Ashurst

Consultation: Direct Consumer Enforcement Guidance (CMA200con) – Response of Ashurst LLP

18 September 2024

1. Introduction

1.1 Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority (**CMA**) on the draft version of the direct consumer enforcement guidance (31 July 2024) (**Draft CMA200**). This response contains our own views, based on our experience of advising and representing clients on the application of consumer law and competition law investigations, and is not made on behalf of any of our clients.

1.2 We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our responses.

1.3 As set out in more detail below, our main suggestions are that the following changes be introduced to:

(a) provide greater detail on how the CMA's duty of expedition will be applied and enforced. In particular, we would welcome further guidance on how this duty will be balanced with the parties' rights of defence in relation to the proposed timeframe for submitting written representations to a Provisional Infringement Notice (**PIN**), extension requests and access to the CMA's file.

(b) clarify that there is no restriction on external consultants engaged by the parties attending oral hearings and that parties will be entitled to a further oral hearing if the CMA issues a Supplementary PIN.

(c) ensure that parties are entitled to make reasonable requests for documents which may be relevant to their decision on whether to engage with the settlement process.

(d) remove two of the examples which the CMA indicates would not constitute a reasonable excuse for a breach: specifically, the unplanned absence of key individuals and compliance with other legal obligations, such as the Data Protection Act 2018.

(e) provide clarification on how fines will be calculated: in particular, that the appropriate starting point is the party's turnover related to the products and services affected by the infringement and ensuring certain factors (such as the level of culpability) are not double counted in the stepped approach.

(f) provide further guidance on how the CMA will decide whether to impose a fixed or daily penalty for administrative breaches and apply the starting codes when calculating administrative penalties. We also suggest reconsidering several of the proposed aggravating factors, including previous infringements of regulatory codes such as the Advertising Codes.

(g) provide further details on when the CMA may consider it appropriate to include the Senior Responsible Officer (**SRO**) in the Final Decision Group (**FDG**).

(h) introduce a single Procedural Officer across direct consumer law enforcement investigations.

(i) reconsider the position on the relevance of pre-commencement conduct.

(j) clarify the methods of communicating with interconnected bodies corporate (**IBCs**) when the CMA is considering making requirements imposed by a Final Infringement Notice (**FIN**) binding on IBCs; allow a more flexible process for affected IBCs to submit representations to the CMA and guidance on the application of requirements to group entities acquired after the FIN has been issued.

2. General comments

2.1 Before responding to the specific questions raised in the CMA's consultation, we would make some general comments in relation to the CMA's approach to consumer enforcement.

The impact of CMA's duty of expedition on the conduct of investigations

2.2 The Draft CMA200 highlights the CMA's new "*duty of expedition*" set out in section 327 of the Digital Markets, Competition and Consumers Act 2024 (**DMCC Act**) and how this will impact the CMA's conduct of direct consumer enforcement investigations. Whilst we recognise the CMA is under a duty to act expeditiously, this must be balanced with the need to protect parties' rights of defence, particularly given the potential for fines of up to 10% of worldwide turnover at the end of a CMA investigation. We would therefore request that the CMA consider this issue and set out in the final version of the Draft CMA200 how the duty of expedition will be balanced with the parties' rights of defence.

2.3 In this respect, we note that the Draft CMA200 proposes that, under the direct enforcement regime, short timeframes will be imposed on parties that are subject to an investigation in a number of instances. For example, paragraph 2.37 of the Draft CMA200 explains that, in setting the deadline for parties to submit written representations to a PIN, the CMA "*will remain mindful of its duty of expedition*" and that parties will have "*between 20 and 30 working days*" from the issuance of the PIN to submit written representations. Further, paragraph 2.38 notes that "*in line with the CMA's duty of expedition*", extensions will only be granted "*exceptionally*".

2.4 We are concerned that the indicative deadline may curtail parties' rights of defence, as experience from existing CMA enforcement processes suggests that they are unlikely to be able to provide a fully reasoned response to the PIN in this timeframe. Another example is requiring extension requests to generally be submitted within five working days of receipt of the PIN (paragraph 2.38, Draft CMA200).

2.5 It would also be helpful for the Draft CMA200 to include a reference to the anticipated timetable for the entirety of the investigation (i.e. from the commencement of the investigation to the issuance of the FIN), including indicative timing for each step of the investigation.

