

## **Which? response to the Competition and Markets Authority (CMA) consultation on proposed updates to its Prioritisation Principles**

### **Introduction**

Which? welcomes this opportunity to provide views on the CMA's proposed updates to its prioritisation principles to reflect changes to the context in which it operates since the principles were published in 2014.

We agree that the CMA needs to ensure that it takes appropriate decisions about which projects and programmes of work it undertakes across all of its areas of responsibility. It must also continue to be able to be agile and reprioritise as needed when new issues emerge.

The principles consist of five key considerations which we comment on in more detail below: strategic significance, impact, is the CMA best placed to act, resources and risk.

### **Consultation questions**

- a) Do you agree that the proposed updates to the Prioritisation Principles achieve the aims set out in this consultation document? If not, please give details of what other adaptations may be necessary.**

We agree with the proposed updates, but have the following comments on the principles:

***Strategic significance*** - does the CMA's action in this area fit with the CMA's objectives and strategy?

Alignment with the CMA's strategy and priorities as set out in its action plan is a crucial basis for prioritisation, as well as having regard to the government's strategic steer.

We look forward to seeing the CMA use its new powers as and when the Digital Markets, Competition and Consumer Bill becomes law. For too long, the CMA has been unable to enforce against consumer law as effectively as it might and this has led to an enforcement gap. It will be important that the CMA prioritises the use of the powers it will have under the administrative model to address this gap and to swiftly establish the deterrent effect of these powers.

We also support the CMA taking forward work that continues to improve the skills and experience of its staff as we recognise that this is important for the long-term success of the CMA. We feel this is especially likely in cases in digital markets where the consumer harms relating to dynamic competition, artificial intelligence and online choice architecture are not yet fully understood.

**Impact** - how substantial is the likely positive impact of CMA action?

We support the CMA in prioritising work which achieves a real-world impact for the people it serves - including consumers. We agree that this should take account of both direct effects (e.g. preventing or terminating harmful business practices) and indirect effects and consider the people who need help most. This is also important to instil widespread confidence in the regulatory regime.

We agree with the CMA that vulnerability should be context specific and that it can take a range of forms. We therefore support the CMA taking this into account when targeting interventions to people who may need particular help to protect them from harm and to get a fair deal.

We also welcome the recognition that sometimes the CMA may achieve impact by prompting another body to act - and therefore that its ability to intervene directly should not be the only consideration when prioritising work. Its recent review of unit pricing is a good example of this.

As the CMA acknowledges, indirect effects of CMA action are very hard to gauge. We agree that these should be considered, but the CMA should be mindful that an imperfect understanding of these indirect effects should not bias it towards certain actions. We can envisage the potential for this with regard to both the deterrent effect or the potential for redress. While estimates exist of the potential deterrent effect of competition cases, there is much about this that remains unknown, and crucially we are not aware of any estimate of the deterrent effect of consumer enforcement cases. It is therefore important the CMA does not use what is measured, but ignore what is not when making prioritisation decisions, as this could tip resources away from consumer enforcement cases. Consumers are less likely than businesses to seek redress from follow-on actions, being much more dependent on the collective action regime, and which does not apply for breaches of consumer law.

**Is the CMA best placed to act?** - is there an appropriate alternative to CMA action?

While we are comfortable with the CMA identifying this as an explicit principle, we urge some caution in the application of it. There may be many circumstances in which the CMA shares responsibilities with other bodies, but these do not act because of, for example, resource constraints or competing priorities. In particular, in regulated sectors in which a regulator has failed to address harmful behaviour or where another regulator may not have the same powers as the CMA to quickly enforce consumer and competition law, then the presence of this regulator should not cause the CMA to stay its hand. Markets with sectoral regulators often play an outsized role in the lives of consumers, representing a substantial proportion of expenditure. As such, a failure to address consumer harm in these sectors has a comparably outsized impact on confidence in our regulatory regime.

**Risk** - does the CMA have the right capacity in place to act effectively?

We support the CMA including a wider consideration of risks in these updated prioritisation principles, going beyond simply the likelihood of success that was previously identified. It is important that the CMA has regard for other risks relating to considerations such as value for money and reputation.

- b) More specifically, do you think the proposed updated Prioritisation Principles provide greater clarity about the relationship between the CMA's prioritisation decisions and its strategic aims, when read alongside the CMA's Annual Plan?**

This relationship is now much more explicit and we agree that this is a better approach.

- c) Do you have any other suggested updates that you would like the CMA to consider? Please give a clear justification for any further updates.**

We would like to draw attention to the extent to which the CMA is able to intervene where Trading Standards are unable to step in, for example because of lack of resources, capability or expertise, but where there is clear evidence of consumer harm. While respecting regulatory boundaries, the CMA should make maximum use of its ability to intervene in order to establish precedent - and make use of both its regulatory and softer powers to achieve impact.

**Which?**

**August 2023**