

Transparency in Consumer Enforcement Cases – Draft Updated Supplementary Note – Consultation

Background to Consultation and Rationale for Change

1. This is a consultation on *Transparency in Consumer Enforcement Cases – Draft Updated Supplementary Note* (the Draft Updated Supplementary Note). The text of the Draft Updated Supplementary Note is found in the Annex to this consultation. The Draft Updated Supplementary Note will replace [Transparency in Consumer Enforcement Cases – Supplementary Note](#) published on 18 June 2018 (the Existing Note).
2. The Existing 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, 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*.
3. The CMA has now prepared a Draft Updated Supplementary Note which retains most of the text of the Existing Note, but which provides that the CMA will normally expect to identify publicly all parties which are the subject of CMA consumer enforcement action in a case:
 - other than in exceptional circumstances, when making any relevant case-opening and/or case update announcements
 - when the CMA issues a consultation letter in the case
 - when 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 Enterprise Act 2002 (EA02) to address those identified infringements by a reasonable deadline notified to the party
 - when the CMA makes an application for an enforcement order in civil consumer enforcement actions, and
 - when the outcome of a case is announced.¹
4. The Draft Updated Supplementary Note also provides that where the CMA has exceptionally not named one or more of the parties in the circumstances set out in paragraph 3 above, the CMA may subsequently do so where the CMA considers it is appropriate, including where:

¹ See para. 7 and 9 of the Draft Updated Supplementary Note.

- continuing to leave 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 has subsequently come into the public domain or become the subject of significant public speculation
 - the subject matter of the investigation has become of widespread public concern
 - a party has requested that it be named by the CMA
 - the CMA considers that it would be appropriate to do so to enable the case to be progressed more effectively, or
 - 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.²
5. This represents a change from the Existing Note, which provides that at an early stage of the case (such as before the CMA informs a party that it proposes to seek a court order to address identified consumer law infringements), the CMA **may** name parties subject to consumer enforcement action where the CMA considers it is appropriate to do so, including in the circumstances set out in paragraph 4 above.³
6. In making this update, the CMA notes that its statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers, and its mission is to make markets work well in the interests of consumers, businesses and the economy.⁴ This includes taking action to restore confidence in markets and show consumers that their concerns are being taken seriously by the CMA. Moreover, the CMA is mindful that since publication of the Existing Note, it has named parties at case opening in consumer cases.⁵
7. Moreover, the CMA noted in its most recent Annual Plan that in order to achieve its goals it needs to get closer to consumers, so that it can better understand their concerns and how they are being affected by the ways in which the economy and markets are changing.⁶ The Annual Plan states that the CMA proposes to exercise its functions with particular regard to six strategic objectives, which include protecting consumers, including in particular those in vulnerable circumstances, and improving trust in markets.⁷ Safeguarding the interests of consumers and maintaining and improving public confidence in markets are areas of key strategic focus for the CMA. Moreover, as articulated recently by CMA senior leadership, the CMA intends to do more to explain the choices it makes (including making its case selection more transparent) and making the CMA more visible and vocal. It is also apparent that the economic consequences of the current coronavirus (COVID-19) pandemic risk further

² See para. 10 of the Draft Updated Supplementary Note.

³ See for example, the Existing Note at para. 14.

⁴ See, for example the [CMA Annual Plan 2020/21](#)

⁵ See, for example, <https://www.gov.uk/government/news/cma-to-investigate-online-gaming-companies-roll-over-contracts>

⁶ Ibid.

⁷ Ibid.

undermining trust in markets and that in order to maintain such trust, the CMA must be more transparent about the steps it is taking actively to respond to consumer concerns.