2.6 We also recommend updating the Draft CMA200 to more thoroughly explain whether the CMA will apply a measurable metric to determine whether (and to what extent) it is complying with its duty of expedition. This would enable parties and practitioners to better understand the CMA's decision-making processes and offer greater certainty to parties. This is likely to be particularly important in the context of a new enforcement regime, where there is no track record of enforcement to guide parties on likely timings.

The importance of updating substantive consumer law guidance

2.7 Although the DMCC Act makes only limited changes to substantive consumer law, the introduction of a direct enforcement regime and the scope for substantial fines means that the risks arising from non-compliance will materially increase. Although various guidance on substantive consumer protection law exists and is available on the CMA's website, in many cases this guidance is out of date: for example, the CMA's guidance on unfair commercial practices (OFT1008), which we expect may be a key area of the CMA's enforcement activities, does not appear to have been updated since 2008. We would therefore emphasise the importance of ensuring substantive consumer law guidance is kept updated, particularly during the early stages of the CMA's direct consumer enforcement regime, to provide companies with sufficient information to inform compliance with the regime.

3. **Q1. Do you have any comments on the proposed process for submitting written representations on provisional infringement and/or administrative enforcement notices?**

3.1 As noted above, we are concerned that only allowing parties 20 to 30 working days to submit written representations in response to the PIN will not, particularly in larger or more complex investigations, provide sufficient time for parties to exercise their rights of defence. We therefore recommend that the CMA adopts a more flexible approach to setting deadlines for written responses and recognises the need for longer response deadlines to be provided in relevant cases. We note that the deadline proposed in the Draft CMA200 is less than half the equivalent period of up to 12 weeks provided for in the CMA's competition law enforcement guidance (CMA8). Given the scope for fines equivalent to competition fines to be imposed in consumer law cases, parties should be given an equivalent opportunity to exercise their rights of defence.

3.2 Similar concerns arise in relation to the proposal in paragraph 6.13 of the Draft CMA200 which indicates that the deadline for written representations in respect of provisional administrative enforcement notices will generally be no more than ten working days. In the context of breaches of undertakings and directions in particular, the nature of the obligations imposed by such instruments may require parties to be provided with a longer period of time in which to respond so that they are able properly to exercise their rights of defence.

3.3 The potential prejudice to parties' rights of defence as a result of a short timeframe for submitting written representations in response to a PIN may also be exacerbated in cases where the CMA adopts a "*streamlined approach*" to disclosure of its case file (as envisaged in paragraphs 2.24 to 2.25 of Draft CMA200). Although parties will have the opportunity to request disclosure of documents listed in the schedule, in practice the short timeframe for submitting written representations is very unlikely to allow the parties time to identify, request, review and consider relevant documents within 20 to 30 working days.

3.4 We therefore suggest that the Draft CMA200 is amended to include an express provision that one of the factors to be taken into account when considering any extension requests is the access to file process and the need to provide adequate opportunity for parties to inspect all relevant material on the CMA's file.

4. **Q2. Do you have any comments on the proposed process for conducting oral hearings on provisional infringement and/or administrative enforcement notices?**

4.1 Paragraph 2.44 of Draft CMA200 indicates that the CMA may seek to limit the number of persons that may attend the oral hearing and in particular that third parties will generally not be permitted to attend the oral hearing. We consider that

parties should not be unduly limited in their ability to ensure that all individuals required to exercise the rights of defence are able to attend the oral hearing (in particular in light of the ability to attend such meetings virtually if required) and further clarity on the CMA's position on this point would be helpful. The scope of the restriction on 'third parties' should also be clarified, in particular to confirm that it does not restrict attendance by external consultants engaged by parties.

4.2 It is unclear from paragraph 2.64 of Draft CMA200 whether parties will have the right to attend a further oral hearing if the CMA issues a Supplementary PIN, in addition to making written representations. As a Supplementary PIN will contain new allegations, it is important that parties have a full opportunity to respond to those allegations, both orally and in writing. We note that in Competition Act 1998 investigations parties are given the opportunity to attend an oral hearing following the issuance of a supplementary statement of objections and we suggest that the Draft CMA200 should be updated to ensure parties are given the same opportunity to attend an oral hearing following a Supplementary PIN.

