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From: Roland Green,
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Dear Craig

**TERMS AND CONDITIONS AND CONSUMER PROTECTION FINING
POWERS: BIS CALL FOR EVIDENCE**

1. I am writing on behalf of the Competition and Markets Authority (CMA) in response to the above consultation. We note that the consultation is primarily aimed at businesses and consumers, and therefore confine our comments to your proposals on civil fining powers, based on our experience of enforcing consumer protection law.

Introduction

2. The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy. The CMA's consumer powers form part of a wider range of powers which may be used to address problems in markets. We take a holistic, integrated approach to deciding which powers to exercise, having regard to what will achieve maximum positive impact for consumers and the UK economy.
3. Experience strongly suggests 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 based on informed choice. Thus, for example, consumer protection laws against unfair practices such as the making of misleading statements protect informed choice and hence promote the process of competition. All such outcomes depend not only on law being in place, but on business understanding and complying with the law and the effective enforcement of it by the authorities. We use a wide range of tools to secure compliance with consumer law, including information and guidance to businesses, working with compliance partners, through to enforcement.

4. Combating unfair practices matters for businesses as well as consumers. The effective enforcement of consumer law helps to protect fair dealing businesses (and ensure a level playing field) by stopping competitors who do not play by the rules from gaining an unfair advantage. This encourages good business practice and business efficiency that, in turn, enables markets to work better to the overall benefit of our economy and our society.
5. We believe that the introduction of civil fining powers for breaches of consumer protection law would improve compliance and our ability to take effective enforcement action where businesses breach the law. At present the UK's consumer protection regime does not provide enforcers with powers which sufficiently deter breaches of consumer law; enforcers only have powers (i) to restrain future breaches by seeking a court order, (ii) to secure redress for consumer victims who have suffered direct loss and (iii) to take criminal enforcement action in certain cases of serious wrongdoing. However, for the kind of cross-market cases taken by the CMA prosecution is not always a sufficiently flexible and proportionate tool and therefore not an effective deterrent for tackling emerging market problems. It is anomalous that, for our other enforcement function - enforcing competition law - we have civil fining powers but we have none for consumer law enforcement – particularly since other comparable sectoral enforcers (as well as a number of leading overseas counterparts) do so.

Response to the consultation

Enforcement and fines

Giving enforcers more effective tools to enforce consumer protection law

[Questions A16/B18]

Benefits of civil monetary penalties in tackling non-compliance by business

[Question A17]

6. We consider that the deterrent effect of civil fining powers would encourage businesses to comply with consumer law as well as giving enforcers more effective and proportionate enforcement tools. The lack of such powers at present reduces our ability to incentivise swift compliance across markets, dissuade businesses in breach from continuing or repeating unlawful practices and deterring similar non-compliance by other businesses in that market.

Limitations of injunctive relief

7. A central weakness of the existing civil enforcement powers relating to breaches of consumer law under Part 8 of the Enterprise Act 2002 (Part 8 EA) is that they are only designed to restrain future misconduct. As a result despite the welcome introduction of redress powers (see below), overall the regime creates little incentive for a business to change its practices in advance of a court ordering it to do so, and strong incentives for it to draw out the enforcement process by waiting until the CMA has collected evidence and initiated civil proceedings before changing its behaviour, to the detriment of the market, consumers and competitors.

8. This is especially the case in circumstances where the trader is able to continue to profit from their non-compliance and regards this as an acceptable risk, which is likely in cases where consumer redress measures may not be appropriate or possible.

Limitations of criminal prosecution powers

9. The CMA does have the power to prosecute for breach of some consumer law; the potential penalties arising from prosecution include imprisonment and/or an unlimited fine. We consider these powers are necessary and appropriate for cases of particularly serious misconduct. However, there are significant drawbacks to use of these powers in the general run of CMA cases, which overall limit their practical deterrent effect.