8. Furthermore, section 6 of the EA02 envisages the CMA being transparent in the exercise of its functions, by conferring on the CMA a specific function of making the public aware of the ways in which competition may benefit consumers and the economy and for the CMA to give information or advice in respect of matters relating to any of its functions.
9. While there may be reasons in favour of maintaining the position as set out in the Existing Note,⁸ taking the above considerations into account, the CMA considers that the more transparent approach to naming of parties at an early stage of the case set out in the annexed Draft Updated Supplementary Note is now appropriate.⁹

Invitation to Comment

10. The CMA welcomes your comments on the Draft Updated Supplementary Note. In particular, the CMA welcomes your responses to the following questions:

1. Is the Draft Updated 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 the Draft Updated Supplementary Note?

11. Comments should be sent by **10 September 2020** to updated.note@cma.gov.uk
12. The CMA expects to publish on www.gov.uk/cma any comments received. 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.
13. 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.
14. Further details of the CMA's approach can be found in CMA6 and the CMA's personal information charter.

⁸ For example, the current approach means that parties that might eventually be scoped out of an investigation may not have been named at investigation opening.

⁹ The CMA is currently consulting on similar transparency changes to its Competition Act 1998 procedures guidance, [CMA8 Competition Act 1998: Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases](#) It is desirable for the CMA to have a consistent approach to transparency between its competition and consumer tools (unless there are good reasons for a different approach).

15. 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

16. The CMA will publish a final version of the Draft Updated Supplementary Note alongside its existing consumer enforcement guidance, CMA58, taking into account the comments received in response to this consultation.

5 August 2020

ANNEX

Transparency in Consumer Enforcement Cases – Draft Updated 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: Statement of the CMA's Policy and Approach* and CMA58 *Consumer Protection: Enforcement Guidance*. It replaces *Transparency in Consumer Enforcement Cases – Supplementary Note*, which was published on 18 June 2018.

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.¹⁰
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 functions¹¹ 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 appropriate 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.¹² In doing so it will take into account the importance of respecting confidentiality and the need to comply with any relevant statutory provisions in this regard, for example under data protection law or Part 9 of the Enterprise Act 2002 (EA02).¹³

¹⁰ See para. 3.21 and 3.22 of CMA58.

¹¹ Such as under Part 8 of the EA02 and the Consumer Rights Act 2015.

¹² See para. 3.22 of CMA58.

¹³ See para. 3.23 of CMA58.

The CMA's guidance on transparency in consumer enforcement cases

5. The importance of transparency in consumer enforcement cases is recognised in CMA guidance such as CMA6 and CMA58 which, for example, make 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.¹⁴
 - 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.¹⁵
6. The level of information about a case provided in a case-opening announcement may vary according to the circumstances of the case.

Transparency as to the identity of parties under investigation

7. 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 will generally 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,¹⁶ and
 - the outcome of a case is announced.¹⁷
8. However, these are not the only circumstances in which the CMA would expect to name parties in a consumer enforcement case.
9. In particular, the CMA would also normally expect to identify publicly all parties who are the subject of CMA consumer enforcement action:
 - other than in exceptional circumstances, when making any relevant case-opening and/or case update announcements¹⁸
 - when the CMA issues a consultation letter in the case,¹⁹ and
 - when 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

¹⁴ See para. 3.9 of CMA6.

¹⁵ See para. 3.7 and 3.9 of CMA6.

¹⁶ See para. 3.13 of CMA6.

¹⁷ See para. 3.16-3.17 of CMA6 and para. 4.20-4.21 of CMA58.

¹⁸ For example, it would not be appropriate to name parties at this early stage of a case where doing so could prejudice an investigation by the CMA or by one of the CMA's enforcement partners.

¹⁹ See para. 4.4 – 4.7 of CMA58.

those identified infringements by a reasonable deadline notified to the party.

10. Where, exceptionally, the CMA does not name one or more parties in one of the circumstances listed in para. 9 above, it may subsequently decide to do so where it considers it appropriate, such as where:

- continuing to leave 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 has subsequently come into the public domain or become the subject of significant public speculation
- the subject matter of the investigation has become of widespread public concern
- a party has requested that it be named by the CMA
- the CMA considers that it would be appropriate to do so to enable the case to be progressed more effectively, or
- 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.

11. 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 provisions in this regard, for example under data protection law and Part 9 of the EA02.