5. **Q3. Do you have any comments on the factors that the CMA proposes to consider when deciding whether to accept, vary or release undertakings?**

5.1 Not applicable.

6. **Q4. Do you have any comments on the factors the CMA proposes to consider, the proposed minimum conditions and process for engaging in settlement discussions and accepting a settlement?**

6.1 In the context of access to file during settlement processes, paragraph 4.49 of the Draft CMA200 notes that the CMA will provide parties with a list of the documents on the CMA's file but providing the parties access to those documents "*will influence the CMA's ongoing assessment of the procedural efficiencies and resource savings that can be achieved from settlement*". In our view, parties should be entitled to make reasonable and proportionate requests for documents that may be relevant to their decision on whether to engage in the settlement process, and ultimately to accept liability on the basis of a settlement decision, without this having a negative impact on the CMA's assessment of procedural efficiencies and resource savings, particularly given the parties will not have an opportunity otherwise to request the documents. A PIN in a settlement process is likely to be shorter than a PIN in a fully contested process, which could mean that the number of documents actually referred to in the PIN may be limited with the majority of the documents disclosed by schedule only.

7. **Q5. Do you have any comments on the factors that the CMA proposes to consider when determining whether a reasonable excuse for certain breaches exists?**

7.1 Section 212(2) of the DMCC Act requires the CMA to provide guidance on the factors that it will take into account when determining whether a reasonable excuse exists for infringements of administrative requirements. Paragraph 7.48 of the Draft CMA200 lists four factors that the CMA indicates may amount to a reasonable excuse. Further guidance on the types of factors that may be considered would be helpful, as well as guidance on whether different factors may be relevant in respect of different types of administrative infringements.

7.2 Paragraph 7.49 of the Draft CMA200 lists six examples that the CMA notes are unlikely to constitute a reasonable excuse. However, certain of these factors merit a more nuanced assessment based on the specific facts and circumstances at issue. In particular:

(a) Paragraph 7.49(d) lists "*for larger companies, the unplanned absence of specific personnel, as it would be reasonable to make contingency plans in order to meet deadlines*": based on our experience, the unplanned absence of specific personnel can make it very challenging to comply with requests, particularly for large companies. We consider it would be unfair to penalise large companies for this reason alone, particularly given the absence may have been at short notice for reasons outside of the individual's (or the company's) control. Even within larger organisations, specific knowledge or expertise may be held by a limited number of individuals only, which can make contingency planning difficult. The short timelines proposed by the CMA in Draft CMA200 may also make it more difficult to ensure appropriate expertise and resource is available at short notice at the relevant time.

(b) Paragraph 7.49(e) lists: "*any claim that compliance would constitute a breach of a non-disclosure agreement by which the party is bound or a claim that the party cannot comply because of its duties under the Data Protection Act 2018*": we consider it to be unfair (both procedurally and substantively) for parties to be penalised where their inability to respond to a request from the CMA is due to their adherence to other legal obligations. This is particularly the case for parties that are in the process of trying to determine the extent to which they are able to engage with the CMA, without breaching any data protection obligations. This challenge is likely to be exacerbated by the short timeframes envisaged by the Draft CMA200 (see our comments at paragraph 3.1 onwards).

8. **Q6. Do you have any comments on the objectives and considerations that the CMA proposes to apply in imposing monetary penalties for substantive and/or administrative breaches?**

8.1 Paragraphs 7.9(a) and 7.10 of the Draft CMA200 emphasise that a key objective of imposing penalties will be to ensure meaningful deterrence. Recent experience of the CMA's penalty assessments in competition law investigations has seen the CMA apply increasing levels of uplift for deterrence. Whilst deterrence and the need to incentivise compliance is clearly an important objective, the scope for deterrence uplifts should be proportionate and predictable to assist with legal certainty. As noted in footnote 167 of Draft CMA200, the CMA has flexibility to choose the type of penalty (i.e. fixed or based on a percentage of revenues) to take account of the party's specific circumstances and to ensure that the penalty provides a meaningful deterrence. The CMA should exercise caution in introducing further significant uplifts for deterrence purposes.

9. **Q7. Do you have any comments on the step-by-step approach and/or on any particular steps that the CMA proposes to apply in calculating monetary penalties for substantive breaches?**

9.1 We welcome the introduction of a stepped approach for the calculation of penalties for substantive breaches, consistent with the CMA's approach to penalties for competition law infringements.

