the Draft Guidance?

Summary of responses

10.1 No further comments were received.

ANNEXE(S)

A. List of respondents

- Bar Council
- Civil Aviation Authority
- Economic and Social Research Council
- Ofgem
- Ofwat
- The Consumer Council for Northern Ireland