Scope to prosecute

10. Firstly, the CMA can only prosecute the main breaches of the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs')¹. Criminal enforcement is not available to the CMA for breaches of other consumer legislation, including the unfair terms provisions of the Consumer Rights Act 2015 (CRA) and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ('CCRs').
11. The resulting difference of the enforcement mechanisms available for different kinds of breach can make it difficult to take 'holistic' enforcement action that addresses the full picture of non-compliance in a consistent way: cases of unfair trading contrary to the CPRs often involve breaches of other legislation, limiting the value of an enforcement power that can be exercised in relation to the CPRs alone.

Lack of flexibility and proportionality

12. Secondly, a criminal prosecution is often not the most practical or proportionate way of securing wide-ranging changes to markets or for tackling emerging market problems, and is therefore not best suited to the kinds of consumer enforcement cases typically taken by the CMA, particularly where multiple parties are involved.
13. We are not suggesting that prosecution for breaches of the CPRs has no value. We believe that in the case of certain unconscionable behaviour, like the pyramid selling case in Bristol that concluded in 2014², and in many cases of the kind brought by Trading Standards Services (TSS), a prosecution is wholly appropriate. However, in practice, while it is necessary and appropriate to prosecute in some cases of serious misconduct, the severity of the outcome, including potentially imprisonment, and the time and resource costs associated with necessary procedural safeguards for defendants, including a high burden of proof, make it difficult for the CMA to justify taking criminal enforcement action in

¹ The CMA also has power to prosecute under the Business Protection from Misleading Marketing Regulations 2008 but these Regulations only regulate business to business activity.

² See <https://www.gov.uk/government/news/nine-convicted-of-multi-million-pound-pyramid-promotional-scheme>

many cross-market cases. We believe this leaves a gap that could be filled if civil sanctions were available.

14. We also note that there can be difficult procedural issues with bringing civil proceedings to restrain future misconduct alongside criminal enforcement action. As a result, a decision to prosecute can make it hard to put in place forward looking injunctive remedies or obtain prompt redress.
15. In summary, we think civil fines would have the advantages of criminal fines (in terms of punishment and deterrence) but without the drawbacks in terms of a lack of flexibility and scope for forward looking remedial action.

Limitations of redress measures

16. Since October 2015 the CMA has had the ability to use its civil enforcement powers to apply to the courts for consumer redress via 'enhanced consumer measures' (ECMs) alongside an injunction. We regard this as a valuable new power which we expect to exercise in appropriate cases.
17. However, the purpose of a redress measure is to compensate consumers affected by a breach of the law rather than to sanction traders for their non-compliance or ensure that they do not profit from it. As a result, the range of cases that are suitable for an ECM is significantly narrower than those which might warrant a financial sanction.
18. An order for consumer compensation is only likely to be practical and justifiable in cases where there is a clear and quantifiable loss for individual affected consumers and the likely costs of a compensation scheme are proportionate compared to the likely benefit to consumers. It is possible to anticipate cases of a serious breach of consumer law where that test would not easily be met, including where the consumer losses are not purely economic in nature (such as where the consumers' economic behaviour was distorted but they may have purchased other goods or services, on different terms) or are difficult to quantify.

Ability of civil penalties to fill the gap

19. The CMA believes there is a strong case for the introduction of a power to impose civil penalties, to address the limitations of the existing enforcement regime. We recognise that seeking penalties would not be appropriate to every enforcement case: in our view they are likely to be mainly relevant to cases involving clear breaches of the law. Their value will also depend on their being capable of being set at a level that is effective, dissuasive and proportionate to the case, taking account of both the nature of the breach, and the size and resources of the relevant business. But, subject to these points, if they were available, we believe it would be possible for more effective and swift enforcement action to be taken to address market problems caused by breaches of consumer law.
20. We note that introducing civil penalties for breach of consumer protection law would be consistent with the position under UK competition law, the other area of law which the CMA has responsibility for enforcing, as well as under various

other economic regulatory statutes, for example the Communications Act 2003 and Financial Services and Markets Act 2000; and with the enforcement arrangements in a number of other states (for example, Canada, Australia, the Netherlands and Italy).