9.2 Paragraph 7.11 of Draft CMA200 explains that the starting point for calculating the level of a penalty is 30% of the party's UK turnover. It therefore appears that the CMA proposes to assess a party's penalty on the basis of its total turnover in the UK, rather than seeking to base it on turnover related to the affected products or markets. In contrast, the relevant turnover in penalties for competition law infringements is the "*turnover of the undertaking in the relevant product market and relevant geographic market*".[1] We submit that a similar approach should be adopted in respect of penalties for consumer law infringements, i.e. the starting point should relate to the relevant affected market(s), rather than to the party's entire UK turnover.

9.3 The CMA should also ensure that its stepped approach does not result in certain factors being double counted in the penalty assessment. For example, Step 1B involves detailed consideration of the level of a party's culpability and it would be inappropriate for the same factors to also be taken into account to justify an increase in the level of penalty at either Step 4 (aggravating/mitigating factors) or Step 5 (proportionality). We would welcome confirmation in the guidance that the

[1] CMA73, para 2.10.

CMA will ensure that relevant factors are assessed at the appropriate step and not counted on multiple occasions.

9.4 Please also see our response at paragraph 11.5(a), which applies in relation to the aggravating factors set out at paragraph 7.34, Draft CMA200.

10. **Q8. Do you have any comments on the factors that the CMA proposes to consider when deciding whether to impose a fixed or daily penalty for administrative breaches?**

10.1 We would welcome further guidance on how the CMA will determine whether to implement a fixed or daily penalty for an administrative breach and when the CMA may consider both to be appropriate. For example, the CMA's draft Statement of Policy on its approach to Administrative Penalties (CMA4) in the competition sphere provides a number of illustrative examples explaining scenarios in which the CMA may consider that both a fixed and daily penalty may be required. We consider that there would be merit in providing similar examples in CMA200.

11. **Q9. Do you have any comments on the step-by-step approach and/or on any particular steps that the CMA proposes to apply in calculating monetary penalties for administrative breaches?**

11.1 As with substantive penalties, we welcome the introduction of a stepped approach for the calculation of fixed or daily penalties for administrative breaches, which we consider provides greater certainty to parties than the 'in the round' assessment of administrative penalties under the competition law enforcement regime.

11.2 In relation to breaches of undertakings and directions, the Draft CMA200 explains that, as for substantive infringements, the maximum starting point is 30% of total UK turnover. We refer to our comments at paragraph 9.2 above and submit that the assessment should relate to the turnover in the relevant products, services or markets affected by the infringement only.

11.3 In respect of Step 1, the Draft CMA200 provides helpful guidance on the factors that will be considered in determining the seriousness of the breach and the level of culpability, and how those factors will be used to determine a starting point code. However, in contrast with the approach for substantive penalties, the Draft CMA200 does not confirm how the starting point code will be applied.

11.4 Paragraph 7.60 of the Draft CMA200 explains that the CMA expects the starting point for level A breaches to the in the upper range of the maximum starting point, with level D breaches likely to start in the lower range, and level B and C breaches falling in between. However, this approach inevitably removes much of the benefit of setting out the factors used to calculate the starting point. We consider that the CMA should therefore update the Draft CMA200 to explain more precisely how the starting point will be applied, in particular in respect of fixed penalties.

11.5 In relation to the aggravating factors listed at paragraph 7.65, we consider that a number may not be appropriate in practice for the following reasons:

(a) "*Previous infringement/s of consumer law or regulatory codes (for example, an ASA adjudication), or associated administrative infringements (for example, a failure to provide information)*": we consider that a distinction should be made between legal / regulatory requirements and industry codes such as the Advertising Codes. The regulation of adverts in the UK is a self-regulatory system and the Advertising Codes are developed by the industry (through the Committee of Advertising Practice). Although the Advertising Codes reflect principles of consumer law, they do not have the same legal status as Acts or Regulations.

(b) "*In the case of an information notice breach, failing to request an extension from the CMA within a short time after initial receipt of the Information Notice, or failure to provide information following an extension granted by the CMA*": there are a number of reasons why it may not be possible to ascertain whether an extension request is required within a short period of time, particularly where there are expansive requests for information and where the CMA has not issued the parties with an information notice in draft before issuing it formally (see further our comment in paragraph 15.11). Therefore, we do not consider it appropriate to include this as an aggravating factor.

(c) "*Where the breach was caused by any member of staff, failure to discipline the staff member*". This may be difficult for an organisation to implement in practice; for example, where a breach is caused by a large number of staff it would not be practical to discipline them all. Moreover, this could conflict with a party's obligations under employment law if the action that caused the breach does not itself meet the relevant threshold for disciplinary action.

