

## Transparency in Consumer Enforcement Cases – Draft Updated Supplementary Note – Consultation – Summary of Responses

### Background to Consultation and Rationale for Change

1. [Transparency in Consumer Enforcement Cases – Supplementary Note](#) published on 18 June 2018 (the Existing Note) provides information about the CMA’s approach to transparency in consumer protection law enforcement cases, in particular, the circumstances in which the CMA 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*.
2. On 5 August 2020, the CMA commenced consultation (the Consultation) on an update to the Existing Note, *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 the Existing Note. The Consultation closed on 10 September 2020.
3. The Draft Updated Supplementary Note retained most of the text of the Existing Note, but provided 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 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 had 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.<sup>1</sup>

**Only the first two bullet points above represent a departure from the current position under the Existing Note.**

---

<sup>1</sup> See para. 7 and 9 of the Draft Updated Supplementary Note.

4. The Draft Updated Supplementary Note also provided 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:
- 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.<sup>2</sup>
5. The changes described above represented 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.<sup>3</sup>
6. In proposing this update, the CMA noted 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.<sup>4</sup> 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 was mindful that since publication of the Existing Note, it has named parties at case opening in a number of consumer protection law enforcement cases.<sup>5</sup>
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.<sup>6</sup> 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.<sup>7</sup>

---

<sup>2</sup> See para. 10 of the Draft Updated Supplementary Note.

<sup>3</sup> See for example, the Existing Note at para. 14.

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

<sup>5</sup> See, for example, <https://www.gov.uk/government/news/cma-to-investigate-online-gaming-companies-roll-over-contracts> and more recently <https://www.gov.uk/government/news/leasehold-homes-cma-launches-enforcement-action>

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

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 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. The Consultation acknowledged that reasons may be advanced for maintaining the position as set out in the Existing Note. For example, the approach in the Existing Note means that parties that might eventually be scoped out of an investigation without further action would not generally have been named at the opening of the investigation. For the reasons set out above, however, the Consultation concluded that it was now appropriate to adopt the more transparent approach to the naming of parties at an early stage of the case set out in the Draft Updated Supplementary Note.<sup>8</sup>

### **Invitation to comment**

10. The CMA in the Consultation welcomed comments on the Draft Updated Supplementary Note.
11. The Consultation closed on **10 September 2020**.

### **Issues raised by the Consultation and Our Response**

12. The CMA received 4 responses to the consultation. The identities of the respondents are set out in Annex 1 and their responses have been published on the consultation webpage.
13. The respondents' views on the questions raised in the Consultation are set out below, along with the CMA's views on them.

**Question 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?**

**Question 2. Do you have any other comments on the information provided in the Draft Updated Supplementary Note?**

### *Summary of responses*

14. All respondents welcomed the CMA's proposed approach in the consultation,

---

<sup>8</sup> The CMA also consulted 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](#) with that consultation also closing on 10 September 2020.

supporting the principle of transparency among other things as a key contributor to fair trading and effective markets. One respondent did caution, however, that the CMA should ensure that it was clear in any announcement naming parties at an early in a case that the CMA investigation was at a preliminary stage and no conclusions should be drawn that the named parties had broken the law.

15. One respondent said that while the CMA's balance of assessment leaned in favour of greater transparency (given its market-wide consumer enforcement remit and tendency to take a comparatively smaller number of very large cases), the assessment in this regard of smaller consumer enforcement regulators, who may often deal with large number of generally small, local cases, may well be different. That said, another respondent encouraged other consumer enforcement regulators in the UK to adopt the approach to early case transparency proposed by the CMA in the consultation.
16. One respondent asked whether the CMA should give parties an opportunity to challenge naming at the consultation letter stage and for that matter, whether it was necessary to name parties at that stage of a case. The respondent said that the CMA could consider such a challenge before making a decision as to whether to disclose the identities of parties to whom a consultation letter had been sent.

#### *The CMA's views*

17. Having considered the various responses, the CMA has not made any changes to the Draft Updated Supplementary Note. While the CMA acknowledges that unlike under the Competition Act 1998,<sup>9</sup> there often is no specific legislative 'starting point' for an investigation on the face of the consumer protection legislation it enforces, the Draft Updated Supplementary Note's proposed approach of normally identifying the parties in a case-opening announcement for a CMA consumer enforcement case remains appropriate.
18. As a matter of practice, in any announcements naming parties at an early stage of a consumer enforcement case, the CMA is and will be very clear that its case is ongoing and that there should be no assumption that consumer law has been broken by the named parties. Moreover, where the CMA decides to take no further action under consumer enforcement law against a trader, having previously publicly identified that trader as a party to a CMA consumer-enforcement case, it will make a public announcement to this effect.
19. With respect to other consumer law enforcers in the UK, the CMA considers that it is for them to make their own decisions about case transparency. Having regard to their own enforcement environments, the CMA fully understands and accepts that they may well reach a different view from the CMA as to where the transparency balance may lie in their own casework.
20. With respect to making an announcement identifying parties to whom a consultation letter has been sent, the CMA considers that doing so is in keeping with its commitment to greater transparency during the various stages of the case. However, as is the case with the overall transparency approach articulated in the consultation, the CMA will make a case by case assessment when deciding whether to make an announcement naming parties to whom it has sent a consultation letter. In the event, if the CMA has not already

---

<sup>9</sup> See, for example, section 25 of the Competition Act 1998. And see footnote 8 above.

identified parties in the relevant case-opening announcement, the public interest might well lean more in favour of identifying the parties at the consultation letter stage of the case in question. But again, this will be subject to a case by case assessment.

### **Next Steps**

21. The CMA therefore on 4 November 2020 published a final version of the Updated Supplementary Note alongside its existing consumer enforcement guidance.

**4 November 2020**

## **Annex 1 – Respondents to Consultation**

- British Retail Consortium
- Chartered Trading Standards Institute
- The Society of Chief Officers of Trading Standards in Scotland
- Which?