Potential design of civil monetary penalty powers [Questions A18/B19]

21. There are a number of potential ways in which civil fining powers could be provided for. We would be open to an approach that is based either on the current approach for enforcement of consumer law - taking cases directly to the civil courts - or one involving administrative decisions made by enforcers subject to an appropriate appeal mechanism.
22. However, on balance, we see greater advantages to a court-based approach where the civil courts had the power to impose fines alongside other potential remedies (for example, an order and ECMs) where an enforcer such as the CMA brought proceedings and sought a fine³. This would 'fit' with the existing court-based decision making regime for consumer law enforcement in respect of injunctive relief (enforcement orders) and ECMs, and ensure that a judicial body had effective oversight of the outcome of a contested case.
23. If the Government were to favour building on the existing regime in this way we can see the benefits of also creating an express power for an enforcer such as the CMA to seek the agreement of the trader to a monetary penalty, to sit alongside and complement the existing power under the Enhanced Consumer Measures provisions to seek to agree measures in lieu of court action. If the trader did not agree to a voluntary settlement, the CMA could issue court proceedings and the court would then have the power to impose a monetary penalty alongside or instead of ECMs. A broadly similar approach already exists, for example, in Canada.
24. We note that an alternative approach suggested in the consultation would be allowing an enforcer such as the CMA to make a finding that there has been an infringement of consumer law and a decision to impose a fine without direct recourse to the courts, but with appropriate guidance, procedural checks and balances and appeal mechanisms in place.
25. We can see that such an approach could be made to work. The CMA has considerable experience of imposing administrative fines when enforcing competition law, and making and operating rules and fair procedures before doing so⁴. Such powers for enforcing consumer law breaches would therefore be consistent with those under the Competition Act 1998. They would also be consistent with the arrangements under the regulatory statutes, where Ofgem, Ofcom and the FCA all have administrative fining powers available in relation to

³ There is a precedent for this under the Financial Services and Markets Act 2000, which allows the FCA to seek a monetary penalty (alongside an injunction or restitution order) before the High Court in cases of market abuse.

⁴ In addition, the CMA is required to carry out its investigations and make decisions in a procedurally fair manner according to the standards of administrative law. In exercising its functions, as a public body, the CMA must also ensure that it acts in a manner that is compatible with the European Convention on Human Rights as required by the Human Rights Act 1998.

breaches of regulatory/licensing provisions that are often designed to protect consumers. However, we note that such an approach would require a significant overhaul of the current consumer protection enforcement regime; would not remove the need for an effective mechanism for appeal to the courts; and would need to be integrated with the current regime for enforcement orders and ECMs.

26. One issue that would arise with either option is deciding to what standard of proof the enforcer would be required to establish the consumer law breach, the civil standard (balance of probabilities) or criminal standard (beyond reasonable doubt), before a fine could be imposed. In our view, the appropriate standard of proof would be the civil standard of the balance of probabilities, to ensure consistency with the standard of proof in civil Part 8 EA enforcement cases. We think that requiring a higher standard of proof would negate many of the benefits of a civil fining regime in addressing market issues.
27. Another key issue would be deciding upon the potential level of civil fines. It would clearly be key to the success of any new scheme that any fines were capable of being set at a level that was sufficient to be dissuasive while also proportionate to the circumstances of a particular case.
28. We note that the Call for Evidence also refers to the option of enhancing existing powers through the Regulatory Enforcement and Sanctions Act 2008 (RESA). The rationale for the RESA powers was to provide a more proportionate alternative to prosecution in cases where there was a potential criminal breach, rather than to seek to address deficiencies in consumer enforcers' civil enforcement powers. As a result we do not think that RESA is the most appropriate way of meeting the Government's objectives. In particular, we note that the RESA administrative fining powers would be limited in scope to cases involving criminal breaches of the CPRs (so would not apply, for example, to unfair terms or breaches of the CCRs, or certain breaches of the CPRs). They would also require the CMA to be satisfied beyond reasonable doubt (to the criminal standard of proof) that a relevant offence had been committed before being empowered to impose a penalty. As we have highlighted above, we do not think this would be appropriate given the CMA does not generally deal with instances of criminal behaviour but rather systemic issues in markets.