12. **Q10. Do you have any comments on the factors that the CMA proposes to consider when deciding whether to start proceedings for recovery of unpaid monetary penalties?**

12.1 Not applicable.

13. **Q11. Do you have any comments on the proposed internal CMA decision-making arrangements for direct consumer enforcement cases?**

13.1 We welcome the CMA's confirmation that it will establish FDGs in consumer law direct enforcement cases. We view the separation of the final decision-makers from the case team that has conducted the investigation as an important procedural safeguard within the CMA's investigative process.

13.2 Paragraph 8.19 of the Draft CMA200 notes that one of the FDG *may* be the SRO. This position contrasts starkly with the position in competition law investigations: CMA8 expressly states that "*the SRO will not be a member of the Case Decision Group to ensure that the final decision is taken by officials who were not involved in the decision to issue the Statement of Objections and any Draft Penalty Statement*".[2] This approach was adopted to minimise the risk of confirmation bias, a risk that will apply equally in relation to consumer enforcement cases. We would therefore recommend following a similar approach to competition law cases and exclude the SRO from the FDG. In the alternative, further clarification on the circumstances in which the SRO may be appointed to the FDG would be helpful; paragraph 8.20 of the Draft CMA200 merely notes that the CMA will decide on each investigation whether it is "*appropriate*" to include the SRO in the FDG.

13.3 If the SRO is appointed to the FDG, we welcome the clarification in paragraph 8.20 of the Draft CMA200 that the other members will be of equivalent or greater seniority, which we understand from footnote 192 to mean that the other members of the FDG will be panel members.

14. **Q12. Do you have any comments on the proposed scope and process for referring and deciding procedural complaints?**

14.1 We support the establishment of a procedural complaints process in relation to the consumer law direct enforcement regime. Paragraph 9.3 of the Draft CMA200 explains that complaints will be referred to a "procedural complaints adjudicator" who will not have been involved in the day to day running of the investigation or as a decision maker. It is unclear, however, whether the CMA intends to appoint a single individual to act as the Procedural Officer in respect of all consumer law investigations, as is the case for competition law investigations. We consider there to be significant benefits in appointing a single individual to act as the Procedural Officer, in particular to ensure consistency across cases.

15. **Q13. Do you have any other comments on topics not covered by the specific questions above?**

Choice of enforcement powers

15.1 As noted in the Draft CMA200, the CMA will have a number of different enforcement routes available to investigate alleged breaches of consumer law: specifically, the CMA will be able to choose whether to use the new direct enforcement powers or to rely on the existing court-based enforcement powers under Part 8 of the Enterprise Act (as amended by the DMCC Act). The Draft CMA200 states that "*the CMA will choose the enforcement route it considers most*

[2] CMA8, para 11.40. This position is unchanged in the recent updated CMA8 published for consultation.

appropriate, taking into account its published prioritisation principles" (paragraph 1.9).

15.2 The CMA's choice of enforcement routes will have significant implications for parties, and it would therefore be helpful to have further guidance on the factors that the CMA will take into account when making this decision. The CMA should also consider whether its prioritisation principles will need to be updated to take into account the new direct enforcement powers.

Relevance of pre-commencement conduct

15.3 Paragraph 1.18 of the Draft CMA200 explains that "*the CMA may have regard to conduct that took place before the commencement date, so far as is necessary or appropriate when determining any matter under the new law, such as when setting directions, Enhanced Consumer Measures (ECMs), and in factors relevant to any monetary penalty for post-commencement conduct*". As the CMA is only able to impose a monetary penalty where the infringing conduct takes place after the commencement date (see paragraph 3, Schedule 19 of the DMCC Act and paragraph 1.17 of the Draft CMA200), it would be inappropriate to take pre-commencement date conduct into account in the assessment of any penalty. This position should therefore be reconsidered in the final guidance.

15.4 In the alternative, further detailed guidance would be required to provide clarity on the extent to which, and if so how, pre-commencement conduct will be considered in the assessment of any penalty for post-commencement conduct. For example, it would need to be clarified expressly in Section 7 of the Draft CMA200 if the CMA's proposal is that pre-commencement conduct will somehow be relevant in assessing the seriousness or duration of the infringement.

