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Competition and Markets Authority,
The Cabot,
25 Cabot Square,
London
E14 4QZ

updated.note@cma.gov.uk

Dear sirs,

CMA consultation on Transparency in Consumer Enforcement

Thank you for the opportunity to respond to this consultation. The Society of Chief Officers of Trading Standards in Scotland is a Scottish Charitable Incorporated Organisation (SC047951), and is the professional body representing the heads of service for trading standards services in Scottish local authorities. We very much value engagement with CMA on consumer protection issues and would make a limited response on this consultation.

Q1. 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?

Q2. Do you have any other comments on the information provided in the Draft Updated Supplementary Note?

SCOTSS supports the principle of transparency as a key contributor to fair trading and effective markets. For example, the requirement for traders to provide specified information to consumers before they make a buying decision, along with the requirements for that information to be supplied clearly and unambiguously, underpins fair and successful retail buying, especially online.

Transparency is also important in warning consumers about problems they could face from bad practices and from particular traders where they have been proven to treat consumers in a significantly unfair manner.

However, there must be a “trade-off” between transparency and fairness to businesses. Disclosure of information by regulators must weigh up any possible detrimental effect it may have on the businesses with the need for consumer protection and fair competition. Enterprise Act 2002 and data protection laws provide the CMA and other regulators, including Scottish local authority Trading Standards (SLATS) with a legal structure in which to operate. The considerations for SLATS are not the same as for CMA, however, given the different circumstances in which the organisations operate. SLATS each deal with a large number of generally small, local cases where early public disclosure of investigations would often have a disproportionate and unfair negative impact on traders. The CMA, with its whole-market obligations and generally small number of very big cases, must have different considerations and inevitably will have a different approach to SLATS. At the same time, CMA must operate in a manner which considers the fairness “trade-off” in the context of the CMA’s activities. The changing world and economy make it necessary to keep these working practices under review and - as the consultation document states –COVID-19 has dented consumer confidence, making the need for transparency more acute.

We note that the 2020 Draft Supplementary Note retains many of the provisions and much of the text from the 2018 version. We think that these provisions are well-judged and – written as they are in a flexible manner – permit judgements on disclosure to be made on a case-by-case basis, allowing for the “trade-off” to be made fairly in the context e.g. “to leave such parties unidentified could be expected to result in significant consumer detriment and/or significant harm to other businesses”.

The main change appears to be the new intention to “normally... identify publicly all parties” in two situations: when a Consultation Letter is sent, and when CMA informs a trader of an intention to apply for an Order. The Note does not appear to bind the CMA to disclose in such cases but makes disclosure the “default” and expected action. We see no problem with this in relation to intentions to apply for an Order. Such cases will be at a very advanced stage and almost invariably involve a failure to agree Undertakings by the businesses involved. Just short of initiating court action – which would be in the public domain anyway – and where businesses have shown a lack of cooperation, assumed disclosure seems appropriate (in the context and scale in which the CMA is operating).

Disclosure at Consultation Letter stage may not be so clear cut. There is likely to have been an investigation launch announcement and further announcements may lie ahead in terms of significant progress and ultimately conclusion of the investigation. Is it also necessary to publicise at Consultation Letter stage? Again, the fairness “trade-off” must be considered, and CMA officers and management will be best-placed to make that judgement on a case-by-case basis.

It may be appropriate to have a mechanism whereby a trader is given the opportunity to challenge a disclosure at the Consultation stage. The CMA could consider any such challenge before making the decision whether to disclose. We recognise that this is likely to happen in practice anyway, but such an approach may benefit for a more systematic process.

Finally, one small addition from the new Draft Note is very welcome: page 6 makes specific reference to CMA not disclosing trader information, where to do so may "prejudice an investigation... by one of the CMA's enforcement partners". We trust that SLATS would be included under the phrase "enforcement partners" and that the CMA would always liaise with the local service in relation to a trader based in that service's area.

I hope our comments are helpful. If you have any queries in regard to our response, please do not hesitate to contact me.

Yours sincerely

Graeme Paton
Chair SCOTSS

The Society of Chief Officers of Trading Standards in Scotland (SCOTSS), is a Scottish Charitable Incorporated Organisation (SC047951). Our members are professional trading standards managers representing every Scottish local authority trading standards service.