Potential legislative scope of civil fining powers [Question A20]

Consumer protection legislation that could be subject to civil fining powers

29. We agree with the government that there is a strong argument for having a consistent approach and extending civil fining powers to breaches of all consumer protection law, rather than limiting their scope to specific legislation. We suggest they could be made available for breach of all the legislation covered under the umbrella of Part 8 EA⁵ (through which the CMA typically takes civil enforcement cases). This would enable consumer enforcers to adopt a consistent approach to consumer enforcement that is focused on the merits and circumstances of each case and the particular harm to consumers resulting from

⁵ Part 8 applies to an infringement of consumer protection law which harms the 'collective interests' of consumers.

particular misconduct, without distortion caused by the different potential sanctions applying to different elements of the misconduct.

30. In practice, it is the particular factual circumstances of breaches, rather than the particular legal instrument involved, which should determine what sanctions are appropriate. Limiting civil fining powers, for example, solely to the enforcement of unfair terms law would risk complicating and distorting enforcement action, given the overlap between the use of unfair terms and breaches of other consumer protection legislation such as the CPRs and the CCRs. As the Call for Evidence recognises, the unfair term provisions of the CRA (which specifically deal with the fairness of the contracts consumers enter) need to be seen alongside the CPRs which cover marketing and other trader activity that has an impact on consumers both before and at the time of their agreement to any contract terms, and with their treatment following any purchases they agree to make. There is also a significant overlap with the CCRs, which require traders to give consumers certain information before they enter into a contract, and which then becomes part of the contract upon acceptance. Depending on the circumstances, the use of particular types of terms could give rise to breaches of one or more pieces of legislation and it would be helpful for the CMA to be able to have the option to pursue action on all relevant bases if appropriate.

Application of civil fines to specific legislative breaches

31. More generally, there is a strong case for having the same civil enforcement scheme available for all breaches of relevant consumer legislation.
32. In our experience, where enforcement action is needed, it is likely to concern a number of different types of practices and breaches of contract terms. If only a narrow subset of practices and terms were singled out as capable of warranting a fine (for example, only the list of banned practices in Schedule 1 to the CPRs, and the 'black list' terms under the CRA), as mentioned above, there would inevitably be a risk of distortion to the overall enforcement of the unfair terms regime.
33. We note that there is another state where a single "holistic" approach has been adopted; in the Netherlands, the Authority for Consumers & Markets can impose administrative fines for breach of general consumer protection laws including the Unfair Commercial Practices Directive (from which the CPRs are derived), the Unfair Terms Directive (implemented in the UK by the CRA), and the Consumer Rights Directive. These powers are not limited to specific provisions within each piece of legislation.

Enforcement bodies to be included if civil fining powers were granted

[Questions A19)/B20]

34. We welcome the recognition in the Call for Evidence of the importance of ensuring that the CMA has effective consumer law enforcement tools to support its role in effecting market change (in particular by taking cases where there are systemic market-wide issues where consumer choice or competition may be undermined).

35. In considering which other enforcement bodies it might be appropriate to include within the scope of any new civil fining powers, the government should have regard to the need to avoid distorting the overall consumer law enforcement landscape. Most of the CMA's current consumer enforcement powers are shared with other authorities. For example, we currently share our civil and criminal enforcement powers with local authority TSS and the Department of Enterprise, Trade and Investment in Northern Ireland. These bodies currently take the lead in national, regional and local enforcement of much consumer law. We coordinate with these bodies to ensure enforcement action is taken by the most appropriate body. If civil fining powers were not given to them, we would want to avoid a potential situation where the difference in enforcement powers drove or distorted their and our prioritisation decisions and so undermined our respective roles in the enforcement landscape.

Yours sincerely

Roland Green