Inspection of the CMA's file

15.5 Paragraph 2.21 of Draft CMA200 specifies the documents which may be withheld from inspection, as set out in Rule 5(1) of the Direct Consumer Enforcement Procedural Rules (CMA201con). Given the various categories of documents which may be withheld, it would be helpful to have additional guidance on when certain types of documents will be withheld. This would help to ensure that parties' rights of defence are not undermined. For example, the guidance could clarify whether documents that identify individual consumers will always be withheld (paragraph 2.21(b), Draft CMA200) or whether it may be possible to disclose such information where it is central to the CMA's case.

Interconnected bodies corporate (IBCs)

15.6 Paragraph 2.65 of the Draft CMA200 notes that, where it is considering making requirements imposed by a FIN binding upon other entities within the same group, the CMA will take the "*steps that it considers to be reasonable and proportionate*

to bring this to the attention of existing members of the party's group". In relation to the "*reasonable and proportionate*" steps the CMA will take, paragraph 2.66 of Draft CMA200 enables the CMA to notify IBCs by: (a) contacting them directly; (b) asking the party to make arrangements to notify any IBC that may be bound; or (c) where (a) nor (b) is practicable, by publishing a notification on the CMA's website. As the FIN requirements may include financial penalties of up to 10% of the group's worldwide turnover, it is not appropriate that entities are only notified of this decision via the CMA's website. We recommend clarifying in the guidance that option (c) may only be used as a notification mechanism alongside option (a) and/or (b), and that option (c) is not a standalone alternative method of notification.

15.7 In relation to paragraph 2.67 of Draft CMA200, we consider that the Draft CMA200 should be amended to clarify that notifications may be sent to the external legal advisors of IBCs as their representatives (where instructed).

15.8 We also submit that the CMA should allow for a more flexible process for affected IBCs to submit representations to the CMA under paragraph 2.68 of Draft CMA200. Although the DMCC Act does not provide an explicit right for IBCs to submit representations, the potential implications of a FIN mean that they should be permitted to make representations on matters relevant to them. Requiring such representations to be collated and submitted by the party under investigation risks making the submission process overly complex (in particular in the short timeframes proposed in the Draft CMA200).

15.9 We would also welcome additional guidance on the application of obligations imposed under the DMCC Act to IBCs. In relation to the FIN, section 200(3) of the DMCC Act allows the CMA to impose "*the requirements (or any particular requirements) […] upon all other members of the group (in addition to the respondent), as if each of them were the respondent*". We submit that the CMA should clarify that this provides it with the ability to decide not to impose requirements on group members and that there is no need for the requirements imposed on group members to be uniform.

15.10 We also recommend that the Draft CMA200 should clarify that the FIN will not be automatically binding on any future members of a corporate group and further guidance should be provided on how the CMA will determine whether to apply the FIN to a newly acquired entity. Similarly, we consider that the CMA should confirm that remedies will not be extended to the acquirer's existing corporate group where a business subject to a FIN is acquired by a third party, given those entities will have had no involvement in the infringing conduct.

Information Notices

15.11 It is unclear from the Draft CMA200 whether, consistent with the CMA's general policy in competition and merger cases, the CMA proposes to issue draft information notices for comment before they are issued to the parties. We recommend that the CMA adopts this approach where possible and that this should be reflected in the final version of the Draft CMA200.

Acceptance of undertakings

15.12 We would welcome additional guidance on the factors affecting the likelihood of the CMA's acceptance of undertakings in cases in which it has decided to pursue a direct enforcement route (paragraph 4.7, Draft CMA200).

15.13 We also note that paragraph 4.10(b), Draft CMA200, specifies that the CMA is unable to accept undertakings where not completing its investigation and issuing a decision would undermine deterrence. Given the novel nature of the direct enforcement regime, we are concerned that this could prove to be unduly restrictive; the benefits of resolving a case through undertakings should be considered on a case-by-case basis.

Enhanced Consumer Measures (ECMs)

15.14 In respect of ECMs (as set out from paragraph 5.6, Draft CMA200), we consider that the Draft CMA200 does not provide sufficient detail on when ECMs might be imposed under the CMA's new enforcement powers and the instances in which imposition of different types of ECMs will be considered reasonable (e.g. the decision to impose compliance measures as opposed to choice measures). We would welcome additional guidance to provide certainty as to the instances in which ECMs may be imposed by the CMA and the nature of the ECMs that may be considered in different scenarios.

Ashurst LLP