

Transparency in Consumer Enforcement Cases - Draft Supplementary Note

1. This note provides information about the CMA's approach to transparency in consumer enforcement cases, in particular the circumstances in which it may publicly name parties under investigation. It is based on the CMA's experience in conducting consumer enforcement work to date, and supplements the guidance on the CMA's broader approach to transparency in CMA6 *Transparency and Disclosure: the CMA's Policy and Approach* and CMA58 *Consumer Protection: Enforcement Guidance*.

The CMA's general approach to transparency

2. The CMA is committed to the principle of transparency in its consumer protection work and in general aims to be as transparent as it can about its enforcement activities, for example, to aid consumer and business understanding of how it seeks to ensure that markets work well.¹
3. The CMA's experience of consumer enforcement cases is that there is a clear public interest in the transparency of such work. Sharing information about its consumer cases – including, where appropriate, the names of parties – can facilitate the performance of the CMA's functions² by, among other things:
 - encouraging business and consumers to come forward with information that can assist the CMA's investigation and protection of the public in appropriate cases
 - enhancing consumer and business understanding of when the CMA does, and does not, consider it necessary to take enforcement action in relation to consumer law infringements
 - keeping the public informed of the progress of a case, including to make clear when businesses in a sector are not under investigation, and
 - developing public confidence in consumer markets and the consumer protection regime as a whole, by demonstrating how the CMA is acting to ensure that consumer law is complied with.
4. The CMA publishes information about its enforcement activities that it considers lawful and in the public interest to disclose, in particular on www.gov.uk/cma and through issuing press notices where appropriate.³

¹ See para. 3.21 and 3.22 of CMA58.

² Such as under Part 8 of the Enterprise Act 2002 (EA02) and the Consumer Rights Act 2015.

³ See para. 3.22 of CMA58.

5. In doing so it will take into account the importance of respecting confidentiality and the need to comply with any relevant statutory constraints in this regard, for example under data protection law or Part 9 of the EA02.⁴

The CMA's existing guidance on transparency in consumer enforcement cases

6. The importance of transparency in consumer enforcement cases is recognised in the CMA's existing guidance which, for example, makes clear that:
 - the CMA will place a case opening announcement on www.gov.uk/cma announcing its decision formally to begin a consumer enforcement case, except if doing so would prejudice the case or otherwise be inappropriate.⁵
 - at the same time or as soon as reasonably practicable thereafter, the CMA will also publish a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for starting a formal case.⁶
7. The level of information about a case provided in a case opening announcement may vary according to the circumstances of the case. For example, it may not be appropriate to name the parties directly involved at this early stage of the case.⁷
8. However, it is often important for the CMA to share its developing thinking through publishing information from an early stage, for example, to gain relevant information related to the conduct of potential concern from the public or third parties. Moreover, it will generally expect to make an announcement on making an application for an enforcement order or a related remedy in civil consumer enforcement actions.⁸
9. On completing a case in relation to which a formal case opening announcement has been made, the CMA will publish the outcome on www.gov.uk/cma and usually issue a press notice⁹ with a link to the relevant pages on www.gov.uk/cma.¹⁰ In a consumer enforcement case, the potential outcomes that will be announced include:
 - the outcome of a court action (with a link to the decision where possible)

⁴ See para. 3.23 of CMA58.

⁵ See para. 3.9 of CMA6.

⁶ See para. 3.7 and 3.9 of CMA6.

⁷ See para. 3.7 and 3.9 of CMA6.

⁸ See para. 3.13 of CMA6. In a consumer enforcement case, the CMA may apply to the court under Part 8 of EA02 for an enforcement order where resolution is not possible through undertakings, or it is a matter of urgency: see, for example, para. 4.13 of CMA58.

⁹ Or make another public announcement.

¹⁰ See para. 3.16 of CMA6.

- the successful negotiation of undertakings
- a conclusion that there is insufficient evidence to continue an investigation, or
- a case closure decision on prioritisation grounds.¹¹

10. The level of detail published will reflect the CMA's statutory requirements and depend upon the nature of the outcome, while also having regard to the CMA's transparency aims and the need to protect confidential information.¹²

11. Thus, where it closes or refrains from opening a case in consequence of having accepted undertakings or other commitments 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).¹³

Transparency as to the identity of parties under investigation

12. The information that may be published under the transparency policy of the CMA mentioned above may include naming the trader whose conduct is subject to investigation. CMA6 and CMA58 are clear that parties in a consumer enforcement case may, in particular, be named in announcements made at the following points in such a case:

- when the CMA makes an application for an enforcement order in civil consumer enforcement actions,¹⁴ and
- case outcome.¹⁵

13. However, as stated above, these are not the only circumstances in which it might name parties in a consumer enforcement case (and see, for example, para. 3.7 to 3.9 of CMA6).

14. In particular, the CMA notes that:

- it would generally expect to publicly identify a party subject to consumer enforcement action **where the CMA informs that party that it proposes to seek a court order to address identified consumer law infringements.** The CMA would normally expect this to happen where that party has failed to provide suitable undertakings (under section 219 of the EA02) to address those identified infringements by a reasonable deadline notified to the party.

¹¹ See para. 3.16 of CMA6.

¹² See para. 3.17 of CMA6.

¹³ See para. 4.20 of CMA58.

¹⁴ See para. 3.13 of CMA6.

¹⁵ See para. 3.16-3.17 of CMA6 and para. 4.20-4.21 of CMA58.

- it may also name parties subject to consumer enforcement action at an earlier stage in the enforcement process, where the CMA considers it is appropriate to do so, including where:
 - leaving such parties unidentified could be expected to result in significant consumer detriment and/or significant harm to other businesses (including those in the same sector)
 - the party's involvement in a CMA investigation is already in the public domain or is the subject of significant public speculation
 - the subject matter of the investigation is of widespread public concern
 - a party has requested that it be named by the CMA
 - doing so is necessary to ensure that the case is progressed effectively, or
 - such enforcement action is associated with similar action being undertaken by one or more other regulators and/or consumer enforcement agencies, whether in the United Kingdom or elsewhere.

15. Any public announcements it makes, including in a consumer case where a party is named, will be made in compliance with the CMA's relevant legal constraints in this regard, for example under data protection law and Part 9 of the EA02.

Invitation to Comment

16. The CMA welcomes your comments on this proposed Supplementary Note. In particular, the CMA welcomes your responses to the following questions:

- 1. Is this draft Supplementary Note clear as to the circumstances in which the CMA will name parties in consumer enforcement cases, or is there further information that you consider should be provided?**
- 2. Do you have any other comments on the information provided in this draft Supplementary Note?**

17. Comments should be sent by 6 June 2018 to steven.preece@cma.gsi.gov.uk or to

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18. The CMA expects to publish any comments received on www.gov.uk/cma.
19. If you consider that your comments contain confidential information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.
20. Any personal data you provide to us will be handled in accordance with our obligations under the Data Protection Act 1998 and with other legislation designed to protect individual privacy. Further details of the CMA's approach can be found in *Transparency and Disclosure: Statement of the CMA's Policy and Approach* (CMA6) and the CMA's personal information charter.
21. Please note that information provided in response to this invitation to comment, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the EA02.

Next Steps

22. The CMA will publish a final version of the Supplementary Note taking into account comments received alongside its existing consumer enforcement guidance, [CMA58](#).